Award No. 19055

Docket No. TE-19032

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert A. Franden, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

THE CINCINNATI UNION TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Cincinnati Union Terminal Company, T-C 5768, that:

Carrier violated the February 7, 1965 Mediation Agreement between the parties when it failed and refused to properly compensate the following protected employes: John Youtsey, Howard Quinn and Robert McDonald, commencing June 1, 1969, for all days lost due to Carrier abolishing their positions without an implementing agreement and refusing to compensate them under Article IV of the Agreement.

Carrier shall now compensate the three protected employes: John Youtsey, Howard Quinn and Robert McDonald at their protected rate, Plus all subsequent rate increases, starting June 1, 1969, and until the violation is corrected. less compensation paid to Claimants for work performed, or due to any loss sustained by voluntary absence due to sickness or disability.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The dispute herein is based upon various provisions of an Agreement between the Cincinnati Union Terminal Company and the T-C Division, BRAC, hereinafter referred to as Employes, dated January 1, 1955, as amended and supplemented, and more specifically the Mediation Agreement, Case No. A-7128, dated February 7, 1965, and by this reference is made available to your Board. (T-C Division Exhibit No. 1) (only Articles relative to our dispute are produced)

Claim was handled in the proper manner on the property up to and including the highest Carrier Officer designated to handle claims and grievances, with conferences held on June 24 and July 5, 1969, and remains unsettled. The Employes, therefore, appeal to this Honorable Board for adjudication.

The claim arose because Carrier, on March 1, 1969, abolished the position of Leverman held by a protected employe and three months later on June 1,

zation's purpose was not to make an agreement but to try to support the claims of the employes who were arguing, "no decline in business criteria agreement — no reductions in force based on decline in business." If the General Chairman made an "appropriate" decline in business agreement he would automatically destroy the only basis he had for his claim. The fact the General Chairman had a personal interest in **not** making an agreement and because he could only repeat and write what he was told by the Grand Lodge Officer whom he stated was too important and too busy to come to the Terminal for a conference, made further negotiations impractical and this Carrier saw no alternative to submitting the case to the Disputes Committee. Carrier's Ex Parte Submission to Disputes Committee established by Article VII of the February 7, 1965 Mediation Agreement, A-7128, is attached as Exhibit No. 1.

Copy of Mediation Agreement Case No. A-7128, dated February 7, 1965, is attached as Exhibit No. 2.

Copy of letter of District Chairman, Mr. M. S. Brazzell, dated January 27, 1970, is attached as Exhibit No. 3.

Copy of letter of District Chairman, Mr. M. S. Brazzell, dated February 3, 1970, attached as Exhibit No. 4.

Copy of Carrier's letter addressed to District Chairman Mr. M. S. Brazzell under date of February 9, 1970 attached as Exhibit No. 5.

Copy of District Chairman, Mr. M. S. Brazzell's letter dated April 2, 1970 and enclosures, attached as Exhibits No. 6, pages 1, 2 and 3.

Copy of Carrier's letter addressed to District Chairman Mr. M. S. Brazzell under date of April 15, 1970, attached as Exhibit No. 7.

Copy of Carrier's letter addressed to District Chairman Mr. M. S. Brazzell under date of April 28, 1970 attached as Exhibit No. 8.

Claim for John Youtsey is in violation of Article V of the August 21, 1954 Agreement due to failure to handle it within the time limits of that Article and failure to follow mandatory procedure of that article which requires that a claim must be presented in writing to the Officer of the Carrier authorized to receive same. Without prejudice to our position claim is barred by Article V of the August 21, 1954 Agreement, copy of letter of General Chairman Howard Quinn, dated September 5, 1969, attached as Exhibit No. 9.

Copy of Carrier's letter addressed to Mr. Howard Quinn under date of October 24, 1969 attached as Exhibit No. 10.

Consistent with policy to make every effort to secure employment for employes surplused due to decline in business, arrangements were made for Claimants to report to the Southern Railway, a tenant line of this company, for employment, but Claimants declined to consider employment with a tenant line of the Cincinnati Union Terminal Company. Report of Assistant Trainmaster Harry G. Clayton, dated March 31, 1970, attached as Exhibit No. 11.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is based on an alleged violation of the February 7, 1965 Mediation Agreement. The case at bar was submitted to the

Disputes Committee established by Article VII of the Mediation Agreement. Award No. 277 of Special Board of Adjustment 605 was rendered therein and reads as follows:

"QUESTIONS AT ISSUE: 1. Does the substitution of data covering 'total engines and cars handled' added to 'Freight Movements and Detour Movements computed on the basis that three such train movements equal one car count' for 'gross operating revenues' and 'net revenue ton miles' respectively, as those terms are used in Article I, Sections 3 and 4 of the Agreement of February 7, 1965, provide an appropriate measure of volume of business of the Cincinnati Union Terminal Company for this craft?

2. If the answer to Question No. 1 is affirmative, should the Agreement proposed by the Carrier, attached hereto as Carrier's Exhibit No. 10, be entered into by the Organization representative in disposition of this matter?

3. If the answer to Question No. 1 is negative, what data should be substituted to provide an appropriate measure of volume of business or in what manner or to what extent should the Carrier's proposed Agreement (Carrier's Exhibit No. 10) be amended or revised?

OPINION OF BOARD: The Committee considers it necessary in this case to obtain additional information from the parties.

AWARD

The matter is remanded to the parties to provide the Committee no later than January 10, 1972, with an actual five-day first trick study of the ratio of telegrapher time spent in the base period and presently in handling detour freight movements compared to engines and cars included in the monthly car count."

It is the contention of the Carrier that the Disputes Committee is the proper forum for this case and that it should therefore be dismissed by this Board. The Organization contents that in that this Board is granted jurisdiction over disputes of this nature by the National Railway Labor Act we must hear the case. There is ample precedent by this Board to support this position of the Carrier. See Awards 14471 (Ives), 16869 (Franden) and 14979 (Ritter).

The Organization has asked that the Board study the matter in the light of Parsons v. Norfolk and Western Ry. Co. 74 LRMM 2493. In that case the Fourth Circuit Court of Appeals affirmed a lower Court in holding that plaintiff was barred from prosecuting his case in Federal Court in that he did not exhaust his administrative remedies by submitting his claim to the National Railroad Adjustment Board.

We do not believe the holding in the Parsons case to be controlling here. Under the February 7, 1965 Agreement the machinery for handling disputes was included in the folowing language:

"ARTICLE VII — DISPUTES COMMITTEE

Section 1 —

Any dispute involving the interpretation or application of any of the terms of this agreement and not settled on the carrier may be

referred by either party to the dispute for decision to a committee consisting of two members of the Carriers' Conference Committees signatory to this agreement, two members of the Employes' National Conference Committee signatory to this agreement, and a referee to be selected as hereinafter provided. The referee selected shall preside at the meetings of the committee and act as chairman of the committee. A majority vote of the partisan members of the committee shall be necessary to decide a dispute, provided that if such partisan members are unable to reach a decision, the dispute shall be decided by the referee. Decisions so arrived at shall be final and binding upon the parties to the dispute."

We have correctly held in the past that the word may be permissive in that it gives either party the option of submitting the issue to the Committee. It is not permissive as to forum. Article VII binds the parties to adjudicate disputes on the committee formed pursuant to its terms and to be bound by its findings.

The decision that the Disputes Committee is the proper forum to hear cases involving the interpretation or application of any of the terms of the February 7, 1965 Mediation Agreement applies to the merits of the cases. This Board will not adjudicate the merits in those cases but does stand as the proper forum should either party wish to subject any of those matters to collateral attack.

Accordingly, the claim is dismissed without prejudice.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

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

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of March 1972.

CONCURRING OPINION OF CARRIER MEMBERS
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We agree with this Award in substance; however, we disagree with the last sentence contained in the penultimate paragraph reading:

"* * * This Board will not adjudicate the merits in those cases but does stand as the proper forum should either party wish to subject any of those matters to collateral attack."

As stated by the neutral, under the February 7, 1965 Agreement, the machinery for handling disputes was included in the following language:

"ARTICLE VII — DISPUTES COMMITTEE

Section 1 —

Any dispute involving the interpretation or application of any of the terms of this agreement and not settled on the carrier may be referred by either party to the dispute for decision to a committee consisting of two members of the Carriers' Conference Committees signatory to this agreeement, two members of the Employes' National Conference Committee signatory to this agreement, and a referee to be selected as hereinafter provided. The referee selected shall preside at the meetings of the committee and act as chairman of the committee. A majority vote of the partisan members of the committee shall be necessary to decide a dispute, provided that if such partisan members are unable to reach a decision, the dispute shall be decided by the referee. Decisions so arrived at shall be final and binding upon the parties to the dispute."

Therefore, this Board cannot stand as the proper forum should either party wish to subject any of those matters, already decided by the Disputes Committee and which are final and binding, to collateral attack.

To that extent we disagree with the Award.

H. M. Braidwood
P. C. Carter
G. T. Naylor

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