PUBLIC LAW BOARD NO. 3314

Parties: Brotherhood of Railway and Airline Clerks
and
Union Pacific Railroad Company

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Company violated the Rules of the Agreement between the parties when they failed to post notice of vacancy for single track operation on June 9, 10, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26 and 27, 1980.

2. The Company shall compensate Mr. W. D. Sharp, Topeka, Kansas for eight (8) hours at the pro rata rate for each date, June 9, 10, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26 and 27, 1980 account of violation of Single Track Agreement, among others."

Background: The relevant Contract provisions are:

"Single Track Agreement of April 10, 1979

...

2. When vacancies known to be from five (5) to twenty nine (29) days duration occur on single track operations, employees will be used as provided in Article II, Section 2 of the November 20, 1975 Zone Extra Board Agreement. Required notices will be posted in the zone where the single tracking occurs."

Article II, Section 2 of the Zone Guaranteed Extra Board Agreement states:

"Section 2. Notices covering new positions and vacancies on assigned positions of five (5) through twenty-nine (29) days' duration, including bulletined positions, where it is necessary to fill

such positions while under bulletin and pending assignment, shall be posted for twenty-four hours in all offices in the station and to extra board employees working at that station. Vacancies posted in accordance with this section shall be assigned to the senior qualified applicant making written application within twenty-four (24) hours from the time the notice is posted."

The Carrier conducted a track maintenance program between Kansas City and Topeka which necessitated a single track operation for the period between June 10 and June 27, 1980, Instead of issuing overall authority for the entire period for the one track operation, the Division Engineer requested authority on a day by day to operate the single track operation. The Carrier conducted the operation by stationing a conductor pilot at each end of the work location. A BRAC employee on the Topeka Zone Guaranteed Extra Board was called each day that one was available to work the single track operation. Two BRAC employees worked seven of involved dates, but no BRAC employees were called for seven other days because there were no extra board employees available.

Claimant Sharp held a regular position as Telegraph Operator - Assistant IBM Train Clerk at Topeka, hours 3:00 P.M. to 11:00 P.M. rest days Saturday and Sunday. His claim was predicated on the fact that the Carrier did not post or bulletin the single track operator position in accordance with the provisions of the Single Track Agreement.

Assistant IBM Train Clerk Golden who held a regular position at Lawrence, Kansas also filed a similar claim.

Initially the Carrier agreed to allow the claims of Messrs. Sharp and Golden. However, when it ascertained that these two Claimants were not available on any of the claim dates, because they were working, the Carrier withdrew its offer of settlement.

Organization's Position

The Organization notes the Carrier has conceded that it breached the Single Track Agreement when it initially offered to settle the claims of Clerks Sharp and Golden. The Organization states that the Carrier's subsequent refusal to pay the claim because the Claimants were not available is wholly without merit. It stresses that if the Carrier had complied with the requisite Agreement and had posted the vacancies, the Claimants would have been in a position to exercise their seniority to these Block Operator positions. The Carrier's breach denied the Claimants the opportunity to bid for the jobs in question.

The Organization also contends that there is no merit to the Carrier's contention that the vacancies could not be posted because it was a day to day operation. The Organization maintains that the work was planned long in advance and the Carrier was fully aware of the length and duration of the operation, and therefore could have easily posted the jobs.

The Organization states the Agreement was breached and the Carrier should be assessed damages for committing the breach. The Organization contends that damages should be assessed in order to enforce and maintain the sanctity of the Agreement. Without the assessment of damages, there is no compulsion or pressure on the Employer to comply or abide with the terms of the Contract. The Board should award damages in consideration of the fundamental concepts of collective bargaining and not allow the Carrier to violate or ignore its contractual committment with impunity.

Carrier's Position

The Carrier stresses the claims cannot be sustained because the relevant Agreements contain no penalty provision, and the Board should not impose one on the parties. It adds that if there is to be a penalty, the parties should agree upon such a provision through the process of negotiations rather than having it imposed upon the parties by arbitral fiat. The Carrier states that when the Board imposes a penalty where none exists, it is amending or making a new agreement.

The Carrier states that both Messrs. Golden and Sharp were compensated for all their work on all of the claim dates, and further their regular rates of compensation were higher than the rates of pay they would have received if they had worked as a single track block operator. The Carrier states that to sustain these claims would be to award the Claimants a windfall.

The Carrier cites several Federal court decisions which have refused to enforce awards where there has not been shown a causal relationship between the breach of the contract and a cognizable loss or damage. The Carrier stresses in the case at hand there is no causal relationship between the breach and an alleged loss. The Claimants have not shown any loss or damage. The Carrier stresses the common law contract rule of damages is that the employee should be made whole for loss he suffered. In the case at hand, the Claimants suffered no loss, and the Carrier should not be subjected to a punitive rather than a compensatory standard of damages.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and carrier are Employee and Carrier within the

Railway Labor Act; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds initially that the Carrier violated the Single Track Agreement when it did not post vacancies for block operators when these vacancies were known to last between five and twenty-nine days. The Board does not find credible the Carrier's contention that an operation of this scope had to be conducted on a day-by-day basis. We find that the Division Engineer did not order the vacancies posted probably because he found it more convenient to carry on the operation in this manner rather than have to go through the detailed troublesome procedures of posting and determining the contractually eligible applicants. However, convenience is not the measure of contractual rights.

The Board finds that on April 10, 1979 the parties in good faith negotiated the Single Track Agreement wherein they agreed that employees for this kind of operation would be used as provided for by Section 2, Article II of the November 20, 1975 Zone Extra Board Agreement, which required, inter alia, the posting of vacancies. The Board finds noteworthy that as a component or element of invoking the Single Track Agreement, the Carrier offered to settle certain outstanding claims. There was valiable consideration for agreeing to this covenant.

The Board finds the gravamen of this dispute is not the question of whether the Agreement was breached, but assuming it was breached, what was the proper measure of damages, if any.

The Board finds that in considering and determining damages, the common law rules on damages to commercial contracts cannot be applied rigidly to collective bargaining agreements. The failure to honor or comply with a collective bargaining agreement has different consequences than the failure or refusal to deliver a ton of coal at a

given time or price. The damages in the latter refusal can generally be remedied in the market place. However, a collective bargaining agreement with grievance/arbitration machinery is a substitute for the right of the parties to resort to strike and lockout. Stability of labor relations demand that the parties comply and honor the committments they have made in their good faith bargaining. Good faith bargaining would be undermined, if not nullified, were one of the contracting parties free to violate its contractual obligations with impunity solely on the basis that no monetary damage or harm had been proved.

The U. S. Supreme Court in 1960 in its Trilogy cases recognized the unique status of the arbitral process in resolving disputes arising under a collective bargaining agreement. In the Gulf Warnor case the Court stated

> "The Labor Arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law - the practice of the industry and the shop - is equally part of the collective bargaining agreement, although not expressed in it."

The specific dilema of this case is aptly portrayed by the same Court, speaking in the Enterprise Wheel case, also part of the Trilogy:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There is a need for flexibility in meeting a variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not dispense his own brand

> of industrial justice. He may of course look for guidance from many sources. Yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The Board finds that this U. S. Supreme Court standard is not very clear, but several lower Federal court decisions have laid down certain standards for determining damages. A reading of the 1964 Denver & Rio Grande - BRT case as well as the 1981 Norfolk and Western - BRAC case make it patently clear that these Courts will not enforce an award that is punitive in nature and that "compensatory damages be based upon cognizable loss causally traceable to the breach."

In light of these Court decisions, the Board finds it would be improper to sustain the claims of Claimants Sharp and Golden because they have not sustained any wage loss as a result of the Carrier breach of the Single Track Agreement. However, the Board finds that it can fashion a remedy that would take cognizance of the fact that the Carrier knowingly and egregiously breached the Single Track Agreement for 15 days. Such conduct should not be permitted with impunity, because if allowed, it undermines the sanctity and solemnity invested in agreement consummated as a result of good faith collective bargaining.

Accordingly, since this prescribed remedy will not result in undue enrichment of the two Claimants, and because it is not proscribed by the existing agreements, the Board directs the Carrier to

make a contribution of fifteen (15) days pay, derived from one employee's then rate of pay as a single track operator, to the United Community Fund in Topeka, in the name of the Brotherhood of Railway and Airline Clerks.

Award: Claims disposed of in accordance with the Findings.

Order: The Carrier is directed to comply with the Award, on or before June 30, 1983.

Jacob Seidenberg, Chairman and Neutral Member

R. D. Meredith, Carrier Member

W. E. Granlund, Employee Member

May 29, 1983