Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13857
Docket No. 13727
05-2-04-2-3

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (National Conference of Firemen and Oilers
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(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"1. That the Duluth, Missabe and Iron Range Railway Company violated Article I of the September 25, 1964 Agreement, when it failed to provide the protective benefits to Messrs. Randy Ellestad, Dave Gorney, Harold Glowacki, Dale Helland, Steven Kemi, Ed Myre, and Gregory Oates, hostlers, Duluth, MN.

2. That accordingly, the Duluth, Missabe and Iron Range Railway Company be ordered to make the aforementioned individuals whole by providing the protective benefits contained within Article I of the September 25, 1964 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 employee 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 were given due notice of hearing thereon.

The Organization argues that the Carrier violated Article I of the September 25, 1964 Agreement. The Organization points to the Carrier's 60 day advance notice and its change in operations and contracts. Specifically, the Organization argues a causal nexus between Section 2 factors, b and e, and the Claimants' furloughs.

The Carrier denied that it changed any of its operations. It argues that it neither discontinued a contractual agreement, changed its operations, nor provided a 60 day notice under the Agreement. In fact, the Carrier's central argument is that Article I, Section 2 causes do not exist. The Carrier argues that the furloughs were caused by a severe decline in business due to the loss of a major customer.

The Board notes that the September 25, 1964 Agreement has two Sections under consideration herein, Article I, Sections 2 and 3. For the Organization to prevail, it must demonstrate a prima facie case that the Claimants' furloughs were due to a Section 2 factor. Until it is established with sufficient probative evidence that either Section 2b or 2e led to the furloughs, then the Carrier does not need to prove its case that there was a Section 3 decline in business.

The Board notes that Article I, Section 3 states in pertinent part that "An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation . . . in case of . . . a decline in Carrier's business or any other reason not covered by Section 2 hereof." The Carrier clearly rebutted the Organization's allegations of Section 2 causes and argued a decline in business. Accordingly, it is important to determine if the Organization provided sufficient evidence for the Board to consider Section 2 causes as the reason for the furloughs.

The Organization argued that the Carrier gave a 60 day notice of its changes of operations and involuntary discontinuance of a contract with the EVTAC iron ore mine. The Board reviewed the March 10, 2003 letter and nothing in the letter refers to the September 25, 1964 Agreement. Further, the Carrier stated on the property that the notice of furloughs was provided under the WARN Act, and not due to any aspect of the September 25, 1964 Agreement. A full review of the record finds no support for the Organization's position.

At the center of this dispute is the Organization's assertion of Section 2 causes. Certainly, if the employees are placed on furlough due to either of the alleged provisions, they are due protective benefits. The provisions alleged are:

> "b. Abandonment, discontinuance for 6 months or more, or consolidation of facilities or services or portions thereof.
>
> e. Voluntary or involuntary discontinuance of contracts."

The Board carefully reviewed the Carrier's response. It fully rebuts the allegations. It argues that EVTAC Mining was one of its largest customers and was ceasing operations. That meant that the Carrier was going to have a decline in business. It also meant that this decline would trigger furloughs. It denied abandonment, discontinuance, consolidation of facilities or services. It denied the effect of an involuntary discontinuance of a contract with EVTAC.

The Board reviewed all of the Organization's evidence and the Awards presented by the parties. One newspaper article states that EVTAC, after bankruptcy, was sold to United Taconite and the Article quoted the Carrier as stating that it did not "have a transportation contract for United Taconite" to move their pellets. The Carrier also stated in its correspondence of March 10, 2003, that due to the closure of EVTAC, "the Company must reduce its operations." The eventual bankruptcy and mine closing that discontinued hauling of iron ore pellets by the Carrier is seen by the Organization as a prima facie case that "the contract to haul iron ore pellets has been discontinued" involuntarily and the service of hauling pellets was discontinued for more than six months. In short, the Organization maintains that the decline in business is obvious, but by Section 2 factors that trigger protective benefits.

First, the Carrier denied that it ever discontinued a contract with EVTAC. The Carrier denied that it changed any of its operations. The fact that EVTAC went bankrupt and stopped using the Carrier does not demonstrate that the Carrier abandoned or discontinued contracts. The Board does not find a prima facie case.

The only factors that count are Section 2 factors. The probative evidence is that the Carrier lost a customer and work performed for that customer. This is a decline in business. Discontinuance of trains caused by a lack of business does not trigger protective benefits. We find no factual proof that the Carrier altered a contract, or discontinued services, only that EVTAC lost customers, ultimately went bankrupt and presumably its contract only existed thereafter on paper. Either way, this is not a Section 2 provision that triggers protective benefits and without that, Article 1, Section 3 prevails. The claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 27th day of July 2005.