SPECIAL BOARD OF ADJUSTMENT NO. 605

AWARD NO. 426

CASE NO. CL-72-E

PARTIES TO THE DISPUTE:

Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers, Express
and Station Employes

and

The Fruit Growers Express Company
Consolidated Rail Corporation

QUESTIONS AT ISSUE:

(1) Did the involved Carriers violate the terms and provisions of the Washington Job Protection Agreement when they de-coordinated the protective service work performed by the employes of the Fruit Growers Express Company and concurrently effected a coordination with the Merchants' Despatch Transportation Corporation without serving the notice required by Section 4, thereof, and negotiating an agreement covering said coordinating?

(2) If Question No. 1 is answered in the affirmative, shall the Carriers now be required to enter into an agreement for the purpose of applying protective benefits and conditions set forth in the Washington Agreement of May, 1936?

OPINION OF BOARD:

Since 1920, the "protective service work" for the former Pennsylvania Railroad, as well as for most of the other constitutent lines forming Conrail, was performed under contract by Fruit Growers Express Company (FGE). Those employes of FGE who performed the work at issue have been represented for several years by the Allied Services Division of the BRAC. The perishable protective service work at issue may be described in simple terms as the

physical work of inspecting and repairing refrigerator and heater units plus associated paperwork.

For some time after the 1973 renegotiation of the several Carriers which formed Conrail, FGE continued to be awarded the subcontract for performance of the protective service work. However, on April 7, 1978, the President of Conrail gave FGE six months notice that, effective October 1, 1978, the work would be given to Merchants Despatch Transportation Corporation (MDT), a wholly-owned subsidiary of Conrail, as follows:

> Mr. C. S. Hill, President
> Fruit Growers Express Company
> 1101 Vermont Avenue
> Washington, D.C. 20005
>
> Dear Mr. Hill:
>
> Consolidated Rail Corporation has recently concluded an extensive study and evaluation of its perishable protective service needs. As a result, we have found it in Conrail's best interests to terminate the existing contracts for such services between Fruit Growers Express Company and the Pennsylvania Railroad Company; the Agreement between Fruit Growers Express and the New York, New Haven and Hartford Railroad; and the Agreement between Fruit Growers Express and the P-RSL, all of which were dated April 5, 1963. This six-month notice of termination is given in compliance with Paragraph THIRTEENTH of these Agreements, and will be effective October 1, 1978.
>
> Perishable protective services on Conrail will be conducted by Merchants Despatch Transportation Corporation, a wholly-owned subsidiary, as of that date. In the interests of continued good business relationships, we trust that we can look forward to an orderly and systematic transition.
>
> Sincerely,
>
> S/ R.D. Spence
>
> R.D. Spence

On the basis of this notification from Conrail, FGE on July 12, 1978 sent the following notice, and supporting data, to BRAC:

Washington, D.C., July 12, 1978

SUBJECT: BRAC Job Protection Agreement
Section 3 - Decline in Business

With termination of Conrail Protective Service Contract with FGE, there will be a severe reduction in number of "labor units" assessed against balance of FGE contract carriers, and a resulting surplus of employees now handling protective service work on Conrail. To be resolved is how and to what extent FGE can apply Section 3 in making force reductions.

The attached Statement No. I develops labor units assessed by months during base years 1963 and 1964, as well as labor units which would have been assessed during each month of 1977 without Conrail, together with indicated decline without Conrail business.

Statement No. II is mileage for base period (1963 and 1964) by months related to mileage for months of 1977. The actual decline in mileage, together with percentage decline is shown.

Statement No. III develops decline (average) for both labor units and mileage, as well as indicated per cent of force reduction as provided in Section 3. However, Section 5 seems to limit the force reduction to not more than 6% and if the full 6% reduction is made at one time, then no further reduction of protected base can be made before 12 months passes. This latter statement assumes there will be no increase in business during the 12 months.

Statement III, which averages per cent of decline in both labor units and mileage, indicates there would have been an average decline (per cent) of 76% in November 1977 business without Conrail. Reducing the average by 5% results in a permissible force reduction of 71%, assuming Section 1 Article 1, has no applicability when reducing forces because of a decline in business.

FGE now has about 120 "protected" employees, of which 32 are located at stations on Conrail and whose positions will be abolished because of Conrail contract termination. Should FGE successfully apply the decline

> in business (71%) formula, this would mean up to 93 "protected" employees could be separated. However, only 32 such employees are scheduled for separation; this indicates there will be no separation costs to FGE through the BRAC Agreement.

Thereafter, the BRAC General Chairman on Conrail advised Carrier's Director of Labor Relations by letter of July 17, 1978 in pertinent part as follows:

> The perishable protective service performed by the Fruit Growers Express Company is work originally performed by employes of the craft or class represented by this Brotherhood in the service of the predecessor carriers now a part of Conrail, above named. On transfer of the work from those carriers to Fruit Growers Express Company, the work continued to be performed by employes of the craft or class in the service of said Fruit Growers Express Company. We recognize the carrier's right to decoordinate and reclaim work properly belonging to Conrail. This principle is well established by decisions of the Section 13 Committee under the provisions of the Washington Job Protection Agreement of May, 1936. However, the carrier does not have the right to recontract the work to another entity without first giving notice to the Organization and negotiating implementing agreements as required by said Washington Agreement of May, 1936. To contract the work to another party or entity constitutes a coordination, as that term is used in the Washington Agreement.
>
> This letter will serve as formal notice to you that it is the position of this Brotherhood that, upon the effective date of the termination of the contracts with Fruit Growers Express Company, the work involved in the perishable protective services belonging to the employes must be returned to the employes covered by our agreements with Conrail as successor in interest to the Pennsylvania Railroad Company, New York, New Haven & Hartford Railroad, and Pennsylvania-Reading Seashore Lines, or, in the alternative, an implementing agreement must be entered into, in accordance with the terms of the Washington Agreement, prior to coordinating and transferring the work to the Merchants Despatch Transportation Corporation.
>
> I would appreciate prompt notice from you to the effect that you will return the work to the scope of our agreements or, in the alternative, that you serve

> appropriate notice and enter into an implementing agreement as required by the Washington Agreement of May, 1936, prior to assigning the work to Merchants Despatch Transportation Corporation.

Conrail declined to accede to the General Chairman's position and, on August 2, 1979, the Organization invoked the services of this Board "to settle a dispute between our Organization and the Fruit Growers Express Company and Consolidated Rail Corporation".

We are faced at the outset by a colourable and wholly unrefuted argument by Conrail that we do not have jurisdiction over this matter because the Merger Protective Agreement of May 20, 1964 superceded the application of the Mediation Agreement of February 7, 1965, pursuant to preemptive clauses in the Agreements dated March 16, 1965 and January 17, 1967 among and between BRAC, the Pennsylvania Railroad Company and the New York Central. Even if arguendo our jurisdiction was unclouded, however, we are persuaded that the questions presented cannot be answered in the affirmative. With respect to FGE, there was no "joint action" constituting a "coordination" or "decoordination", within the meaning of the term in Section 2 of the Washington Job Protection Agreement (WJPA). The protective service work was taken away from FGE over its protest and without its concurrence. This can hardly be termed a "joint action" between Conrail and FGE. Previous awards of this Board and of the Section 13 Committee make it clear that a taking back of work is not a "coordination" under the WJPA. See SBA 605, Awards 390 and 420; Section 13 Committee Dockets No. 61 and 148.

With respect to the transfer of the protective service work from FGE to MDT, we follow authoritative precedent in Award 414 of this Board in holding that such conduct likewise did not constitute a "coordination".

In Award 414 certain carriers removed demurrage work from one contractor and transferred it to another. The case virtually is on all fours with our present dispute and the Board spoke therein as follows:

> It is undisputed that the May, 1936 Washington Job Protection Agreement was intended to make applicable to those employees affected by a coordination, the protective benefits and allowances provided by that Agreement. However, Section 1 of the Washington Job Protection Agreement makes it clear that the intent of the Agreement was to provide this protection only when changes in employment in the Railroad Industry were solely due to and resulting from such coordination. Section 2(a) of the Washington Job Protection Agreement defines the term coordination as follows:
>
> > The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.
>
> After carefully considering the arguments and evidence submitted by all the parties involved in the instant controversy, it is the considered opinion of this Board that there was no coordination involved herein as that term is defined in Section 2(a) of the Washington Job Protection Agreement. In the view of this Board there was simply no joint action by two or more carriers to consolidate their separate facilities or to consolidate any of the operations or services previously performed by them. This Board holds that merely because the Carriers involved herein removed their demurrage work from the Western Weighing and Inspection Bureau and transferred it to the Houston Belt and Terminal Railway Company, this conduct did not meet the definition of a coordination as set forth in Section 2(a) of the Washington Job Protection Agreement. There was no unifying, consolidating, merging or pooling separate railroad facilities or operations or services previously performed by these Carriers. Rather they were merely transferring their demurrage work from one agent to another agent.

We find no meaningful distinctions between the present dispute and that decided in Award No. 414, which is dispositive of the issue before us. See also SBA 605, Awards 230, 390, 410 and 416. Accordingly, we conclude that there was no coordination by Conrail and/or FGE with the MDTC, as defined in Section 2(a) of the WJPA. Thus, there was no obligation upon the Carriers to enter into an implementing agreement with the Organization.

AWARD

Question No. 1 is answered in the negative.

Dana E. Eischen, Neutral Member

Date: August 3 1991