

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 3689

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

AWARD NO. 5

Case No. 5

STATEMENT OF CLAIM

1. The Carrier violated the provisions of the February 7, 1965 Mediation Agreement when it furloughed Highway Crossing Watchman Mr. R. M. Acocks without first serving the Organization with the mandatory sixty (60) day written notice and obtaining an implementing agreement.

2. The Carrier further violated the said Agreement when it failed, or otherwise refused, to compensate Claimant in accordance with the applicable provisions of said Agreement.

3. That the Carrier shall be required to properly compensate Claimant for all wage loss suffered commencing September 7, 1984, forward.

FINDINGS

Following issuance of five-day force reduction notices, five employees assigned as Crossing Watchmen at Salt Lake

City, Utah were terminated from their positions, upon the installation of automatic crossing gates at the location. Of the five employees, it is conceded that two had protected status under the February 7, 1965 Mediation Agreement (herein, the "Mediation Agreement"). One of these two employees applied for and was granted his annuity. The other employee, the Claimant herein, indicated his availability for recall to work.

As of September 10, 1984, the Claimant was offered a position as Extra Gang Laborer at Salt Lake City. Acceptance of the position as Extra Gang Laborer would have commenced a new seniority date in that position for the Claimant. The Claimant declined to accept this position.

On this basis, the Carrier determined that the Claimant was no longer considered as a protected employee under the Mediation Agreement in view of his declination of the Extra Gang Laborer position. Subsequently, the Carrier made four other offers of employment to the Claimant, all of which would require new seniority and/or change in location. The Claimant declined all of these positions as well.

The Organization argues that the Carrier is in violation of the Mediation Agreement on two counts: (1) it did not

provide necessary advance notice and the negotiation of an implementing agreement, pursuant to the abolition of the Crossing Watchmen positions because of the installation of the new gate crossing; (2) the Claimant is entitled to protective benefits, despite his declination of the Extra Gang Laborer position (and presumably other positions later offered to him).

The questions before the Board, therefore, are the following:

1. Did the Carrier violate the Mediation Agreement by failing to seek an implementing agreement with the Organization, accompanied by the required notice period therefor?

2. Did the Carrier violate the Mediation Agreement by denying protective benefits to the Claimant upon his refusal to accept the position(s) offered to him?

Pertinent portions of the Mediation Agreement read as follows:

ARTICLE II - USE AND ASSIGNMENT OF EMPLOYEES
AND LOSS OF PROTECTION

Section 1 -

An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his

seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement.

Section 2 -

An employee shall cease to be a protected employee in the event of his failure to accept employment in his craft offered to him by the carrier in any seniority district or on any seniority roster throughout the carrier's railroad system as provided in implementing agreements made pursuant to Article III herein, provided, however, that nothing in this Article shall be understood as modifying the provisions of Article V hereof.

Section 3 -

When a protected employee is entitled to compensation under this Agreement, he may be used in accordance with existing seniority rules for vacation relief, holiday vacancies, or sick relief, or for any other temporary assignments which do not require the crossing of craft lines. Traveling expenses will be paid in instances where they are allowed under existing rules. Where existing agreements do not provide for traveling expenses, in those instances, the representatives of the organization and the carrier will negotiate in an endeavor to reach an agreement for this purpose.

ARTICLE III - IMPLEMENTING AGREEMENT

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 without 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. . . .

Article III, Section 1 covers the requirements for implementing agreements. In view of the rights of carriers "to make technological, operational and organizational changes"

and of the "protective benefits" provided by the Agreement, Article III establishes implementing agreements to be reached by carriers and affected organizations. These, however, have to do with the transfer of work and/or employees. No such transfer is involved in the abolishment of Crossing Watchmen.

On November 24, 1965, the parties to the Mediation Agreement agreed upon interpretation of the Mediation Agreement. As to Article III, Section 1, the interpretation reads as follows:

The parties to the Agreement of February 7, 1965, being not in accord as to the meaning and intent of Article III, Section 1, of that Agreement, have agreed on the following compromise interpretation to govern its application:

1. Implementing agreements will be required in the following situations:

(a) Whenever the proposed change involves the transfer of employees from one seniority district or roster to another, as such seniority districts or rosters existed on February 7, 1965.

(b) Whenever the proposed change, under the agreement in effect prior to February 7, 1965, would not have been permissible without conference and agreement with representatives of the Organizations.

Since the Carrier's right to abolish Crossing Watchmen is unchallenged, it is clear that neither condition was met which would require an implementing agreement. As to this

portion of the claim, therefore, the Carrier is not in violation of the Mediation Agreement.

The substitution of crossing gates for the work of Crossing Watchmen can, however, reasonably be judged as a "technological" change since the function (safety precautions) was continued.

Did the Claimant lose his rights to protective conditions by failure to accept the position(s) proffered to him? Guidance is available in Article II. Section 1 provides for loss of protection when an employee fails "to accept employment as provided in this Article". Sections 2 and 3 concern the requirement to accept other employment. Section 2 is concerned with the results of implementing agreements and, as discussed above, is inapplicable here. Section 3 grants the Carrier the right to use a protected employee "in accordance with existing seniority rules for vacation relief, holiday vacancies, or sick relief" (none of which is applicable here) or "for any other temporary assignments which do not require the crossing of craft lines". The proposed offer of work as an Extra Gang Laborer did not require the "crossing of craft lines". But this sentence is limited to "temporary" assignments.

In the course of the claim handling procedure, the Carrier suggested that the assigned to Extra Gang Laborer was a "temporary" position. The Organization dissents to this line of argument, and the Board agrees with the Organization's

position. Nothing in the offer of work suggested that the assignment was "temporary" and, in fact, the Carrier admits that the offer was made in lieu of hiring new employees for such work.

Section 1 states that an employee loses protection when he fails "to retain or obtain a position available to him in the exercise of his seniority rights". There was no showing that any such position, based on exercise of his seniority rights, was available to the Claimant (since the Crossing Watchmen positions had been fully eliminated). It follows, therefore, that nothing in Article II provides for the loss of protection for the Claimant in his particular circumstances.

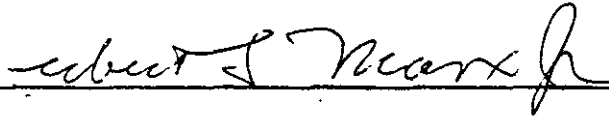
The Carrier cites Award Nos. 66 and 169 of Special Board of Adjustment No. 605 in support of its position. Examination of these awards shows, however, that the positions refused by the employees therein were specifically cited as "temporary positions". Thus, the rationale of these awards is not applicable here.

The third paragraph of the claim requests compensation "commencing September 7, 1984". The Carrier properly points out that this date should be September 10, 1984. Except as

to this change, the second and third paragraphs of the claim have merit.

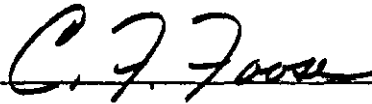
A W A R D

1. Paragraph 1 of claim denied.
2. Paragraphs 2 and 3 of claim sustained, except as to the change of date noted in the Opinion. The Carrier is directed to put this award into effect within 30 days of the date of this award.



HERBERT L. MARX, JR., Chairman and Neutral Member

E.R. MYERS, Carrier Member



C.F. FOOSE, Employee Member

New York, N. Y.

DATED:

December 17, 1985