

The Second Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (

(St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That the St. Louis Southwestern Railway Company violated the controlling agreement, as amended, and the Railway Labor Act, as amended, when the St. Louis Southwestern Railway Company failed to employ former Rock Island Carmen J. Ulreich, D. S. Ettinger, J. R. Estrada, F. C. Rickman and S. J. Lozano, as Carmen in the facility of the St. Louis Southwestern Railway Company at Kansas City, Kansas on or before January 1, 1983.

2. That the St. Louis Southwestern Railway Company be required to pay Carmen Ulreich, Ettinger, Estrada, Rickman and Lozano eight (8) hours' per day for each day that they were denied employment at the pro rata rate, all denied overtime, accrual (sic) of vacation pay, Railroad Retirement credits and benefits, Travelers, Aetna and Provident Insurance benefits. It is specifically requested that each day's pay be credited to a calendar date. This claim to commence on January 11, 1983 and to run continuously until the named employees are employed in accord with the March 4, 1980 Agreement.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Carrier purchased trackage rights of the former Rock Island Lines, which included the Line from St. Louis, Missouri to Tucumcari, New Mexico. The purchase by the Carrier included the Armourdale facility at Kansas City, Kansas, which had an increase in traffic in January, 1983.

The increase of traffic at the Armourdale facility necessitated additional Carmen positions. In filling the positions, the Carrier transferred furloughed senior Carmen who applied for transfer to Kansas City.

The Organization contends that under the applicable provisions of the March 4, 1980 Agreement, former Rock Island employees who were employed at the Armourdale facility have a prior right to the positions. Article II, Section 2 of the March 4, 1980 Agreement provides as follows:

"Article II, Section 2. Determination of need
for Additional Employees--

A purchasing carrier shall determine its necessary additional manpower requirements by craft due to its taking over those Rock Island and Milwaukee Lines ***. If a purchasing carrier has employees on furlough they will not be subject to recall as a result of the manpower requirements resulting from a transaction until after bankrupt carrier employees on appropriate seniority rosters have exhausted their opportunity to be hired hereunder."

This Board concludes that by the Carrier's "taking over" the former Rock Island facility under Article II, Section 2 of the Agreement, it is prohibited from recalling its furloughed employees to satisfy additional manpower requirements "until after bankrupt carrier employees on appropriate rosters have exhausted their opportunity to be hired ***." Following the March 4, 1980 Agreement, a Labor Management Government Committee was established to consider matters arising under the Agreement. On February 24, 1981, among the questions raised and answers supplied was the following:

"(4) Do former Rock Island employees have preference to work over furloughed employees of a purchasing carrier or interim operator due to increase in traffic?

Answer: The answer to this question depends upon the cause of the increase in traffic. If the increase in traffic results from the acquisition of the Rock Island line, the Rock Island employees would have preference to work over furloughed employees of the purchasing carrier or interim operator. If, however, the increase in traffic is not due to the purchase of the Rock Island property but from other factors, former Rock Island employees would not have preference to work over furloughed employees of the purchasing carrier or interim operator."

The Board is of the opinion that Question No. 4 constitutes the question or issue to be answered in this case. Moreover, the Committee supplied the answer which also resolves the instant dispute. There was an increase in traffic caused by the Carrier's acquisition of the Rock Island facilities at Kansas City, Kansas. Accordingly, consistent with the Committee's answer to Question No. 4, the Rock Island employees "have preference to work over furloughed employees of the purchasing carrier.***"

The Carrier contends that the increase in traffic was not due to the purchase of the Rock Island Lines "but from other factors," namely, the Trackage Rights Agreement with the Missouri Pacific between St. Louis and Kansas City. However, had the former Rock Island facilities not been taken over, the Carrier would not have any additional manpower requirements for Carmen at Kansas City. Without the former Rock Island facilities the Carrier could not have diverted any traffic from St. Louis. Clearly, the increase in traffic was due to the acquisition of the Armourdale facility.

Futhermore, under Article II, Section 3 of the March 4, 1980 Agreement which is entitled "Preferential Hiring" the parties agreed that as a Carrier determines its need for additional employes under this Article, "it shall allow eligible employes in seniority order on the Rock Island or Milwaukee the first right of hire respectively, ***." Thus, Article II, Section 3, which is clear and unequivocal, requires the Carrier to first hire eligible employes in seniority order on the Rock Island Roster at Kansas City.

The Carrier also seeks support for its position from an arbitration decision rendered on March 9, 1983 arising from a dispute between the Carrier and an operating craft. The question presented to the Arbitrator which is pertinent to this dispute, was whether the Carrier was required to hire train service employes of the Rock Island Line to handle traffic over the Line between St. Louis and Kansas City due to a Trackage Rights Agreement it had entered into with the Missouri Pacific. The Arbitrator ruled that inasmuch as "the specific transaction that generated this issue, namely, the Trackage Rights Agreement was not the direct result of the Carrier taking over the Rock Island Lines within the meaning of the March 4, 1980 agreement, the hiring of additional employes would not have required that they be hired. ***" It is significant to point out that similar arguments were made by both the Carrier and UTU concerning Article II, Section 2 which were made by the parties to the instant dispute. The Arbitrator indicated that the Organization's position was "reasonable." Unlike the arbitration decision, this Board believes that not only is the position of the Organization reasonable in this case, but its position is supported by the record which indicates that the Carrier violated Article II, Sections 2 and 3 of the March 4, 1980 Agreement. The Board wishes to underscore that Article II, Sections 2 and 3 reserve the work at the Armourdale facility to former Rock Island employes who hold seniority at that point.

Support for the decision in this case also derives from Second Division Award No. 9735 where the Carrier awarded a vacancy to a furloughed employe rather than awarding it to a former employe of the Rock Island Line at Hutchinson, Kansas. In relevant part, Award No. 9735 indicated the following:

"This dispute is governed by the March 4, 1980 National Labor Protective Agreement and the June 10, 1980 Memorandum of Agreement on this property. This Board has jurisdiction over the case, since the parties specifically agreed to resolve disputes concerning the potential employment rights of former Rock Island employes

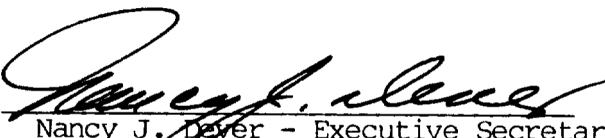
by utilizing the provisions of the Railway Labor Act. Article II, Section 3 of the March 4, 1980 Agreement gives preferential hiring rights, in seniority order, to former Rock Island workers. Section 2 of the June 10, 1980 Agreement expressly contemplate the hiring of additional carmen from the Rock Island seniority roster to carry out the terms of the March 4, 1980 Agreement. Thus, Claimant should have been given an opportunity to fill the vacancy at Hutchinson on August 1, 1980."

In light of the aforementioned considerations the Claimants are entitled to eight (8) hours pay per day at the straight time rate for each day that they were denied employment at the Armourdale facility as a result of the Carrier's violation of the Agreement. The Claimants' requests for overtime pay and other retroactive benefits are denied. Any unemployment compensation or earnings, which Claimants received during this period should be deducted from the backpay award.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of December 1986.

CARRIER MEMBER'S DISSENT
TO
AWARD 11095, DOCKET 10734
(Referee Cohen)

The Majority in their findings are in error by concluding that the Carrier violated Article II, Sections 2 and 3 of the March 4, 1980 Agreement when it did not employ former Rock Island Carmen U. Ulreich, D. S. Ettinger, J. R. Estrada, F. C. Rickman and S. J. Lozano at Kansas City, Kansas.

The Majority was correct when it stated that Question No. 4 before the March 4, 1980, Labor-Management-Government Committee resolved the instant dispute. However, the Majority clearly misinterpreted the answer to the question. The answer reads in part:

"If, however, the increase in traffic is not due to the purchase of the Rock Island property but from other factors, former Rock Island employees would not have preference to work over furloughed employees of the purchasing carrier or interim operator."

The increase in the volume of traffic at Kansas City, Kansas, was not the result of the purchase of the Rock Island property in March, 1980. It resulted from the Carrier being granted trackage rights over the Missouri Pacific Railroad Company trackage from St. Louis, Missouri to Kansas City, Kansas, by Interstate Commerce Commission Docket No. 30,000 served on October 20, 1982. On January 6, 1983, the Carrier began operating trains over this trackage. As a result of this diversion of traffic, it was necessary to establish additional carmen positions at Armourdale Yard in Kansas City, Kansas. These positions were properly filled by carmen transferring from other points as provided in the current controlling agreement. It is apparent that the increase in traffic was not due to the purchase of the Rock Island in 1980. It was due to diversion of traffic

over newly acquired trackage rights beginning on January 6, 1983. This obviously falls into the category of "other factors" as covered in the answer to Question No. 4.

The Majority chose to simply disregard the findings of Neutral Referee Jack A. Warshaw in his decision of March 9, 1983, concerning the same issue in a dispute between the Carrier and the United Transportation Union. The Majority made the following statement in regard to Referee Warshaw's earlier decision:

"Unlike the arbitration decision, this Board believes that not only is the position of the Organization reasonable in this case, but its position is supported by the record which indicates that the Carrier violated Article II, Sections 2 and 3 of the March 4, 1980 Agreement."

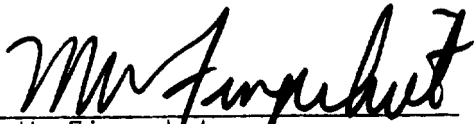
The Carrier's submission documented beyond any doubt that the increase in traffic was due to "other factors" as covered in the answer to Question No. 4 of the Labor-Management-Government Committee. Therefore, the Majority's decision that the Carrier violated Article II, Sections 2 and 3 of the March 4, 1980 Agreement is unfounded. It is inconceivable to the Carrier that the Majority would misinterpret the answer to Question No. 4 and also choose to disregard precedent on this property concerning the same issue.

The Majority was also in error in issuing an award which might be interpreted as granting injunctive relief. The Railway Labor Act does not confer authority upon the Board to grant injunctive relief. The Referee's decision in this case is not consistent with precedent set by previous awards issued by this Board or by his own decision in Second Division Award 10954 in which he states: "It is well established that this Board has no authority to issue a declaratory judgment or to grant injunctive relief." As this award might be interpreted as granting injunctive relief, the

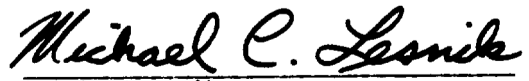
Majority exceeded the authority granted to the Board by the Railway Labor Act.

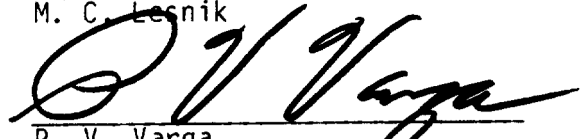
Therefore, the findings of the Majority are incorrect and should not be used as a precedent for future cases of this nature.

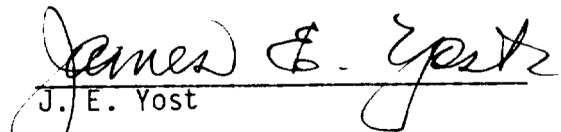
Hence, we dissent.


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


P. V. Varga


J. E. Yost

