Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44693
Docket No. MW-46159
22-3-NRAB-00003-200203

The Third Division consisted of the regular members and in addition Referee Pilar Vaile when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement and Side Letters I and 2 of the Agreement when it worked employes under the provisions set forth in these Side Letters after they expired on November 2, 2018 (Carrier's File BMWE 13/2019 KLS).

(2) As a consequence of the violation referred to in Part (1) above, the Organization requests that '… all employees held to the terms of the Side Letter Agreements, after the expiration date of November 2, 2018 be compensated $100.00 for each day worked, in addition to all missed wages, they must also be properly placed on all missed seniority rosters and they be immediately reverted to the working terms of the controlling Agreement. Please advise the pay period in which the Claimants will be properly compensated, made whole for missed wages, their seniority made up to date and when the employees will revert back to the terms of the controlling Agreement."

FINDINGS:

The Third 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 were given due notice of hearing thereon.

The Claimants in this dispute are all employees who have established and held seniority within Carrier's Maintenance of Way Department and were working under one of two different side agreements dated July 18, 2018. (Two other individual matters concerning these Side Letters were heard contemporaneously to this, and those Awards are adopted and incorporated by reference herein. *See* NRAB 3-200194 regarding W. Rowe and NRAB 3-200195 regarding A. Fernandez.)

What is called "Side Letter #1" created 14 "'locked-in" I&R Crews; and what is called "Side Letter #2" created 70 "locked-in" "Force Account Flagmen" positions. Both Side Letters included or involved, among other things: (a) a $2.00/hour differential and/or other benefits or premiums (Side Letter #2 for Flagmen also included a $48.00 per diem in lieu of travel time and mileage); and (b) a twelve (12) month lock-in after bidding or bumping into the position (*see* NRAB 3-200194 for the differences in language between the two Side Letters in this regard).

Both Side Letters also included identical provisions allowing for unilateral cancelation as follows:

> **this agreement may be <u>automatically cancelled at any time by either party by written notification thirty (30) days in advance of any abolishment of the position</u>.**
>
> **(Carrier Ex. 2, emphases added.)**

By letter dated October 3, 2018, the Organization served written notice to the Carrier of cancellation of Side Letter Nos. #1 and #2, after the Parties had failed to resolve a dispute regarding additional meal allowances. Thereafter, the Parties conferenced on October 23, 2018 but did not reach an agreement to extend the Side Letters. The Carrier, however, did not initiate abolishment until December 4, 2018;

and; when it did, it did so in batches or rounds and it did not initiate the last round of abolishments until March 11, 2019.

In the interim, the Carrier continued to apply the terms of Side Letters Nos. #1 and #2, so the Side Letters continued in effect as a practical matter for approximately four (4) months after the Organization exercised its right of cancellation. During this time, the employees continued to receive the pay and benefit premiums owed under the Side Letters. Nonetheless, the Organization objected, protesting the loss of opportunities to apply for new Seniority positions and pay raises, such as bidding and advancing from Assistant Foreman to Foreman.

By letter dated November 8, 2018 the Organization demanded that the Carrier immediately cease imposing the working rules as provided in the Side Letter Agreements, and "revert back" to the controlling Agreement, because in the Organization's view the terms of the Side Letters expired and became void effective November 2, 2018. Thereafter, the Carrier initiated the abolishment process, as described above, commencing on December 4, 2018.

The Organization timely filed a claim under the Railway Labor Act, 45 USC §§ 151, *et seq*., which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Organization argues that under the terms of Side Letter Nos. #1 and #2 the agreements became void when they expired effective November 2, 2018, 30 days after the Organization gave notice of cancellation; and that the Carrier violated Scope, Seniority and Assignment Rules when it failed to stop working employees under the expired provisions of Side Letter Nos. #1 and #2 effective November 2, 2018. In doing this, it asserts, the Carrier ignored the express automatic cancellation provision of the Side Letters; and interfered with the Claimants' ability to exercise their Seniority rights to bid on other assignments. The Organization also argues that the Carrier exercised bad faith in utilizing an unnecessarily "drawn out" abolishment process, instead of immediately reverting everyone to their prior position. Before the claim was denied, the Organization alleged that the Carrier had entered into the Side Letter agreements during a single bid cycle; and after the claim was denied it produced Carrier Memos substantiating the allegation. (Org. Subm. 35-65, 69-70, 75.)

The Carrier argues that not all the positions were posted at once, so they cannot all be all abolished at once. This is not borne out by the record as discussed in the preceding paragraph, but the Carrier does not recognize documents to the contrary submitted by the Organization during the post-denial grievance conferral process, asserting that those documents were late raised.

At the time, the Carrier informed the Organization that it would continue to abolish positions as it deemed fit to maintain staff consistency, and operational efficiency. However, the Carrier asserts, the Organization presented two fronts with differing interests to the Carrier: while the General Chairman wanted to cancel the Side Letters when an agreement on meal allowances could not be reached, the local members and/or Local Representative(s) advised the Carrier in undocumented conversations that they wanted to continue the benefits and premiums paid under the Side Letters. The Carrier asserts that it acted in good faith throughout. It also observes that it commenced abolishment once the Carrier received the General Chairman's November 8, 2018 letter and it was "finally clear" to the Carrier that no agreement to continue the Side Letters could be completed.

Upon consideration of the whole record, the Board finds and concludes as follows. As an initial matter, the Board notes that this was a "one-off issue", because although it gave rise to three (3) complaints before the Board including this one (see also NRAB 3-200194 regarding W. Rowe and NRAB 3-200195 regarding A. Fernandez), all of the positions under the Side Letters have by now been long abolished and the Board is confident that going forward, should similar side letters be negotiated again, the Parties will be more clear in specifying the process and/or timelines by which positions would be abolished and/or the affected employees assigned elsewhere upon notice of cancellation by either Party.

That said, a live complaint and appeal is still before the Board for resolution, not having been withdrawn below. Upon consideration of the whole record, the Board determines that the Carrier violated the terms of the Side Letter and the CBA, when it failed to commence abolishment of "any", meaning at least one, of the covered positions 30 days after the Organization's notice of cancellation.

As often noted by and before the NRAB, it is a guiding principle that "[w]hatever the parties' different intents may have been", the Board "is constrained to

give effect to the thought expressed by the words used", meaning the Board must "give common or normal meaning to the language used in (an) agreement'", "however onerous the terms of an agreement may be, they must be enforced if such is the meaning of the language used". *See BMWE* and *Burlington Northern Santa Fe* (Suntrup 1999) (unnumbered; internal citations omitted); *see also* Third Div. Awards 18423, 24306, 40229 and Fourth Division Award 3442.

Admittedly the Side Letters' cancellation provisions were awkwardly written – probably because they aim to reflect in a single line both the Parties' equal rights to cancel the Side Letters with 30 days' notice, and the Carrier's co-equal obligation to give thirty days' notice of any abolishment of the Side Letter positions. Notwithstanding that, however, it is still clear under the plain terms of the Side Letters that they – and, derivatively, the positions created thereunder – could be unilaterally cancelled by either Party with 30 days' notice and that "any" abolishment must commence by or within the same 30-day period.

As such, the Carrier was initially in breach of the Side Letter effective November 2, 2018. However, the Carrier came into compliance 32 days later on December 4, 2018 when it commenced the abolishment of "any" position and it remained in compliance until all positions were abolished on or about March 11, 2019. Moreover – as explained more fully in NRAB Case 3-200194, which is incorporated herein by reference – the plain terms of the Side Letters clearly conjoined cancellation and abolishment, such that it is evident that the Parties' contemplated abolishment would also be a precondition for complete termination of the agreement, awkward wording aside.

Thus, at best the Organization has established a technical violation. Notably, however, the Organization still did not present substantial evidence of a basis for remedy under the facts and circumstances. *See* Third Div. Award No. 29856, *BRS and CSX Transportation, Inc. (former Louisville & Nashville Railroad Company)* (Eischen 1993) ("it *is* part of the Organization's burden of proof to establish compensable damages) (emphasis in original). The Organization has not shown any specific, compensable injury in this case, as the employees received pay and/or benefit differentials during this period and the issue became moot in fairly short order. Nor was there substantial evidence of bad faith such as to warrant some form of "penalty",

assuming the Board has authority to order such a remedy.[1] The initial delay, as explained in NRAB Case 3-200194, was attributable to the Organization more so than the Carrier; and there was not substantial evidence that four months was an unreasonable amount of time to abolish all of the affected positions.

AWARD

Claim is denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that a monetary Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of January 2022.

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[1] The record was not well developed on this point. The Organization offered no authority in support of its request for a penalty payment in this case. The Carrier pointed only to a 1960s Tenth Circuity Court of Appeals case indicating the NRAB lacks statutory authority to award liquidated or punitive damages, but the contract is not governed by Tenth Circuit precedent and the NRAB has awarded penalty overtime for cases of egregious contract violation. *Compare Brhd. of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Co.*, 338 F.2d 407 (10th Cir. 1964) 1964) (finding that the NRAB has no specific statutory power to employ such sanctions and such power cannot be inferred) to Third Division Award No. 30931, *TCIU and CSX Transportation, Inc. (former Seaboard Coast Line Railroad)* (Wesman 1995) (awarding damages despite the lack of specific harm shown because the Board found there was "a clear showing of a willful and malicious breach of the contract", given that 11 identical claims were pending on-property). However, the issue is made moot in this case by the Board's findings and conclusions.