AWARD NO. 500
CASE NO. CL-178-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Transportation•Communications International Union
)
) and
)
) Union Pacific Railroad Company

QUESTIONS AT ISSUE:

1. Did Carrier violate the provisions of the February 7, 1965 Job Stabilization Agreement, as amended, when it suspended the protective status of Ana M. Silva on or about January 14, 1991?

2. Shall Carrier now restore the protected status of Ana M. Silva and compensate her for all lost protective benefits and wages, including interest, all out-of-pocket expenses resulting from her attempts to travel to St. Louis, and reimburse her for any medical and dental expenses incurred as a result of suspending her protected status?

OPINION OF THE BOARD: Claimant, who holds an April 23, 1979 seniority date, worked for eight years in the Carrier's Marketing and Sales office located in Toronto, Ontario, Canada. On November 1, 1987, the Carrier closed all of its Canadian marketing sales offices and shifted the clerical work to its St. Louis, Missouri Customer Service Center. As a result of the closure of the Toronto office, Claimant was furloughed and she collected protective benefits under the February 7, 1965 Job Stabilization Agreement, as amended.

Sometime during July, 1988, the Carrier attempted to recall Claimant to a Customer Service Representative position at St. Louis, pursuant to the relevant provisions of UP/CSC Memorandum of Agreement No. 1 dated July 21, 1987. A dispute arose between the Organization and the Carrier concerning the propriety of the Carrier's notice recalling Claimant to service. In 1990, *Public Law Board No. 4070 (Stalworth), Award No. 39* held that the Carrier

had not provided Claimant with proper recall notice. In compliance with *Award No. 39*, the Carrier afforded Claimant protective benefits for the period subsequent to July, 1988.

On September 20, 1990, the Carrier sent Claimant notice, via registered mail and in conformity with the ruling of *Award No. 39*, recalling Claimant to a St. Louis Customer Service Representative position. Although UP/CSC Memorandum of Agreement No. 1 required Claimant to respond to the recall within 10 days, the Carrier extended the time for her to report to training in St. Louis until January 14, 1991.

In her correspondence dated September 27, 1990, Claimant gave a litany of personal reasons for not being able to immediately report to work. She also alluded to "legal details" involving her, as a Canadian National, coming indefinitely to the United States to occupy a permanent position. These legal problems ultimately became insurmountable.

Although Claimant was prepared to travel to St. Louis in time to report to a training class commencing on January 14, 1991, the Carrier had determined that the U. S. Immigration Service would not allow Claimant to enter the United States. Thereafter, the Carrier, with Claimant's cooperation, attempted to procure an appropriate visa from the United States Immigration Service to gain Claimant's entry into the United States. These efforts were unsuccessful.

Effective approximately January 15, 1991, the Carrier suspended Claimant's protected benefits because Claimant failed to respond to the recall by reporting to the St. Louis Customer Service Center on or before January 14, 1991.

On July 23, 1991, the Organization initiated a claim alleging that the Carrier wrongfully suspended Claimant's protected status because her inability to enter the United States was not her

fault. The Carrier replied that it was equally blameless for the U. S. Immigration Service decision preventing Claimant from residing in the United States to work at the St. Louis Customer Service Center. The Carrier also contended that the claim was untimely filed inasmuch as Claimant knew, by March 11, 1991, that her protected benefits had been suspended.

This Board need not address the Carrier's time limit argument because the claim must be denied on its merits. UP/CSC Memorandum of Agreement No. 1 clearly gave Claimant a paramount right over United States citizens to fill a permanent vacancy on a Customer Service Representative position in St. Louis. However, supervening law prevails over provisions in the parties' negotiated agreement. Stated differently, if the parties negotiate a contract term that is eventually determined to be contrary to law, the contract term is unenforceable. In this case, the immigration laws prevented Claimant from taking advantage of her seniority right under UP/SCS Memorandum of Agreement No. 1.

Next, this Board must look to the applicable provision in the February 7, 1965 Job Stabilization Agreement, as amended. Article V, Section 3, provides protected employees (with 10 or more years of service) with three options. One option was to transfer to St. Louis. Nothing in the amended Job Stabilization Agreement places responsibility on the Carrier, or for that matter on Claimant, when a supervening law bars an employee from transferring to an available position. Therefore, Claimant was relegated to selecting one of the two remaining options. The continuation of protective pay was not one of the two legally permissible options and so, the self-executing provisions of Article V, Section 3 do not mandate the Carrier to assume special responsibility for the unfortunate repercussions of this country's immigration laws.

The record reflects that Claimant made numerous allegations that the Carrier tried to sabotage her efforts to enter the United States. The Board finds that at least initially Claimant, herself, was less than diligent in trying to arrange her entry into the United States. Nevertheless, the Board need not decide if the Carrier is under some implicit standard to cooperate with Claimant because, the record reveals that the Carrier acted in good faith and it exerted reasonable efforts to try to procure Claimant's entry into the United States. The ultimate fact was that citizens of the United States had preferential rights over Canadian Nationals (as well as citizens of other countries) to fill jobs at the St. Louis Customer Service Center.

AWARD

1. The Answer to Question No. 1 at Issue is No.

2. The Answer to Question No. 2 at Issue is moot.

Dated: July 24, 1995

John B. LaRocco
Neutral Member