Award No. 213
Case No. CL-42-E
INTERPRETATION

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO DISPUTE) The Cincinnati Union Terminal Company
and
Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees

OPINION OF BOARD: On November 17, 1969, we rendered an award in the above matter which set forth guidelines for negotiation of a local agreement and is incorporated herein by reference. The genesis of the instant dispute is Article I, Section 3, of the February 7, 1965 National Agreement, as well as Question and Answer No. 4, of the November 24, 1965 Interpretations.

In order to focus on the core of the parties' failure to enter into a local agreement, we shall attempt to review the background of their disagreement.

The pertinent portion of Article I, Section 3, of the February 7, 1965 National Agreement, provides as follows:

> "In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating revenue and net revenue ton miles in any 30-day period compared with the average of the same period for the years 1963 and 1964, a reduction in forces in the crafts represented by each of the organizations signatory hereto may be made

"at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles devided by 2.----."

In the November 24, 1965 Interpretations, the negotiators attempted to cope with the special problem presented by short lines or terminal companies inasmuch as they do not have gross operating revenues or net revenue ton miles, to wit:

"Answer to Question No. 4: Short lines or terminal companies for which data covering net revenue ton miles or gross operating revenues may not exist should enter into local agreements for the purpose of providing an appropriate measure of volume of business which is equivalent to the measure provided for in Article I, Section 3."

Admittedly, the Carrier herein is a Terminal Company; and its facilities are primarily utilized by seven proprietary lines as a passenger train station. As such it does not have data covering net revenue ton miles or gross operating revenues. Consequently, the Interpretations require the parties to enter into local agreements. It was the intent of the national negotiators that these local agreements, negotiated on the property by the parties directly involved, would best reflect and be more apt to provide an appropriate measure of a decline in the volume of business which is equivalent to the gross operating revenue and net revenue ton miles specified in Section 3.

In the instant dispute, there are reflected data of numerous conferences conducted on the property for the purpose of arriving at an equivalent measure. In brief, the failure of the parties to enter into a local agreement is highlighted by their inability to agree on a measure of equivalency. Furthermore, each accuses the other of seeking an advantage and of frustating the manifested intent of the National Agreement.

At the outset, one additional problem should be noted herein. The Organization vigorously insists that we have fully performed our function as evidenced by Award 156. Further, we have no authority to write agreements for the parties. We recognize our limitations in that regard. We have no intention of writing an agreement for the parties. However, we have an obligation to resolve disputes which arise from the February 7, 1965 National Agreement and the November 24, 1965 Interpretations thereto. In that vein, we seek to further the interests of the parties by assisting them to enter into a local agreement.

We have carefully reviewed the various proposals submitted by the parties on the property in their endeavor to enter into a local agreement. Initially, the Carrier contended that the equivalent measure to that provided in Article I, Section 3, were cars and locomotives handled in and out of the terminal and feet of mail handled by the terminal. It argued that over the years,

"fluctuations in cars and locomotives handled have been the basis for increasing or decreasing forces in general, and fluctuations in feet of mail handled have been the basis for increasing or decreasing forces ---." In turn, the Organization decries this approach as merely a continuation of conditions which existed prior to February 7, 1965. It insists that the National Agreement granted additional protection to the work force to cope with variations in business fluctuations.

Thereafter, the Organization proposed that the average of the decline in business of the seven using carriers be substituted for gross operating revenues and net revenue ton miles. This was declined as it would not produce a realistic guide for measuring a decline in the Terminal's business.

The Organization then proposed gross operating revenue which was also declined on the ground that it had none. The next substitute proposed by the Organization was car count. The Carrier accepted this as one of two factors to be considered.

The next Organization proposal was the use of normal attrition. The Carrier declined on the ground that this would bar any reductions due to a decline in business.

The Organization then indicated that it would agree to use car count and feet of mail if the 5% arbitrary cushion contained in Section 3, would be increased to approximately 18%. Thus, the Carrier emphasizes that the Organization's substitute proposal conceded the use of car count and feet of mail as an equivalent measure -- provided other concessions were allowed -- and these it rejected.

The Organization, in turn, caustically argues that the Carrier is merely a foil for the proprietary lines. It is seeking to accomplish an act which the proprietary lines are prevented from doing. Under the guise of a decline in business it is allegedly instituting technological, operational or organizational changes. In addition, the Organization insists that the Carrier has failed to furnish it with adequate records for the purpose of reaching a local agreement. It has not received a list of currently protected employees nor those who were furloughed and receiving compensation, etc. In fact, the Organization argues that it has been the one which constantly prodded the Carrier to enter into a local agreement. In toto, it denies that car and locomotives handled in an out of the Terminal is an equivalent substitute for net revenue ton miles due to the lack of control by the Carrier over this item.

In summary, the foregoing facts reveal conferences were held on the property, nevertheless, the parties were unable to reach an agreement. While we do not criticize the parties for seeking to protect their interests, we are, nonetheless, confronted with the impasse. Our concern was expressed in Award No. 156, which sought to provide guidelines for the parties to enable them to enter into a local agreement.

In an endeavor to aid the parties to reach a local agreement, it is our opinion that the following criteria be used as an equivalent measure of a decline in the volume of business to the measure provided in Article I, Section 3:

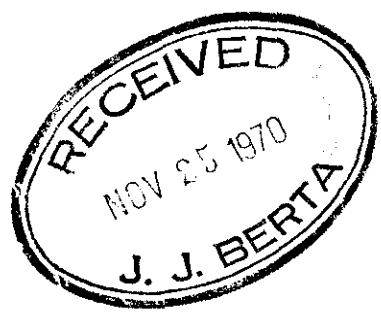
The weighted average of:

1. Total Engines and Cars
2. Feet of Mail Handled
3. Revenue from Tickets Sold
4. Number of Tickets Sold
5. Operating Deficit
6. Total Incidental Revenue

AWARD

The Questions at Issue are remanded to the parties for negotiation of a local agreement on or before June 26, 1970, or as mutually extended, in accordance with the equivalent measure contained in the Opinion.

Murray M. Rohman
Neutral Member



Dated: Washington, D. C.
May 25, 1970

DISSENTING OPINION OF EMPLOYEE MEMBERS TO AWARD NO. 213
OF SPECIAL BOARD OF ADJUSTMENT NO. 605

The Employee Members of Special Board of Adjustment No. 605 dissent from Award No. 213 of such Board, dated May 23, 1970, on the grounds that the Award is beyond the jurisdiction of said Board.

Special Board of Adjustment No. 605 is created pursuant to the provisions of Article VII of the agreement of February 7, 1965, known as the National Employment Stabilization Agreement. Both The Cincinnati Union Terminal Company (Terminal Company) and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) are parties to that agreement. Article VII, Section 1 of the agreement provides for the submission to a disputes committee of any dispute involving the interpretation of any of the terms of the agreement and not settled by the parties. This Section reads as follows:

> "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 Employees' 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."

The decision in Award No. 213 does not concern itself with such a dispute, but constitutes an effort beyond the jurisdiction of Special Board of Adjustment No. 605 to prescribe the terms of a supplemental

agreement to be executed between BRAC and the Terminal Company providing different measuring criteria in Article I, Section 3 of the agreement of February 7, 1965, for reductions in force by a carrier signatory to the agreement, from the criteria contained in the original agreement, but equivalent to the measure provided in said agreement.

Article I, Section 3 of the agreement of February 7, 1965, provides as follows:

> "In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating revenue and net revenue ton miles in any 30-day period compared with the average of the same period for the years 1963 and 1964, a reduction in forces in the crafts represented by each of the organizations signatory hereto may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by 2. Advance notice of any such force reduction shall be given as required by the current Schedule Agreements of the organizations signatory hereto. Upon restoration of a carrier's business following any such force reduction, employees entitled to preservation of employment must be recalled in accordance with the same formula within 15 calendar days."

On November 24, 1965, the parties to the agreement of February 7, 1965, issued certain interpretations with respect to the interpretation or application of said agreement. These included the following with respect to the application of Article I, Section 3 to terminal companies:

"Question No. 4: How does the decline in business formula apply to short lines or terminal companies for which data concerning net revenue ton miles or gross operating revenues may not exist?

"Answer to Question No. 4: Short lines or terminal companies for which data covering net revenue ton miles or gross operating revenues may not exist should enter into local agreements for the purpose of providing an appropriate measure of volume of business which is equivalent to the measure provided for in Article I, Section 3."

BRAC and the Terminal Company conducted negotiations for a local agreement to provide an appropriate measure of the volume of business of the Terminal Company which is equivalent to the measure provided for in Article I, Section 3 of the agreement of February 7, 1965. These negotiations did not produce an agreement by August 25, 1969. Thereafter, the Terminal Company submitted the following questions to Special Board of Adjustment No. 605 concerning the negotiation of a local agreement as a dispute between the Terminal Company and BRAC cognizable by the Board under the above-quoted provisions of Article VII, Section 1 of the agreement of February 7, 1965:

"(1) Does the substitution of data covering 'cars and locomotives handled in and out of the Terminal' and 'feet of mail handled by the Terminal' 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?

"(2) If the answer to Question No. 1 is affirmative, should the Agreement proposed by the Carrier, attached hereto as Carrier's Exhibit No. 25, 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. 25) be amended or revised?"

These questions clearly did not concern a dispute "involving the interpretation or application of any of the terms" of the agreement of February 7, 1965, over which this Board had jurisdiction under the provisions of Article VII of such agreement. BRAC, therefore, in the Employees' Answer to the Terminal Company's position, stated in pertinent part as follows (pages 7 and 8):

> "It is our position that the questions posed by the Carrier are not proper questions to be decided by the Disputes Committee. We submit that the members of the Committee are in no position to dictate to the parties the substitute measure to be used on this property in determining whether or not this Carrier has suffered a decline in business of sufficient severity to warrant a reduction in the force of protected employees.
>
> "It is further our position that the Agreement proposed by Carrier (Carrier's Exhibit No. 25) does not represent an appropriate measure of volume of business which is equivalent to the measure provided for in Article I, Section 3 of the February 7, 1965 Agreement.
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> "It is likewise our position that any agreement resulting in a substitute for 'gross operating revenues' and 'net revenue ton miles' must be an agreement mutually satisfactory to the parties and one which reflects the intent and purpose of the February 7, 1965 Agreement."

In Award No. 156, dated November 17, 1969, the Board did not attempt to answer this basic challenge to its jurisdiction, but proceeded to render a decision on the issues before it. In this decision, the Board stated (page 2):

"Award:

> "The Questions at Issue are returned to the parties for negotiation of a local agreement in accordance with the Opinion."

The opinion set forth certain elements which it described "As a guideline for negotiations".

Although this Award was null and void as clearly beyond the jurisdiction of the Board, BRAC resumed negotiations with the Terminal Company. On March 12, 1970, the Terminal Company informed the Chairman, National Railway Labor Conference, and Chairman, Employees' National Conference Committee, that "the carrier intends to move at the next meeting of Special Board of Adjustment No. 605 for Dr. Rohman to specify what the terms of the Agreement should be".

The Board obviously did not have jurisdiction to entertain such a submission. BRAC, therefore, on behalf of the employees of the Terminal Company, objected to the jurisdiction of the Board to entertain the Terminal Company submission. In Award No. 213, the Board issued the following award (page 4):

"AWARD

> "The Questions at Issue are remanded to the parties for negotiation of a local agreement on or before June 26, 1970, or as mutually extended, in accordance with the equivalent measure contained in the Opinion."

The opinion (page 3) states as follows:

> "In an endeavor to aid the parties to reach a local agreement, it is our opinion that the following criteria be used as an equivalent measure of a decline in the volume of business to the measure provided in Article I, Section 3:
>
> "The weighted average of:
>
> 1. Total Engines and Cars
> 2. Feet of Mail Handled
> 3. Revenue from Tickets Sold
> 4. Number of Tickets Sold
> 5. Operating Deficit
> 6. Total Incidental Revenue."

The Award speaks as follows with respect to the Board's jurisdiction (page 2):

> "At the outset, one additional problem should be noted herein. The Organization vigorously insists that we have fully performed our function as evidenced by Award 156. Further, we have no authority to write agreements for the parties. We recognize our limitations in that regard. We have no intention of writing an agreement for the parties. However, we have an obligation to resolve disputes which arise from the February 7, 1965 National Agreement and the November 24, 1965 Interpretations thereto. In that vein, we seek to further the interests of the parties by assisting them to enter into a local agreement."

Thus, the Board specifically recognizes, as it must, that it has no jurisdiction to write agreements for the parties, but, to the contrary, the local agreements for terminal companies must be negotiated agreements. Having so recognized its limitations, the Board, however, proceeds to direct the parties to negotiate an agreement "in accordance with the equivalent measure contained in the Opinion". Thus, the left hand assumes the very authority which the right hand rejects.

Not only does this Award do violence to the basic terms of reference establishing the Board, but it also compounds such error by attempting to render a different award on a dispute in which it had already rendered an award. If it be assumed arguendo that the Board had jurisdiction to entertain the questions originally submitted to it by the Terminal Company in the dispute between the Terminal Company and BRAC, Award No. 156, dated November 17, 1969, rendered a decision in such dispute final and binding therein by the terms of Article VII, Section 1 of the agreement of February 7, 1965, quoted above. Article VII contains no provision for reconsideration of an

award or for supplementary awards. Having established in Award No. 156 a guideline for negotiations between the parties consisting of five elements or factors, the Board had no authority to issue another award at the request of the Terminal Company providing different factors and that the parties should negotiate a local agreement in accordance with these factors.

George E. Leighty
GEORGE E. LEIGHTY

C. L. Dennis
C. L. DENNIS

June 19, 1970