Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27637
THIRD DIVISION Docket No. MS-26786
88-3-85-3-760

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Victor R. Polewsky
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(Bay Colony Railroad Corporation

STATEMENT OF CLAIM:

"(a) Bay Colony Railroad Corporation (hereafter referred to as 'the Carrier') violated section 704(c) of the Regional Rail Reorganization Act when it hired employees to start working coincident with commencing operations on June 12, 1982 without first reporting job vacancies to the Railroad Retirement Board thus depriving unemployed railroader with substantial experience in railroad operations, V. R. Polewsky (hereafter referred to as 'claimant') from knowledge of vacancies and opportunity to compete for any of the open positions.

(b) Because of said violation the carrier shall now compensate this claimant income which claimant could have earned retroactive to June 12, 1982."

FINDINGS:

The Third 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 employes 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.

Claimant was separated from his employment by the Chicago, Rock Island and Pacific Railroad on March 31, 1980, when that company discontinued all rail operations. According to his Rock Island service record, Claimant was employed as a Dispatcher at the Rock Island Des Moines, Iowa, facility for the entire term of his employment, beginning on October 9, 1978. According to an employment resume submitted to Carrier, Claimant had also been employed by the Canadian Pacific Railway Company and Canadian National Railways for various periods commencing in 1969. During this period, Claimant worked as an operator, a telegraph/operator and an agent/operator.

According to Carrier's submission, the Bay Colony Railroad Corporation (BCLR) was organized to lease and operate as a Class III common carrier several line segments abandoned by Conrail under the Northeast Rail Service Act of 1981 (45 U.S.C. Subsection 748) and acquired from Conrail by the Commonwealth of Massachusetts. Its total system is 127 miles.

Carrier commenced railroad operations on June 12, 1982. Several employees were hired initially: two to operate and maintain a Cape Cod Canal lift bridge owned by the U.S. Army Corps of Engineers; one electrician; and four Maintenance of Way employees. Carrier asserts that it has not at any time employed a dispatcher, and that train movements have been "dispatched" by a Management employee, Mr. Joseph Manning. Carrier avers that Manning's "dispatching" responsibilities consume at most 15-30 minutes each day, a small part of his overall duties which include claims processing, agency work, data management, car movement records, as well as duties in connection with Gordon Fay Associates, Inc., a consulting firm which initially organized BCLR. Manning, a civil engineer, had been employed by Gordon Fay Associates, Inc. since 1979 prior to his employment with Carrier in 1982.

In June, 1983, Claimant made inquiry with the Carrier concerning possible employment opportunities. When no response was forthcoming, Claimant commenced proceedings before the Railroad Retirement Board, asserting that Carrier violated his preferential hire rights set forth in Section 703 of the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. 797b.

On October 4, 1983, the Railroad Retirement Board commenced its investigations. The record before us contains the correspondence between the Retirement Board and each party. When requested by the Board to furnish information as to why job vacancies filled since August 13, 1981, were not reported to the Board as required under federal law, Carrier responded:

> "3. These job openings were not reported to the Railroad Retirement Board because at the time of the majority of openings we were not yet certified as a railroad by the Board. In addition, as a new railroad, we were not aware of the need to file such openings prior to going into operation. We have only just recently become aware of the applicability of this statute and will notify the Board of further openings."

On August 9, 1985, the Retirement Board concluded that Carrier may have violated Claimant's rights by not reporting job vacancies to the Board as required by Section 704(c) of the Regional Rail Reorganization Act. The Board stated, "since the vacancies were not reported, the Board was prevented from referring employees and [Claimant] was unable to find out about the employment opportunities."

By letter dated December 25, 1985, Claimant served notice with the National Railroad Adjustment Board of his intention to file an ex parte submission regarding the instant dispute. Apparently, Petitioner's original submission was filed with the Board on February 3, 1986, and a "corrected" submission with minor changes not relevant herein was filed February 18, 1986.

After informing the Board of his intention to file a submission, but before a submission was filed, Claimant on January 13, 1986, requested a conference with the Carrier. Carrier did not respond, nor did it make reference to any possible procedural defects in its February 19, 1986, submission. In its rebuttal brief, however, Carrier argued that Claimant had placed the instant dispute before this Board prior to requesting a conference, thereby precluding the Board from asserting jurisdiction over this case.

Claimant's position is that Carrier violated the provisions of the Regional Rail Reorganization Act when it failed to notify the Railroad Retirement Board of vacancies. As a result, Claimant alleges that he was not allowed to compete for the vacant positions, positions which he claims he was qualified to fill.

Carrier asserts that Claimant has not had any first right of hire. A separate Rock Island employee's rights accrue only with respect to vacancies for which he or she may be qualified and for which other applicants are not more qualified - circumstances which, Carrier argues, do not exist with respect to the present claim. Therefore, Carrier submits that any delay in filing notices of vacancy does not entitle Claimant to relief in this proceeding.

This dispute involves the interpretation and application of the Statutory First Right of Hire which is accorded to railroad workers deprived of employment on certain current and former railroad enterprises. The right is set forth in the Milwaukee Railroad Restructuring Act, the Rock Island Railroad Transition and Employee Assistance Act, and the Regional Rail Reorganization Act of 1973 as amended by the Northeast Rail Services Act of 1981. 45 U.S.C. 907; 45 U.S.C. 1004; and 45 U.S.C. 797(b).

The jurisdiction and power of this Board are derived from the Railway Labor Act, 45 U.S.C., 151 et. seq. Section 3, First (i) of the Railway Labor Act requires the parties to handle claims ". . . in the usual manner . . ." before filing a claim with this Board. The usual handling of claims includes the duty of the parties to hold a conference on the property prior to submitting the controversy to us. 45 U.S.C., 152, Second. "The conference requirement is designed to encourage the parties to reach a mutual accommodation vitiating the need for formal adjudication before this Board." Fourth Division Award No. 4419.

We have been referred to several cases before the various divisions of this Board in which claims regarding preferential first right of hire were dismissed as procedurally defective because a conference was not held on the property. Second Division Awards 11097, 11134, 11215, 11206. This case stands on a somewhat different footing, however. Here, Claimant did request a conference, albeit after filing Notice of Intent to file a submission before this Board. Carrier did not respond to Claimant's request for conference.

In First Division Award No. 23836, the Board was confronted with a similar situation. Therein, it noted:

> "The Section 3, First (i) of the Railway Labor Act requirement that the parties handle their claims on their respective properties, '. . . in the usual manner. . .' before filing a claim with this Board allows the parties to compile a complete record containing all relevant evidence before submitting the case to this Board. The usual handling procedures are most often found in an applicable collective bargaining agreement, however, in this case, Claimant is not represented by a labor organization and there has been no showing that a labor contract exists for his craft. This Board is faced with certain insurmountable factual issues as demonstrated, for example, by the assertions or questions raised by the parties as to the employment history and background of the twenty-four (24) individuals hired in Claimant's craft. Because of this, we are compelled to remand the case back to the property for handling."

Accordingly, we will remand this case to allow the parties to properly develop a complete record containing all relevant evidence before the submission of the case to the Board.

Claimant may file a claim with the Carrier setting forth his position and including all facts and arguments the Claimant believes support his position. Expeditious handling requires that this be done within sixty days from the date of this Award. Carrier shall then have the right to respond to Claimant within sixty days from the date the claim is received. Claimant shall thereafter request a conference for the purpose of attempting to resolve the dispute. The conference shall be held within sixty days after Claimant's receipt of the Carrier's position.

Should the matter not be resolved in conference, the Claimant shall expeditiously file an ex parte submission before this Board.

It must be emphasized that the above-stated order is necessitated by the unusual posture of this case, and is limited to the particular facts and circumstances of this dispute.

We recognize that there is a Third Division Award (15880) which held under similar circumstances that if one of the parties refuses or fails to avail itself of a conference where there is an opportunity to do so, it cannot then assert the defense of a lack of jurisdiction. While we do not wish this

opinion to be construed to mean that either party can evade this Board's jurisdiction by refusing or otherwise evading a conference when requested, we do note that the conference requirement is a statutory condition precedent which cannot easily be set aside. In that regard, the Board stated in Fourth Division Award 4419:

> ". . . the policies underlying the usual handling requirements encourage the parties to explore all avenues of possible settlement and promote voluntary dispute resolution. The parties, if they are required to meet in conference, may be able to settle the Claim, especially when the Retirement Board has already determined that a Railroad Company might have undermined a protected worker's preferential hire rights. Automatically transferring the Claim from the Retirement Board to this Board thwarts the parties' attempts to settle the Claim. If a settlement is feasible, the Section 3 procedures give the parties an opportunity, consistent with due process, to compile a complete record containing all relevant evidence before submitting the case to this Board. Adjudicating a Claim immediately after the Retirement Board has issued a possible violation finding prevents the parties from coming forward with additional evidence to support their positions. If we decide a Preferential Hire Claim submitted to us directly from the Retirement Board, we would simply be reviewing precisely the same evidence (and nothing more) on which the Retirement Board premised its possible violation determination. Obviously, Congress envisioned that this Board would independently evaluate Preferential Hire Claims based on a full and complete record. Our role in the adjudication procedure was not limited to duplicating the function of the Retirement Board. Thus, the policy of encouraging the voluntary resolution of disputes dissuades us from carving out a jurisdictional exception to the usual handling prerequisites in Section 3, First of the Railway Labor Act.

We realize that absent a settlement by the parties, our decision will delay, but not unreasonably so, the processing of Claims brought under the Regional Rail Reorganization Act and like Laws. Assuming the parties are unable to reach a mutually satisfactory disposition of the Claim on the property, an aggrieved worker's rights will be protected because this Board is empowered to issue a make whole remedy in accord with the broad remedial provisions in Section 704(g)(3) of the Regional Rail Reorganization Act. 45 U.S.C. 797 (g)(3)."

Based on the foregoing discussion, this Board will remand the instant claim as set out above, without prejudice, to permit the parties to comply with Section 3, First (i) of the Railway Labor Act, and if the claim is not settled on the property, to later progress the dispute to this Board.

A W A R D

Claim disposed of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1988.