NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21706

THIRD DIVISION Docket Number MW 21775

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Illinois Central Gulf Railroad Company.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it permitted Machine Operator J. B. Jones to displace Machine Operator W. A. Ussery on or about May 5, 1975 (System File A1-35-MO-35/134-703-616 Case No. 985 MofW).

(2) Machine Operator W. A. Ussery be compensated for travel time and reimbursed for expenses incurred because of the aforesaid violation beginning on or about May 5, 1975 continuing until he is allowed to return to his former position.

OPINION OF BOARD: The dispute herein involves an alleged violation of the Merger Agreement between the parties. As a threshold issue, Carrier contends that this Board does not have jurisdiction over the dispute, since the Merger Agreement provides for a special arbitration procedure which should have been the forum for the resolution of the dispute. Petitioner, on the other hand argues that the language of the Merger Protective Agreement, establishing an arbitration procedure is permissive rather than mandatory with respect to using that procedure.

The language of Section 8 of the Merger Protective Agreement provides:

> "Section 8. For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement shall be inapplicable and the following provision inserted in lieu thereof:
>
> "In the event any dispute or controversy arises between the New Company and the organization signatory to this Agreement with respect to the interpretation of application of any provision of this Agreement or of the Washington Job Protection Agreement or of any implementing agreement entered into between the New Company and the labor organization which are parties hereto pertaining to the said transactions, or a dispute over the failure to make, or the terms to be included within, an implementing

agreement, which cannot be settled by the New Company and the labor organization within thirty (30) days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select a member of the arbitration committee and the members thus chosen shall endeavor to select a neutral member who shall serve as Chairman, in which event the compensation and expenses of the Chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall then be paid in accordance with existing law. If any party fails to select its member of the arbitration committee within the prescribed time limit, the representative of such party signatory to this Agreement or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. The Committee shall meet within fifteen (15) days after selection or appointment of the neutral member and shall render its decision within sixty (60) days thereafter. The decision of the majority of the arbitration committee shall be final and binding, except that in any case in which there is an unequal number of carrier and organization members on the arbitration committee, the decision of the neutral member shall be final and binding. The time limits above prescribed may be extended by mutual agreement."

The language quoted above is similar to that in many other such protective agreements. We do not agree with the Organization's interpretation of the meaning of the word "may" as used above. It is quite clear that the parties did not contemplate the selection of alternate forums for the resolution of disputes coming under that Protective Agreement, since no alternatives were specified; rather, the word "may" was used, as we see it, to give the Petitioner the choice between arbitration or abandonment of the claim (c.f. the Eighth Circuit Court of Appeals, Bennet v. Congress of Independent Unions, Local #14, 331, F. 2d 355, 359,56). Although a number of Awards of this Board have held that such language did provide an election of forums (such as Award 19859), a substantial number of awards held precisely the opposite. We think the latter series of awards present the better reasoned approach; they include Awards 18281, 19372, 19723, 20982, 19295, 18602, 18925 and a host of others. It is our conclusion that the procedure established by the parties themselves for resolving disputes under the Merger Protective Agreement must be respected (Award 17988). Accordingly, the Claim must be dismissed.

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 Claim be dismissed without prejudice.

A W A R D

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1977.