Award No. 490

Case No. MW-24-SE

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

TO THE) and

DISPUTE) CSX TRANSPORTATION, INC.

(former B&O Railroad)

CARRIER'S QUESTION AT ISSUE

"Does the attached implementing agreement (Carrier's Exhibit 'A') proposed by the Carrier fully comply with the provisions of Article III of the Agreement, and, if not, in what respect should it be changed before transferring employees on the basis of these provisions?"

OPINION OF BOARD:

Claimants are 16 Maintenance of Way employes ("BMWE") who were employed by CSX along its line between Buffalo, New York and Eidenau, Pennsylvania. The ICC granted authority to CSX sell the line to the Buffalo and Pittsburgh Railroad ("B&P") by order dated December 21, 1987. That order did not impose labor protection conditions. The sale was consummated on July 19, 1988. Pursuant to the sale, 41 BMWE positions were abolished. Despite its position that the Mediation Agreement of February 7, 1965 ("Stabilization Agreement") did not apply to the line sale, by letter dated September 26,1988, CSX extended the protective

benefits of the Stabilization Agreement to Claimants as if they had been entitled to benefits. The extension of benefits was pursuant to a suit filed by the employes. The letter provided:

> "As you know, under the February 7, 1965 Agreement these employees are obligated to exercise their seniority to the highest rated position to which their seniority entitles them. Their failure to do so will result in their being treated, for guarantee purposes, as occupying any position to which they did not bid. All requirements of the February 7, 1965 Agreement must be made by the employees if they are to receive these payments."

CSX did not reduce the benefits to Claimants by the amount that any of them was earning on the B&P.

On August 2, 1989, the parties met to discuss several issues. The Carrier proposed a plan to provide benefits to Claimants, among others. Further discussions were held on November 3, 1989, but the issues were not resolved. By letter dated November 15, 1989, the Carrier withdrew its previous proposals. The Carrier advised further that the BMWE was to treat the November 15 letter as the notice required under Article III of the Stabilization Agreement that it desired to enter into an implementing agreement that would enable the utilization of Claimants, who were protected and furloughed. The implementing agreement proposed at that time is the one to which the Carrier's Question at Issue refers, and is Carrier Exhibit A. It is incorporated by reference.

The Carrier's letter stated:

"Accordingly, please consider this as the required notification under the provisions of **ARTICLE III - IMPLEMENTING AGREEMENTS** of the Mediation Agreement made February 7, 1965 (Case No. A-7128) that inasmuch as the employees referred to hereinabove are obviously surplus to the Carrier's needs in the seniority territory where they are presently located, and inasmuch as Article III of this Mediation Agreement recognizes the right of the Carrier to transfer employees throughout its system and provides that the Organization shall enter into those implementing agreements as may be necessary to effectuate the utilization of employees, the Carrier will offer employment opportunities elsewhere on its system in a manner that is consistent with the provisions and interpretations of the Mediation Agreement made February 7, 1965. Such offers of employment opportunities elsewhere on the Carrier's system may be located on seniority territories other than where the protected employees are presently located and may require that the employees referred to herein change their residence."

On June 6, 1990, this dispute was submitted to the Disputes Committee.

Article III of the Stabilization Agreement provides:

"ARTICLE III - IMPLEMENTING AGREEMENTS

Section 1 -

The organizations recognize the right of the carriers to make technological, operational and organizational changes, and in consideration of the protective benefits provided by this agreement the carrier shall have the right to transfer work and/or transfer employees throughout the system which do not require the crossing of craft lines. The organizations signatory hereto shall enter into such implementing agreements with the carrier as may be necessary to provide for the transfer and use of employees and the allocation or rearrangement of forces made necessary by

the contemplated change. One of the purposes of such implementing agreements shall be to provide a force adequate to meet the carrier's requirements.

Section 2 -

Except as provided in Section 3 hereof, the carrier shall give at least 60 days' (90 days in cases that will require a change of an employee's residence) written notice to the organization involved of any intended change or changes referred to in Section 1 of this Article whenever such intended change or changes are of such a nature as to require an implementing agreement as provided in said Section 1. Such notice shall contain a full and adequate statement of the proposed change or changes, including an estimate of the number of employees that will be affected by the intended change or changes. Any change covered by such notice which is not made within a reasonable time following the service of the notice, when all of the relevant circumstances are considered, shall not be made by the carrier except after again complying with the requirements of this Section 2.

Section 3 -

The carrier shall give at least 30 days' notice where it proposes to transfer no more than 5 employees across seniority lines within the same craft and the transfer of such employees will not require a change in the place of residence of such employee or employees, such notice otherwise to comply with Section 2 hereof.

Section 4 -

In the event the representatives of the carrier and organizations fail to make an implementing agreement within 60 days after notice is given to the general chairman or general chairmen representing the employees to be affected by the contemplated change, or within 30 days after notice where a 30-day notice is required pursuant to Section 3 hereof, the matter may be referred by either party to the Disputes Committee as hereinafter provided. The issues submitted for determination shall not include any question as to the right of the carrier to make the change but shall be confined to the manner of implementing the contemplated change with respect to the transfer and use of employees, and the allocation or rearrangement of forces made necessary by the contemplated change.

Section 5 -

The provisions of implementing agreements negotiated as hereinabove provided for with respect to the transfer and use of employees and location or reassignment of forces shall enable the carrier to transfer such protected employees and rearrange forces, and such movements, allocations and rearrangements of forces shall not constitute an infringement of rights of unprotected employees who may be affected thereby."

Some of Claimants perform seasonal work. Article I, Section 2 of the Stabilization Agreement provides:

"Section 2 -

Seasonal employees, who had compensated service during each of the years 1962, 1963 and 1964, will be offered employment in future years at least equivalent to what they performed in 1964, unless or until retired, discharged for cause, or otherwise removed by natural attrition."

Interpretive questions and answers regarding Article 1, Section 2 include:

"Question No. 2: What protection is guaranteed to seasonal employes under this Section?

Answer to Question No. 2: A seasonal employe is guaranteed under this Section an offer of employment in future years equivalent to his 1964 seasonal employment both as to period and as to compensation. See Answer to Question No. 5 dealing with the exercise of seniority by seasonal employes.

Question No. 3: Must the equivalent employment offered in future years be offered in the same seniority territory or general work location in which the 1964 employment was performed?

Answer to Question No. 3: No. However, the offer of employment must be within the seasonal employe's seniority territory or if such employe has an employment relationship but does not have seniority the offer must be limited to the operating division on which the employe qualified by reason of service in 1964."

On August 7, 1975, the a Memorandum Agreement was entered between the BMWE and the Carrier's predecessor railroad. There is dispute between the parties as to the nature of this agreement.

The position of the Carrier is that the transfer of Claimants (surplus protected employees) as explained in its November 15, 1989 letter and in the proposed implementing agreement, is "within the purview of matters to be handled under the terms and conditions of the Stabilization Agreement." The Carrier accuses the BMWE of negotiating in bad faith and engaging in delaying tactics. The Carrier points out that there are no job opportunities for Claimants in the subject territory and that it wants to transfer them to "other locations on its system where it has opportunities which would otherwise accrue to employees not protected under the Stabilization Agreement."

The Carrier argues that the August 7, 1975 Agreement does not prohibit its transferring Claimants off their seniority district. The Carrier contends that the August 7, 1975 Agreement was designed to expand job opportunities for BMWE-represented employees by the elimination of several smaller seniority territories and the establishment of larger ones. The prior rights on the former,

smaller territories were established to protect the existing employees. The Carrier argues:

> "In order to comply with intent of that part of the **interpretation** of Article III to the Stabilization Agreement which reads:
>
> > '...The language above quoted is intended to mean that seniority districts or rosters existing on the effective date of the February 7, 1965 Agreement are not to be changed insofar as the application of the aforesaid (Stabilization) agreement is concerned, except as a result of an implementing agreement or other agreement mutually acceptable to the interested parties.'" (Emphasis Added)
>
> "...an understanding was reached between the parties in connection with this consolidation of rosters reflecting that (except for those employees who voluntarily transfer their seniority as provided elsewhere in that particular agreement) insofar as applications of the Stabilization Agreement are concerned, BMWE-employees who were protected under the terms of the Stabilization Agreement will not be required to do more, as a condition of retaining that protection, than would have been required of them had such rosters not been consolidated."

The Carrier contends that its intent, in the August 7, 1975 Agreement, to comply with the intent of Article III of the Stabilization Agreement does not abrogate its "rights and prerogatives" under Article III of the Stabilization Agreement. Had the parties intended that, the Carrier argues, they could easily have written that into the later agreement. Even if the August 7, 1975 Agreement constituted an implementing agreement, the

Carrier maintains that it was not a bar to the proposed action (by its terms or implication) and that nothing in Stabilization Agreement restricts the Carrier to only one implementing agreement. If that were the case, then employees would be locked into one particular spot, receiving protection pay but without a job.

The Carrier rejects the BMWE's argument that requiring Claimants to transfer would take away bidding rights on Regional Gangs because no such gangs existed to which Claimants were or would be entitled. Nevertheless, the Carrier concedes that it has no objection to the fashioning of language to preserve those rights.

The Carrier also rejects the BMWE's argument that it is improper for it to dovetail Claimants' seniorities with those of employees on the territories to which they are to be transferred. The Carrier rejects as well the BMWE's argument regarding seasonal employees since it is based on an interpretation of Article I, Section 2 not Article III of the Stabilization Agreement.

Finally, the Carrier rejects the BMWE's argument that these proceedings are untimely by arguing that there are no specific time limits mentioned and that the only proper inquiry is whether laches applies. The Carrier maintains that since Claimants were paid for the entire period, they were not prejudiced, and therefore, this proceeding is not out of time.

The position of the BMWE is that the August 7, 1975 Agreement restricts the application of the Stabilization Agreement and prohibits the Carrier's proposed implementing agreement. The work that Claimants performed, the BMWE argues, was given to someone else, but still exists and the Board is not "empowered to allow the Carrier to abrogate those contractual commitments simply by allowing it unilaterally to submit a new 'alleged' implementing agreement for a second chance."

The BMWE maintains that the Board is without authority to write an agreement for the parties or to nullify the previous (i.e. August 7, 1975) Implementing Agreement. The BMWE argues that the Stabilization Agreement contemplated that the seniority districts and rosters then established would not be changed. In support thereof, the BMWE cites from Attachments "C" and "E" to Addendum 10. According to the BMWE, these attachments mandate that an employee not be required to "accept a position outside the territory covered by their respective frozen seniority roster to retain their protected status and protected rate...."

Citing interpretive questions and answers regarding Article I, Section 2, of the Stabilization Agreement, the BMWE argues that seasonal employees, such as some Claimants here, must be offered employment within their seniority territory, and presumably, nowhere else.

The BMWE raises the issue of timeliness and argues that Article III, Section 4 requires that the parties come to arbitration immediately after 60 days. Since June 6, 1990 is more than 60 days after November 15, 1989, this entire proceeding is untimely.

After consideration of the entire record, the Board finds that the proposed implementing agreement complies with the Stabilization Agreement.

The proposed implementing agreement is not inconsistent on its face with Article III of the Stabilization Agreement. There is no provision of the Stabilization Agreement that limits the parties to only one implementing agreement. Therefore, even if the August 7, 1975 agreement were an implementing agreement, its existence as such does not bar a further agreement. The BMWE's objections as to movement between territories have been shown by the Carrier's arguments to be contrary to the intent of the Stabilization Agreement. It is not improper for the Carrier to seek out job opportunities for Claimants as it had done here. Similarly the BMWE's arguments regarding seasonal workers are not persuasive as they are grounded in the language of Article I, Section 2 and Article III is more appropriately applied. Finally, the Carrier correctly argues that its submission to arbitration is not untimely. The 60 days is not a limitation period and the relevant inquiry then becomes whether the submission of the dispute is

barred by laches. In this matter, the elapsed time is not so great as to mandate such a bar.

AWARD

The answer to the Question is "Yes."

Nicholas H. Zumas, Neutral Member

Date: 10-24-91