Award No. 5135
Docket No. 4914
2-CofG-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 26, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

CENTRAL OF GEORGIA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement, Machinist A. A. Elliott was unjustly deprived of his service rights at the Central of Georgia Shops, Columbus, Georgia, when the management recalled to service a Machinist with less seniority than Machinist Elliott.

2. That accordingly, the Central of Georgia Railway Company be ordered to compensate Machinist A. A. Elliott for all wages and fringe benefits that would have been due him if he had been recalled to service during the period of November 1, 1963, through January 26, 1964.

EMPLOYES' STATEMENT OF FACTS: The Central of Georgia Railway Company, hereinafter referred to as the carrier, maintains a diesel locomotive and freight car running repairs facilities at Columbus, Georgia. In the central shops at the time this dispute arose, machinists were employed, all of whom are on the machinists seniority roster shown in the respective order of their employes.

Machinist A. A. Elliott, hereinafter referred to as the claimant, is shown on the carrier's seniority roster at their shops in Columbus, Georgia, with a seniority date of February 14, 1961. The Claimant held a regular machinist assignment with the carrier at their Columbus Shops up until July, 1963, when claimant and Machinist B. H. Williams, Jr. with a seniority date of February 15, 1961, were forced into a furloughed status, as a result of the carrier closing their mechanical facilities in Macon, Georgia, on June 17, 1963, as authorized in Interstate Commerce Commission Finance Docket Number 21400.

When the carrier closed their mechanical facilities in Macon, Georgia, they furloughed all their hourly and monthly rated employes, including su-

the board's jurisdiction under the Railway Labor Act. Under that Act this board has jurisdiction only over "disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. §153, First (i). That act, by which this board was created and which confers upon it the only jurisdiction which it has, gives it no jurisdiction whatsoever to interpret employe protective conditions prescribed by the commission pursuant to the Interstate Commerce Act.

D. SUMMARY

In summary, this board is without jurisdiction to entertain this so-called "claim" and should dismiss the same because:

1. The jurisdiction of this board is by the Railway Labor Act limited to disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions and this dispute is not of that nature, but on the contrary arises out of the effect of actions taken pursuant to the authorization by the Interstate Commerce Commission under the Interstate Commerce Act in Finance Docket No. 21400 for Southern to acquire control of Central, subject to the employe protective conditions prescribed by the commission in that proceeding.

2. Even if this were a dispute arising under the rules and working conditions agreement, which it is not, the employe protective conditions prescribed by the commission in the authorization granted in finance docket No. 21400 supersede the rules and working conditions agreement so far as this dispute is concerned, since the authority so granted by the commission is by the terms of the Interstate Commerce Act exclusive and plenary and the carriers participating in the transaction, which include Central of Georgia Railway Company, are relieved of all restraints of law so far as necessary to carry out the transaction authorized by the commission in accordance with the terms and conditions imposed by the commission.

3. Even if there were any doubt about the foregoing reasons, which there is not, this board would still lack jurisdiction to entertain the so-called "claim", since determination of the dispute would unavoidably require interpretation of the commission's employe protective conditions which this board is wholly without jurisdiction to make and which, in addition, would be an intrusion upon the jurisdiction of the several courts which now have pending before them cases involving interpretation of the same conditions.

CONCLUSION

All data submitted in support of the carrier's position have been heretofore submitted to those persons named in the "STATEMENT OF CLAIM" or their duly accredited representatives.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The substance of this claim is that Central of Georgia Railway Company, hereinafter called Central, wrongfully denied a machinist an opportunity to exercise seniority rights to a vacancy at its Columbus, Georgia, Shops. That a machinist position vacancy did exist at Columbus and was bulletined and, effective November 1, 1963, awarded to an employe junior to Claimant is clear. The record also establishes that Central failed to notify Claimant of the vacancy and to give him an opportunity to bid for it. There accordingly is no question but that Central ignored the seniority requirements of Rules 25 and 29 of Central's Collective Bargaining Agreement with Petitioner.

Carrier maintains, however, that this Board is without jurisdiction to pass upon the claim. It points out that the Southern Railway acquired Central of Georgia on June 17, 1963, pursuant to an ICC decision that was handed down on November 7, 1962 (see 317 I.C.C. 557), only after the employes' representatives had been given fair opportunity to be heard and the ICC was satisfied not only that the acquisition would result in economies and improved service but also that the employes would be adequately protected. The ICC proceedings were held in accordance with Section 5 of the Interstate Commerce Act (49 U.S.C. Sec. 5). Particularly pertinent to Central's position in this case are subsections (2) (f) and (11) of Section 5 which read as follows:

Section 5 (2) (f):

> "As a condition of its approval . . . of any transaction involving a carrier or carriers by railroad . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employes affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employes of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded by any employe pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employe was in the employ of such carrier or carriers prior to the effective date of such order. . . ."

Section 5 (11):

> ". . . The authority conferred by this section shall be exclusive and plenary . . . and any carriers . . . and their officers and employes and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations and prohibitions of law, Federal, State, or mu-

nicipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ."

In line with Section 5 (2) (f), protective conditions were prescribed in the ICC Report and Order of November 7, 1962, that entitle those employes displaced or dismissed by reason of the acquisition to receive monetary compensation for at least four years or for the period of their service prior to the effective date of that Order if that period was less than four years. The Carriers immediately proceeded to comply with these conditions and began to consolidate positions.

Thereafter a number of court actions were launched by various collective bargaining representatives. In those cases, the Organizations sought permanent mandatory injunctions directing that Central and Southern rescind all consolidations that had been accomplished in furtherance of the ICC's Order. In the main these actions have either been dismissed or held in abeyance and it would serve no useful purpose to consider them in further detail in this discussion. Suffice it to say that one of the cases, Railway Labor Executives Association v. United States, has been remanded by the District Court to the ICC, at the direction of the United States Supreme Court (379 U.S. 199 (1964)), with instructions to the ICC to amend its Report and Order to deal with the RLEA's request that Sections 4, 5 and 9 of the so-called Washington Agreement of 1936 be included in the employe protective conditions and to indicate specifically why each of these provisions is either omitted or included.

Claimant was affected by the acquisition in July 1963 when he was displaced from a machinist position at Columbus by a senior employe who had lost his position at Macon when Central had closed its Macon mechanical facilities as authorized by the ICC Order. A few weeks later, Claimant was offered by Southern, and accepted, a position at Chattanooga. In making the move, he apparently received the benefits to which he was entitled under the employe protective provisions of the Order. Shortly thereafter, on about November 1, 1963, the Columbus machinist position became available. The present claim was filed when Claimant found that he had not been notified of the vacancy and a junior employe had filled it.

Carrier's position that this Board lacks jurisdiction to entertain the claim is based on contentions that (1) while our jurisdiction is limited to disputes growing out of grievances or collective bargaining agreements, this dispute is not of that nature but on the contrary arises out of actions taken pursuant to ICC authorization of the merger; (2) Section 5(2)(f) and (11) and authorities cited make clear that employe protective conditions prescribed by the ICC Order are "exclusive and plenary" and pre-empt the rules and working conditions agreement so far as this dispute is concerned; and (3) determination of this dispute would unavoidably require interpretation of the Commission's employe protective conditions and would be an intrusion upon the several courts which now have pending before them cases involving interpretation of the same conditions.

In our judgment, Carrier's contentions lack merit. We are satisfied that nothing in Section 5 of the Interstate Commerce Act or in the ICC Order or court decisions cited by Carrier affects the claim now before us. This is not a situation where Claimant is seeking some benefit that is incompatible

with the ICC's Order or authority. He is not disputing Carrier's right to remove him from his Columbus position back in July 1963 in favor of a senior employe who was displaced because of the acquisition. He did not resign from his Columbus position and merely seeks to assert seniority rights that at no time have been abandoned, forfeited or annulled.

Neither the ICC nor any other competent authority has caused applicable seniority rosters to be integrated or modified. (Cf. **Hyland v. United Air Lines, Inc.**, 265 F. Supp. 367 (N. D. Ill. 1966) and **Kent v. Civil Aeronautics Board,** 204 F. 2d 263 (2d Cir. 1953), Cert. den. 346 U.S. 826; where the CAB did expressly combine or modify seniority interests.) In the present case, the ICC not only did not undertake to dovetail or abolish seniority rosters but expressly indicates in Appendix II to its Report of November 7, 1962, in considering displacement allowances, that it expects "Seniority rights under existing agreements, rules, and practices" to continue in effect. (See 317 ICC 557, 589). In permitting Claimant's displacement at Columbus in July 1963 before he moved to Chattanooga, Carrier appears to have observed the existing seniority rules and practices.

The fact that Claimant was entitled to exercise his seniority in this case has no bearing whatever on national transportation policy and does not detract from the plenary powers mentioned in Section 5 (11) of the Interstate Commerce Act. Nothing in the seniority practices and rules imposes a restraint upon the paramount power vested in the I.C.C. to prescribe protective conditions for employes.

The present claim concerns seniority rights and therefore plainly involves a dispute growing out of a grievance within the meaning of the Railway Labor Act. This Board possesses excluive jurisdiction of a dispute of this nature in the railroad industry and indeed has the duty and clear responsibility to determine it without delay (See Third Division Awards 15028 and 15087 and the court decisions therein cited.). It would be unrealistic and an abdication of our functions for us to refrain from asserting jurisdiction over the dispute until all court cases involving the acquisition have been completed.

The seniority rules, the parties to the agreement and the dispute are all before us and no justification is perceived for failing to provide for the prompt and orderly settlement of this claim in line with well established national policy. We accordingly will exercise our jurisdiction and rule on the merits of the case.

Since it is established by the record that Claimant was denied an opportunity to exercise his seniority, part 1 of the claim will be sustained.

With respect to the remedy, we find that Claimant suffered no loss in wages or fringe benefits and was compensated for the expenses incurred in moving from Columbus to Chattanooga. It also appears that the Columbus position that became available on November 1, 1963, was abolished on January 21, 1964, and therefore would have been filled by Claimant for less than two months. He then would have had to move elsewhere. On the other hand, Claimant did sustain damage in not being permitted to exercise seniority to a position at a location he preferred. Upon balancing these considerations, we find it reasonable and proper to allow compensation under part 2 of the present claim in amount equal to forty hours pay at the regular rate listed in Bulletin No. C-36-63, dated November 1, 1963, for the Columbus machinist position.

AWARD

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April, 1967.

DISSENT OF CARRIER MEMBERS TO AWARD 5135

The Carrier Members respectfully dissent from the majority's (the Referee's and the Labor Members') assumption of jurisdiction in this proceeding. It is clear from the Carrier's submissions presented to the Board that the federal courts have and will continue to exercise jurisdiction in this case and that the Interstate Commerce Commission has and is continuing, under Supreme Court mandate, to exercise jurisdiction. Yet, by its decision, the majority attempts to assert authority and render a mere arbitrary award where authority to do so does not exist as is true in this particular case.

The majority was quite correct when it proceeded to consider the provisions of Section 5(2), (11) of the Interstate Commerce Act (49 U.S.C. §5(2), (11), in order to determine the effect of that enactment upon the jurisdiction of this Board. By so doing it directly adopted the keystone of the Carrier's argument to the effect that this enactment affects the jurisdiction of this Board where the dispute, as is the case here, has arisen within the factual context of a railroad consolidation. This being true, the only question remaining is the matter of what interpretation is to be placed upon those portions of Section 5 of the Interstate Commerce Act which impinge or might impinge upon this Board's jurisdiction. This being the essential issue before us, it is the determinative which must be resolved in order to properly dispose of the claim. We, the Carrier Members of this Board, dissent from so much of the award as is concerned with the construction and applicability of Section 5 of the Interstate Commerce Act and which holds that the claim in question arose outside the framework of the railroad consolidation here involved.

Additionally we are particularly disturbed by the nature of, and we dissent from, the monetary award. Nowhere in the rules-and-working-conditions agreement is any warrant to be found authorizing the imposition of "an amount equal to forty hours pay at the regular rate listed in Bulletin No. C-36-63, dated November 1, 1963, for the Columbus Machinist position". The record clearly shows that Claimant Elliott's damages were only nominal. It would appear from the submissions and arguments, viewed from the present perspective, that Carriers' alleged breach actually resulted in an avoidance of monetary loss by the single employe here involved. The award of forty-hours pay is clearly punitive and not a compensatory one. In addition, it is so clearly arbitrary in its amount as to be unsupportable in law or logic. We would follow the award recently rendered in the Third Division which held that this Board is without power to arbitrarily assess punitive damages. See

Award No. 20344 and 20106 of First Division; 4974 and 5152 of Second Division; 12131 and 15062 of Third Division and 1382 and 1585–Interpretation No. 1 of Fourth Division as well as those cited therein.

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