NEW YORK DOCK
SECTION 11 - ARBITRATION BOARD
ICC Finance Docket No. 28676 (Sub-No. 1)

John C. Fletcher - Chairman & Neutral Member
M. J. Kovacs - Carrier Member
Gerald Gray - Organization Member

between:

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION
CARMEN DIVISION

and

GRAND TRUNK WESTERN RAILROAD INCORPORATED

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DATE OF HEARING - SEPTEMBER 23, 1996
DATE OF AWARD JANUARY 10, 1997

BACKGROUND

In anticipation of the acquisition of the Detroit, Toledo and Ironton Railroad Company (DTI) and the Detroit and Toledo Shore Line Railroad (DTSL), the Grand Trunk Western Railroad (GTW)[1] negotiated protective agreements with various unions representing its employees, including the Brotherhood Railway Carmen (BRC).[2] These agreements, known as the "1979 Agreements," provided *New York Dock* protection for all employees of the three predecessor roads until such time as a single working agreement was negotiated for all employees within a class or craft. Section 11 of the 1979 Agreements provided that the protection would then be enhanced beyond that afforded by *New York Dock* conditions. One such enhancement was the extension of the protection period until the protected employee becomes eligible for GA46000 retirement insurance. The Interstate Commerce Commission, in *Finance Docket No. 28675 (Sub-No. 1), Grand Trunk Western Railroad-Control-Detroit, Toledo*

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[1] For the purposes of this Award, the term "Carrier" will be used to identify the merged companies.

[2] The Brotherhood Railway Carmen subsequently merged with the Transportation Communications International Union, and is now known as the Brotherhood Railway Carmen Division of the TCIU. The term "Organization" will be used to identify the BRC both before and after its merger.

and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company, served December 3, 1979, approved the merger with these protective conditions.

On June 24, 1980, the Grand Trunk acquired the DTI, but did not merge the operations of the two systems until December 31, 1983. The DTSL was acquired on April 13, 1981, and merged into the Grand Trunk on October 1, 1981. A single working agreement was reached with the Organization on September 23, 1981, applicable to all carmen on the GTW and the DTI. The September 23, 1981 Agreement provides, in relevant part, as follows:

I. 1. It is the intent and purpose of this Agreement to provide for expedited changes in services, facilities and operations and for the orderly transfer of protected employees, work and positions between the G.T.W. and D.T.&I. Railroads and within the two Railroads. It is also the intent and purpose of this Agreement that the G.T.W. or D.T.&I. Railroad will not be required to hire a new employee at any point for a position that is subject to the G.T.W. - D.T.&I. - B.R.C. Working Agreement at a time that a B.R.C. protected employee who is qualified or has the fitness and ability to become qualified for such position is receiving protection compensation as a furloughed employee pursuant to the September 4, 1979 Agreement.

NOTE: "Protected employee" as used in this Agreement is one defined as such in the September 4, 1979 Agreement.

2. Work, positions and/or employees may be transferred to another seniority point. Prior to any transfer 30-days (90 days if the transfer of employees requires a change in residence) written notice outlining the details of the transfer will be given to the employees and B.R.C. and the procedure set forth below will be followed:

A. <u>POSITION AND WORK BEING TRANSFERRED</u>

(a) At the same time as the notice (30 or 90 days) is given the position will be advertised for seven (7) calendar days at the point where the work and position is being transferred from and awarded to the senior employee applying for the position at that point. Such employee will be transferred at the end of the 30 or 90 day period unless the parties to this Agreement agree otherwise. Employees transferred pursuant to this Section (a) will have their seniority dovetailed at the point where they transfer to.

On March 16, 1995, the Carrier met with General Chairman Larry G. Thornton and outlined plans for the transfer of work and positions from the rip track at Port Huron, Michigan, to Battle Creek and Flint. Thornton wrote to the Carrier the following day to express his opinion that such moves were ill-advised as there was sufficient work to perform in Port Huron. On March 20, 1995, Carrier issued notices advising it intended to transfer positions and work from the Port Huron Car Department to either the Battle Creek or Flint Car Departments, effective on or about June 18, 1995. Each notice identified four positions that would be established at the respective location. The notices both contained the following statement:

> This Notice is being issued in accordance with Section I, Para. 2, A, (a) of Agreement "H" (Carmen), dated September 12, 1981, or the September 25, 1964 Agreement. Therefore, please consider this a thirty (30) or ninety (90) day notice, whichever is applicable. If no bids are received for these positions, Carrier may, at its option, assign the junior protected employee under Article I of the Sept. 25, 1964 Agreement or the junior protected employee under Agreement "H" at the point where the work is being transferred from to such position.

Also on March 20, 1995, Carrier posted bulletins addressed to the Port Huron Carmen, advertising the four positions at Battle Creek and the four positions at Flint. The bulletins stated successful applicants will have their seniority dove-tailed into the Carmen's Seniority Roster at the new location.

Over the next few months, the parties exchanged correspondence and met to discuss the Carrier's actions. Subsequently, Carrier reduced the number of positions to be transferred to each location from four to two. By bulletins dated April 25, 1995, Carrier assigned Carmen D. G. Whittaker and D. P. Martin to positions at Battle Creek, and Carmen G. D. Thayer and D. C. Norris to positions at Flint. The Organization subsequently protested the dove-tailing of these four employees onto the Battle Creek and Flint seniority rosters.

THE ISSUE PRESENTED

Attachment "A" to the agreement establishing this Board defined the issues in dispute to be:

1. Is inspection and rip track work considered as being transferred due to the rerouting of trains?

2. And, if not, should the seniority of the below listed employees have been dovetailed when they transferred to other points on the Company's system?

D. Martin
D. Whittaker
D. Norris
G. Thayer

THE POSITION OF THE PARTIES

The Position of the Organization:

The gravamen of the Organization's claim is that Carrier did not transfer work from Port Huron to Battle Creek or Flint. Therefore, concludes the Organization, the Carrier improperly dove-tailed the seniority of the four employees that were transferred. Additionally, the Organization asserts the Carrier failed to serve proper notice before transferring the employees.

With respect to the Organization's argument concerning notice, it avers Paragraph 2 of Agreement "H" requires Carrier to give written notice outlining the details of the transfer to the employees and the Organization. The Organization denies such notice was given.

According to the Organization, Carrier, before this dispute arose, moved trains through Port Huron to Canada via an old tunnel that was too small to accommodate high and wide loads. The carmen at Port Huron would inspect trains for AAR and FRA defects, as well as for high and wide loads, prior to entering the tunnel. Defective cars were then repaired at Port Huron and high and wide cars were set out to be transported to Canada via barge.

The Organization states Carrier opened a new tunnel in March 1995, eliminating the need for inspections at Port Huron. It avers Carrier then rerouted traffic around Port Huron to Flint or Battle Creek, and closed the repair track at Port Huron. The Organization asserts other carriers, such as CSX, are inspecting their trains at other locations prior to operating through the GTW tunnel.

The Organization claims Carrier had a need for additional carmen at both Battle Creek and Flint due to vacancies created by attrition, even before it changed its operations. It concludes Carrier filled these vacancies with protected employees from Port Huron rather than provide those employees with protective benefits when the work at Port Huron dried up and there was no longer a need for carmen at that location.

The Organization insists the work of inspecting and repairing cars at Port Clinton was eliminated rather than transferred. It further claims such work is not transferable in that running repairs must be performed at the same location where the defects are detected. This, notes the Organization, is a requirement of the FRA. The Organization also cites Award No. 1055 of Special Board of Adjustment No. 570 in support of its position. In that dispute, the Board held:

> The change, according to the Organization, eliminated mechanics inspection at Pueblo, which in turn eliminated detection of defects at Pueblo which would have been repaired by Carmen at Pueblo. The inspections are now occurring at Denver and defects detected there are being repaired by Denver Carmen, which constitutes a transfer of work from Pueblo to Denver.
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> This Board has held on a number of occasions, Awards 896, 796, 795 and 345, that rerouting of trains, without more, is insufficient to establish that a transfer of work has occurred.

The Organization asks this Board to direct Carrier to serve a proper notice and meet with the General Chairman and negotiate an Implementing Agreement in accordance with the provisions of the applicable agreements, and until such is done return the employees to their protective status at Port Huron with their names

remaining on that roster and moved to the bottom of the Flint and Battle Creek rosters respectively.

The Position of the Carrier:

The Carrier asserts it transferred work and positions from Port Huron to Flint and Battle Creek in accordance with all applicable Agreements. It insists the Organization acknowledged this in General Chairman Thornton's letter of April 5, 1995, wherein the Carrier says he affirmed a change of operations whereby carmen perform car inspections and repair bad order cars that would have formerly been performed at Port Huron.

Carrier denies it was required to negotiate an implementing agreement covering the transfer of work. It submits the September 25, 1964 Agreement has been superseded by the parties' September 23, 1981 Agreement "H," which covers transfer of work, positions and/or employees involving merger protected employees. Agreement "H," according to the Carrier, is the only implementing agreement necessary and is in satisfaction of Section 4 of the *New York Dock* Conditions. The Carrier submits it was the intent of this Agreement to permit it to transfer jobs, work and/or people as it deemed necessary. There are no limitations placed upon the Carrier's right, it says, to determine when, where or which work and/or positions are moved.

Although Carrier maintains there is no requirement to discuss or negotiate such changes with the Organization, it notes numerous meetings and discussions were held with the Organization regarding this move. In particular, Carrier points to a discussion on April 5, 1995, which General Chairman Thornton memorialized in a letter that same date. Carrier cites the following from that letter:

> Mr. Hamilton did say that even so, he thought it should warrant two Carmen dovetailing into Battle Creek and Flint. I told Mr. Hamilton that I thought I would be comfortable if one Carman dovetailed, as that is what I believed would be right. I also told Mr. Hamilton, that if he

> dovetailed two at each point, I would not be the first to object if the people in Flint and Battle Creek were comfortable with the second Carman dovetailing into those two rosters ... .

From the above quotation, Carrier concludes Thornton recognized that work was being transferred from Port Huron to Flint and Battle Creek, and that dovetailing of seniority was proper. The Carrier further avers the Agreement is silent as to the amount of work that must be transferred before invoking the dovetailing provisions of Paragraph I.2.A.(a). It insists, however, that the work of two carmen was transferred to each point.

Carrier argues Award No. 1055 of Special Board of Adjustment No. 570 is distinguishable from the instant case. First, it notes that dispute involved the decline in business provision of the September 25, 1964 Agreement, which is not applicable in this case. It also submits that there are more facts in this case to support its position that a transfer of work has occurred, particularly Thornton's April 5, 1995 concurrence on this point. The Carrier additionally notes that the Labor Members of Special Board of Adjustment vigorously dissented to the Award, and stated it was "worthless as precedent in this forum or any other forum constructed under the Railway Labor Act."

DISCUSSION

At the outset, it is necessary for this Board to define its jurisdiction and scope of authority. The Agreement between the parties establishing this Board does so pursuant to Section 11 of the New York Dock protective provision as imposed by the Interstate Commerce Commission in *Grand Trunk Western Railroad - Control - Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company*, Finance Docket No. 28676 (Sub-No. 1). As such, this Board may only consider disputes or controversies with respect to the interpretation, application or enforcement of the protective conditions. This Board is not established pursuant to

the Railway Labor Act, and may not consider disputes over the application of any other agreements, in particular the September 25, 1964 Agreement.

The Board's scope of authority is further limited by the Agreement establishing the Board, in particular Section (E), which reads as follows:

> (E) The Board shall have jurisdiction only of the issue and claim jointly submitted to it under this Agreement. No other issue or claim shall be submitted to the Board except by Agreement of both parties.
>
> The Board shall not have jurisdiction of disputes growing out of request for changes in rates of pay, rules or working conditions, nor have authority to change existing agreements or establish new rules.
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> The execution of this Agreement will in no way serve as a waiver of defenses or contentions of either party with respect to the propriety, jurisdiction or merits of any of the cases included as a part hereof or which may subsequently be included for disposition by this Board.

As Attachment "A" to the Agreement, the parties stipulated the sole issues to be presented to the Board, such issues being as stated in the "Statement of Issue" above. This Board cannot read this agreed upon issue in any way that would encompass the question as to whether Carrier satisfied the notice requirements of the applicable Agreement. As that issue has not been joined by the parties, the Board determines it is not properly before the Board.

It is significant that the Organization, through General Chairman Thornton, agreed that work had been transferred from Port Huron to Flint and Battle Creek, and that it would be appropriate for at least some carmen to have their seniority dovetailed at these points. As noted by the Carrier, Thornton's letter of April 5, 1995 summarized a meeting he had with the Carrier that day. That letter, addressed to Carrier's Assistant Director of Labor Relations, R. J. O'Brien, reads, in its entirety, as follows:

> Mr. O'Brien, Sir:
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> This concerning my understanding, arising out of the discussions in the meeting held at Brewery Park today. That meeting was held at the request of CMO Hamilton and yourself. Just yesterday, April 4, 1995, I

was invited to attend the meeting, and accepted. Attending the meeting was David Hathaway, the Carrier consultant, C. E. Hamilton, and Paul Werner, for the Carrier. I represented the Organization. Mr. Hathaway proved to be very knowledgeable in the movement of trains and work done by the Carmen at Port Huron, Battle Creek and Flint.

With the paper work I have attained and cross checked much of it with Mr. Hathaway, and the ensuing discussions, it does appear that about all of our work is being lost to different points in Canada. Listening to the explanations of Mr. Hathaway and the information, he quoted from, it was determined that some of the work in Battle Creek and Flint could be construed as work formerly done in Port Huron. If the FRA Laws were adhered to completely, in my opinion the work would all have to be done in Canada. But that is the CN responsibility, and Mr. Hamilton has determined that indeed he had over quoted the actual work that may be construed as going to Flint and Battle Creek. .

Mr. Hamilton did say that even so, he thought it should warrant two Carmen dovetailing into Battle Creek and Flint. I told Mr. Hamilton that I thought I would be comfortable if one Carman dovetailed, as that is what I believed would be right. I also told Mr. Hamilton, that if he dovetailed two at each point, I would not be the first to object if the people in Flint and Battle Creek were comfortable with the second Carman dovetailing into those two rosters. But if there was a challenge (grievance filed against the dovetailing, that I would handle the claim through the grievance procedure, with every bit of information I have.

The Contract to operate will probably end up in arbitration, and this change of operation caused by a Foreign Government owned railroad, CN, leaves very many unanswered questions that will be addressed. This letter and all previous information will be a matter of record in the event of arbitration. The Carmen who cannot exercise their seniority in the movement from Port Huron, have been essentially stripped of their seniority rights by the loss of work to Canada. I have informed you before, and I do so now, that I believe $250,000.00 is a small price to pay each Carman affected, for the moving of our work to a Foreign Government Railroad, in a Foreign country, which stands to gain Billions of dollars in profit from this change in operation, by opening the traffic to the new tunnel.

Also, I believe it extremely necessary that the four Carman positions (Door work) allegedly, to be dovetailed into the Carshops, be addressed thoroughly before any new notices are put up. These Carmen and their families have been through enough uncertainty already.

I am suggesting that the four positions and work be maintained on the current Rip Track roster. These Carmen would work their doors, and service the area traffic when needed, and be available for any set out work that may develop on the main line, or any emergency, such as maintaining their own wreck crew as they do now. When all Carmen furloughed and or on the Extra Board are called back to work at the Carshops, we would look at ways in which, if needed these Rip Track

Carmen could be utilized along side the Carmen inside the Shops proper. Any new hires would have to be hired into the Carshops proper, and would be utilized before utilizing these Rip Track Carmen.

I am also, asking that the notices be held up until after the scheduled meeting at Flat Rock April 13, 1995, when a Grand Lodge Officer will be present. There are other details that need discussed at that meeting, in which may have a bearing on whether and what option these Carmen would choose.

Hoping for your concurrence to these request, and as disrupting as it is to move from their homes, or lose their jobs, this Carrier owes the faithful employees. Thank you Sir.

Respectfully

/s/ Larry Thornton
Larry Thornton, General Chairman

Following the April 5, 1995 meeting and Thornton's letter, Carrier modified its plan to transfer four employees to each location and issued bulletins advertising two positions at those points. From all indications, Carrier's decision to do so was based upon representations made by Thornton at the meeting and in his letter. Although Thornton concludes his letter by seeking a way to preserve the work at Port Huron, he begins the letter by agreeing "that some of the work in Battle Creek and Flint could be construed as work formerly done in Port Huron." He then informed the Carrier that he thought he "would be comfortable if one Carman dovetailed, as that is what [he] believed would be right." Finally, he stated he would not object to dovetailing a second carman at each point if the employees there had no objection.

One of the basic principles of labor relations is that negotiators must be prepared to stand behind their statements. Had the Carrier, at some point, told the Organization that no work was being transferred, this Board is certain the Organization would ask us to hold that statement against the Carrier, and we would. Here, Thornton's statement constitutes an admission that work was transferred. He would not have consented to having one carman's seniority dovetailed at either location unless work was transferred. Under the Agreement, the transfer of work is

a necessary prerequisite to the dovetailing of seniority. The only question that might have then arisen would be whether there was sufficient work being transferred to each point to warrant the dovetailing of the second carman. This question, however, was not raised before this Board, and we will not consider it.

Based upon the record presented to the Board, we find that inspection and rip track work was transferred from Port Huron to Flint and Battle Creek. Accordingly, the seniority of the named employees were properly dovetailed onto the respective rosters.

A W A R D

Issue No. 1 is answered:

Inspection and rip track work was transferred from Port Huron to Flint and Battle Creek.

Issue No. 2 is answered.

The seniority of D. Martin, D. Whittaker, D Norris, and G. Thayer was properly dovetailed onto the respective rosters.

John C., Fletcher - Chairman & Neutral Member

M. J. Kovacs - Carrier Member 1-24-97

Gerald Gray - Organization Member

Signed at Mt. Prospect, Illinois, January ~~10~~ 24, 1997