NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20161
THIRD DIVISION Docket Number CL-20228

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Detroit, Toledo and Ironton Railroad
(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes

STATEMENT OF CLAIM: Where the February 25, 1971 National Agreement granting future wage increases and according the Carrier the exclusive option either to consolidate clerk-telegrapher work or not to consolidate it, contains no prohibition against it, can the Carrier withdraw a notice of its desire to consolidate such work, where the Carrier advises the Organization of that withdrawal before any agreement on consolidation is effected and before the date after which the Carrier is free to defer payment of the wage increases granted by the Agreement?

OPINION OF BOARD: The issue in this dispute appears to be unique and unprecedented. The Claim, presented by the Carrier, is posed as a "Question in Dispute" and deals with the issue of whether Carrier may withdraw its notice and proposal that the BRAC-TCU Agreements be combined in accordance with the National Agreement dated February 25, 1971. The pertinent provisions of that Agreement are as follows:

"ARTICLE VIII - CONSOLIDATION OF CLERK-TELEGRAPHER WORK

section 1. At the option of a carrier as provided in Section 2(a) hereof, and in order to permit a carrier to make work assignments interchangeable between Clerks and Telegraphers, the separate scope rules of the Clerks and Telegraphers agreements will be jointly applicable to all Clerk and Telegrapher employees after the procedures in Section 2 have been complied with. Appropriate seniority rosters of Clerks and Telegraphers in operating divisions or operating Departments shall be combined in a manner adapted to meet existing conditions, in accordance with one of the following procedures:

(a) Agreed upon seniority rosters of Clerks and Telegraphers will be dovetailed with Clerks having prior rights to assignments filled by Clerks, and Telegraphers having prior rights to assignments filled by Telegraphers, on the date seniority rosters are combined. Employee hired after such date shall be placed at the bottom of the dovetailed rosters and with seniority thus acquired they may fill any assignments in accordance with the applicable Clerk or Telegrapher Agreement, or

"(b) Agreed upon seniority rosters of Clerks and Telegraphers will be dovetailed with employes having the right to exercise full seniority and displacement rights in accordance with the applicable Clerk or Telegrapher Agreement. Employes hired after the date seniority rosters are combined shall be placed at the bottom of the dovetailed rosters and with seniority thus acquired they may fill any assignments in accordance with the applicable Clerk or Telegrapher Agreement, or

(c) In geographic territories which are covered by no more than one Clerks' agreement and no more than one Telegraphers' agreement, agreed upon seniority rosters of the Clerks and Telegraphers in such territory will be dovetailed, with employees having the right to exercise full seniority and displacement rights. Scope rules and agreement rules of such Clerks and Telegraphers will be combined and the preferable rules in either the Clerks' agreement or the Telegraphers' agreement will be included in the surviving combined agreement. Determinations as to preferable rules to be made jointly by the General Chairmen or the organization. When such determination involves merger agreements or job stabilization agreements, the selection must be either such merger or stabilization agreements, including related agreements, in their entirety applicable to the Clerks or such merger or stabilization agreements, including related agreements, in their entirety applicable to the Telegraphers."

"Section 2.

(a) Subsequent to the date of this Agreement a carrier desiring to implement the provisions of Section 1 of this Agreement will notify the General Chairmen of the Clerks and Telegraphers of its desire, designating which rosters it desires to combine.

(b) Within 60 days from the date of receipt of notification from the Carrier the involved General Chairmen shall jointly notify the Carrier which of the procedures outlined in Section 1 hereof they desire or that they are unable to agree on a procedure.

(c) If the General Chairmen notify the Carrier that they are unable to agree, the carrier will then submit to the General Chairmen a proposal for combining the designated seniority rosters under the procedure of Section l(a) hereof, designating positions and individuals on the roster with a 'C' for Clerks and a 'T' for Telegraphers, and all other information carried on rosters under the applicable rules agreement. The Organization shall submit to the carrier a counter-proposal to the carrier's proposal, if it so desires, with respect to the merging of seniority rosters under Section l(a) hereof.

"(d) If within 150 days after the date of the carrier's notice served under paragraph (a) hereof -

(1) Agreement has not been reached implementing the option elected by the General Chairmen pursuant to paragraph (b), or

(2) If no option has been elected and agreement has not been reached implementing the carrier's proposal pursuant to paragraph (c) hereof and

(3) The General Chairmen have not agreed to arbitrate the issues described in either item (1) or (2) above as provided in paragraph (e) hereof,

the wage increases for January 1, 1973 and April 1, 1973 due under Article I of this Agreement shall be effective 30 days later for each 30-day period of delay or fraction thereof beyond the said 150 day period for all employees covered by Section 1 of this Article as defined in Note 1 thereto.

(e) Within LO days of receipt in writing by the carrier of notice of the General Chairmen of desire to refer the issues covered in paragraph (d) to arbitration, each General Chairman ehall select one member of the Arbitration Board, the carrier shall select two members of the Arbitration Board, and the National Mediation Board will appoint the neutral member. If any party fails to select its members of the Arbitration Board within the prescribed time limit, the General Chairmen representing Clerks and Telegraphers respectively and the two officers designated to handle such matters for the Carrier shall be deemed to be the selected members. The decision shall be made by the neutral member within 45 days from the date of his appointment and shall be final and binding upon the parties."

The Organization first raises the question and challenges this Board's jurisdiction in view of the provisions of Section 2 (d) and (e) above. However we view the provisions for arbitration contained in Article VIII above to be limited to specific disputes outlined in Section 2. The dispute in this case however is clearly on an issue involving the interpretation or application of the Agreement, mid particularly Article VIII, and as such is covered by Section 3, First (i) of the Railway Labor Act. For this reason we shall deny the Organization's contention.

The relevant facts are not substantially in dispute, merely how they may be construed is in issue. The most significant events may be outlined as follows:

1. June 26, 1972 - Carrier wrote to the General Chairman indicating that it desired to implement Section 1, Article VIII and combine the Transportation-Communications Division Roster with the Roster of District 2, Brotherhood of Railway, Airline and Steamship Clerks.

2. July 7, 1972 - Organization wrote to Carrier acknowledging the June 26th letter and indicating an option for the procedure of Section l(c), as provided by Section 2 (b) of the Agreement.

3. August 10, 1972 - First conference between parties.

4. September 20 and 21, 1972 - Conferences were held between the parties which covered, among other things, a Carrier proposed merged roster of BRAC-TCU employees and a previously presented proposed "cherry picked" merged Agreement prepared by the Organization.

5. September 29, 1972 - Organization wrote to Carrier confirming prior conference discussion, setting the dates (October 17 and 18) for the next meeting, stating Organization would present a re-written proposed Agreement either prior to or at the meeting and finally confirming the understanding that if no agreement was reached in October the 150 day provision of Article VIII would be extended until December 31, 1972.

6. By agreement, the October meetings were re-scheduled for November 27 through 30, 1972.

7. On October 24, 1972, Carrier wrote to the Organization as follows: "This is to advise that the Detroit, Toledo and Ironton Railroad has decided to withdraw its proposal that the BRAC-TCU Agreements be combined pursuant to the National Agreement dated February 25, 1971. This is to further advise that my letter of June 26, 1972 concerning the proposal is hereby withdrawn without prejudice.

   Accordingly, please cancel our conferences scheduled for the week of November 27, 1972."

8. November 20, 1972 - Organization wrote Carrier objecting to withdrawal of the option and enclosing a new and revised rules proposal.

9. December 19, 1972 - Carrier gave written notice of its intention to file the instant "Question in Dispute" with the Third Division of the N.R.A.B.

10. December 20, 1972 - Organization wrote Carrier indicating that they desired to submit the dispute to arbitration under the terms of Section 2 (c) of Article VIII of the Agreement. Following such submission by the Organization and further correspondence, on January 24, 1973 a letter from the National Mediation Board advised that the request for arbitration was being placed before the Board for review and consideration. No determination has been made of the request as of the date of the submissions.

11. January and April 1973 - The wage increases provided by Article 1 of the Agreement were put into effect by Carrier.

* * * *

Carrier contends that Article VIII, Section 1 of the Agreement accords Carrier the exclusive option to make work assignments inter-changeable and by parity of reasoning the Carrier has the right to withdraw such option. Further there is no prohibition in the Agreement which would preclude Carrier from withdrawing its exclusive option. It is further argued that Carrier withdrew its option before the date after which the Carrier was free to defer payment of the wage increases provided by Article I and subject to the limitations of Article VIII Section 2 (d); the Organization, having accepted the wage increases, is estopped from challenging the validity of the Carrier's position, Carrier also maintains that Article VIII was negotiated to give the Carriers certain advantages and thus the withdrawal of its proposal not only meant relinquishing such advantages but also meant giving up any right to defer the two 1973 wage increases and has h-d no one except perhaps the Carrier.

The Organization argues that once Carrier exercised its option both parties are bound equally to comply with the specific terms of the Agreement; there are not two options. Organization contends further that it had restructured the bargaining units in anticipation of agreement and has expended considerable time and money in preparation for the rule changes and attendent negotiations. It is further urged that there is nothing in the Agreement which permits Carrier to withdraw its option. Finally it is argued that if Carrier had the right to withdraw its option notice, it should be precluded from ever again serving such notice.

In examining Article VIII, we conclude that the payment of the two 1973 wage increases is not relevant to the disposition of the issues in this dispute. If Carrier had not served notice the two increases would have been due on the two specified dates, Deferral of the increases was apparently provided as an aid to Carrier and to prevent the Organization from delaying agreement. Once the option had been chosen by Carrier the wage increases could only be deferred if the General Chairmen failed to meet the requirements of Section 2 (d), which cannot be established in this case. Carrier's initiative in this situation encompassed certain risks including the payment of the wage increases while the issue which it raised was still to be adjudicated; certainly then, this action cannot be treated as weighting the argument in Carrier's favor.

Both parties correctly assert that there is nothing in the Agreement which either permits or precludes the withdrawal of the option. We must therefore examine the implications of the two alternatives. If the option may be withdrawn, "without prejudice" as stated by Carrier, may the same option be exercised again? How often? May Carrier try on a number of occasions until the most propitious circumstances arise for agreement on consolidated rules? Was this the intent of the parties? By the same token, may the Organization, for example, change its option under Section 2 (b), after a period of unsatisfactory negotiation with the Carrier? We are also faced with implications of ruling that such an option may be withdrawn, on the entire spectrum of agreements in the industry, including the question of at what point in a negotiation may a commitment such as this be withdrawn. It must be noted that the record in thi; case does not indicate the motive causing Carrier's *action;* nevertheless we can foresee permission of withdrawal of an option causing substantial chaos in the collective bargaining relationships. Such a result would be clearly contrary to the best interests of both parties and also contrary to the intent of the Railway labor Act, since it would not foster a stable and constructive relationship. Our conclusion therefore is that Carrier had complete freedom of choice under the provisions of Article VIII but once having made an election, it could not change its mind.

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; and

That the Question in Dispute is resolved in the negative.

A W A R D

The Carrier cannot withdraw its notice of its desire to consolidate work under Article VIII of the February 25, 1971 National Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1974.