Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12945
Docket No. 12744
95-2-93-2-137

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen
(and Oilers, System Council No. 15
(
(Belt Railway Company of Chicago

STATEMENT OF CLAIM:

"1. That the Belt Railway Company of Chicago violated Article 1, Section 4 of the September 25, 1964 Agreement, when it posted a five day notice (rather than 60 day notice) of the abolishment of the positions of Messrs G. Stofferahn, P. Waldon, D. Hansen, T. Luick, S. Grajek, S. Gaal, F. Crothers, M. Kelly, J. Hennigan, R. Fick, T. Gialamas, A. Milton, J. Steinkamp, P. Kositsky, R. Galassi, K. Evans and T. Greene.

2. The Belt Railway Company of Chicago further violated the September 25, 1964 Agreement, when it failed to provide the protective benefits to the aforementioned individuals who were affected as a result of changes of the Belt Railway Company as defined in Article 1, Section 2, paragraphs a, b & e.

3. That accordingly, the Belt Railway Company of Chicago be ordered to make the aforementioned individuals whole by payment for time lost as a result of the abbreviated furlough notice, and further that the protective benefits of the September 25, 1964 Agreement be applied."

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 waived right of appearance at hearing thereon.

The Carrier is a switching railroad, operating in the Chicago area on behalf of nine owner railroads making use of the Carrier facilities. A drastic change in the Carrier's operations occurred beginning in late November 1989, as indicated by the Carrier's memorandum dated December 1, 1989 to "All Employees and Their Representatives", which read in pertinent part as follows:

> "In late October, the Management of The Belt Railway Company was informed by two of its Owners of their intention to withdraw traffic from Clearing Yard, effective November 27, 1989. During this past week, a number of other Owners have also indicated their intention to do likewise. We have no way of knowing, at this time, whether this reduction in force will be permanent.
>
> In view of these facts, we feel it advisable to inform all of our employees that these operational changes by our owner lines will necessitate significant force reductions on this property in the near future. Consequently, the required force reduction notices and bulletins are being published and posted to notify those employees who will be affected by these changes."

The Claimants are Enginehouse Laborers who were furloughed from service between July 1988 and May 1990. It is the Organization's contention that these furloughs were the direct result of the lost work which resulted as was predicted in the Carrier's December 1, 1989 memorandum. The Claimants contend they are entitled to protective benefits under the September 25, 1964 Agreement, which provides in pertinent part as follows:

> "ARTICLE 1 - EMPLOYEE PROTECTION
>
> Section 1 -
>
> The purpose of this rule is to afford protective benefits for employees who are displaced or deprived of employment as a result of changes in the operation of the carrier due to the causes listed in Section 2 hereof, . . .

Section 2 -

The protective benefits of the Washington Job Protection Agreement of May, 1936, shall be applicable, as more specifically outlined below, with respect to employees who are deprived of employment or placed in a worse position with respect to compensation and rules governing working conditions as a result of any of the following changes in the operations of this individual carrier:

a. Transfer of work;

b. Abandonment, discontinuance for 6 months or more, or consolidation of facilities or services or portions thereof; . . .

e. Voluntary or involuntary discontinuance of contracts; . . .

Section 3 -

An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation and rules governing working conditions in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to work due to disability or discipline, or failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or reductions in forces due to seasonal requirements, the layoff of temporary employees or a decline in a carrier's business, or for any other reason not covered by Section 2 hereof. In any dispute over whether an employee is deprived of employment or placed in a worse position with respect to his compensation and rules governing working conditions due to causes listed in Section 2 hereof or whether it is due to the causes listed in Section 3 hereof, the burden of proof shall be on the carrier."

The Organization recognizes the relationship between the Carrier and the nine owner lines which are in a position to determine the amount of work to be performed by Carrier forces. The Organization argues, however, that -- as to the affected employees -- there was clearly a "transfer of work" as provided in Section 2(a) of the September 25, 1964 Agreement. The work did not disappear but was simply relocated and handled in a different manner by the nine owner lines which had been directly involved with the Carrier's switching facility. On this basis, the Organization contends that conditions of the September 25, 1964 Agreement were met, both as to protective benefits and as to a required 60-day notice.

The Board notes that Organization' arguments as to Section 2(b), "abandonment. etc." and Section 2(e), "voluntary or involuntary discontinuance of contracts", but does not find these centrally relevant to the occurrence here under review.

The Carrier contends that what occurred here was simply a "decline in business", with the user lines finding other means for servicing equipment, resulting in less work available to Carrier forces. The Carrier also notes that it had "no contractual control over" the railroads making use of Carrier facilities and thus cannot be held responsible for the resulting decline in activity.

The Board finds that the relationship between the Carrier and the nine owner railroad lines is sufficiently well established to make it apparent that a "transfer of work" occurred when the owner lines determined, at least temporarily, to cease utilizing the Carrier's facilities. Under these circumstances, the fact that the change was not initiated by the Carrier is not the pivotal point. What is of prime significance is the effect of the transfer as to the Claimants' status.

The Organization cites Special Board of Adjustment No. 570 Awards in support of this principle. Award 127 states:

> "Nor is the fact that this Carrier did not initiate the change in service that led to these furloughs determining for our decision. . . . [I]t is the change in the operations of the particular carrier that is significant, and that we find in Article I, Section 2 no provision for an exception based on the concept of initiation."

Award 153 states:

> "The mere fact that some of the changes were made by the trunk lines railways rather than by Carrier is not a valid defense to the present claim for they caused work that had been handled at the Terminal to be transferred elsewhere and thus clearly brought about changes in this Carrier's operation."

Award 176 concerns the withdrawal of the need for services by "tenant" railroad lines from a Terminal Company and concludes that affected employees are eligible for employee protection.

A contrary holding is found in a denial Award, Special Board of Adjustment No. 570, Award 657. In that instance, a major railroad owning 51 per cent of the Carrier (a switching railroad) determined to bypass the Carrier's yard and use its own facility elsewhere. This caused a reduction in force at the switching railroad facility. While this has some similarity to the matter here under review, it can be distinguished in that rerouting of a Carrier's trains is of a different character than the relocation of servicing of equipment.

The Carrier accurately states that it experienced a severe "decline in business" and notes the exception made therefor in Article 1, Section 3. Numerous Awards have held that where such "decline" is based on a Section 2 cause, as here, this argument loses its effectiveness as compared with instances where force reduction is proven to be based solely on lowered business levels.

Having found merit in the Claim, the Board nevertheless determines that some of the Claimants are not covered by the Board's finding. Six of the 17 Claimants were furloughed in 1988, well before the transaction discussed herein. They cannot be found to be affected by the changes commencing in December 1989 and are not eligible for protective benefits. Likewise, one other employee was furloughed, according to the Carrier's report, on March 16, 1991, a date far too removed from the operative date. (If this date is inaccurate and the Claimant was furloughed in early 1990, then he would be eligible.) The remaining Claimants are found eligible to apply for protective benefits, subject to the qualifying conditions of the September 25, 1964 Agreement.

There remains the question of the 60-day notice (and, in effect, pay in lieu thereof). Given the Carrier's announcement of December 2, 1989, it is difficult to determine how the Carrier could have provided any greater notice. As a matter or practical application, this portion of the Claim will be denied.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 23rd day of August 1995.