CSX TRANSPORTATION

File: 16M (90-660)

Public Law Board No. 5213

Parties to Dispute

International Association of Machinists and Aerospace Workers	)	
vs	)	**Case 18/Award 18**
CSX Transportation, Inc. (formerly: B & O Railroad Company)	)	

Statement of Claim

1. That, in violation of the Employee Protection Agreement (EPA), the Carrier arbitrarily and capriciously worked a junior Machinist on extra work positions beginning in November, 1989 and continuing through April 1, 1990, instead of Machinist J. F. Gordon.

2. That, accordingly, CSXT be ordered to pay Mr. J. F. Gordon at the pro-rata rate of pay and all other service benefits to which he is entitled for that period beginning in November, 1989 and continuing through April 1, 1990.

Background

On August 7, 1985 the Claimant was advised that his position would be abolished, effective at the end of his tour of duty, on August 17, 1985. The Claimant advised local management at the Brunswick Locomotive Shop on August 9, 1985 that he would be available for extra work. Some five years after this, on July 19, 1990, a claim was filed. That claim reads as follows:

"The following claim is submitted on behalf of Machinist J. F. Gordon, Brunswick, Maryland pursuant to Article II, Section (i)...of the EPA Agreement (which) was violated when the Carrier failed to recall furloughed Machinist J. F. Gordon to the vacancy that was filled by Machinist D. F. Stokes at Brunswick, Maryland, who is junior in seniority to J. F. Gordon. The position Stokes was

> working, worked for approximately six (6) consecutive months beginning in November of 1989 and continuing through April, 1990.
>
> "Accordingly, claim is hereby submitted on behalf of Machinist J. F. Gordon for pay at the pro-rata rate of pay and all other service benefits to which he is entitled to for that period beginning in November of 1989 and continuing through April 1, 1990."

In denying the claim on September 24, 1990 the Carrier's Director of Labor Relations states to the General Chairman that:

> "...investigation reveals that this matter was discussed in conference with you and the Local Committee at Brunswick, Maryland on June 14, 1990 with Mr. R. D. Hiel of this office...(and)...the Claimant was disqualified due to a heart condition during the time in question...(and was thus)...unavailable for any type of service during the claim period."

The record also shows that a letter written to the Claimant on June 12, 1990 by the Carrier's Chief Medical Officer. In that letter, the Chief Medical Officer states:

> "...upon review of recently received information, you have been found medically unqualified to safely perform your job (and) your supervisor has been so notified...".

This letter further states that it is the obligation of the Claimant to provide to the Carrier updated medical information by having his personal physician provide an assessment of his current condition. This information was provided to the Carrier and on June 27, 1990 the Claimant was advised by the Carrier's Chief Medical Officer that "...upon review (of updated information)...I find you medically qualified to continue your duties with the railroad...".

In his denial of the claim in his September 24, 1990 letter to the General Chairman of the Organization, the Carrier's Director of Labor Relations also states that "...Mr. Gordon has been contacted

in the past to fill vacancies under the EPA Agreement but has declined, as he is engaged in outside employment...".

On March 5, 1991 the Claimant was advised by the Manager of the Carrier's Riverside Shop in Baltimore that he was being recalled from furlough "...as a Machinist at the Brunswick Locomotive Shop and should report to work as soon as possible...". The record shows that the Claimant returned to work on March 18, 1991.

On July 23, 1991 the Carrier received a letter from the Organization stating that:

> "...Enclosed you will find our claim on behalf of Machinist J. F. Gordon, Brunswick, Maryland---pursuant to Article II of the EPA Agreement dated July 19, 1990. You will further find dates that are to be claimed on behalf of Machinist Gordon...".

After further conferencing of the claim the Carrier states in correspondence to the Organization, which is part of the record, that settlements was reached in exchange for withdrawal of the claim originally filed on July 19, 1990. Those settlements included the return of the Claimant to work on full-time status in March of 1991, and a sum of money at the "straight time rate" of the position the Claimant was working in March of 1991. Such proposed settlements were never formally agreed upon, however, and on January 24, 1994 the Organization advised the Carrier that:

> "...(the Claimant) has rejected all your (both verbal and written offers)...in their entirety and (the Organization) will progress the claim to arbitration..."

Findings

The Agreement Article at bar reads as follows, in pertinent

part.

Article II, Section (i.)

> Extra work positions to be established on working for a period in excess of five (5) consecutive days or ten (10) calendar days within a calendar month on same position will be established as a regular assignment and furloughed employees recalled for such positions.

There are a number of threshold issues which this Board must rule on prior to ruling on the merits of the instant case.

First of all, a review of the record shows that the only claim before this Board is the one filed on July 19, 1990. In that claim the Claimant argues that the EPA Agreement was violated and that he consequently had right to relief from November of 1989 through March of 1990.[1] No additional claim was ever filed by the Claimant. Relief requested was for a specific period of time.[2] To extend the quantum of relief as the Claimant asks the Organization to do for him represents an improper amendment of the original claim filed in

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[1]The Carrier's statement of claim in it submission states that the period of relief requested is from the "...beginning (of) November, 1989 through Feburary, 1991...". This is in error. The original statement of the claim requests relief "...through April 1, 1990". (See Carrier's Exhibit F)

[2]Under date of April 6, 1992 the Organization alleges that the Carrier had not responded to the "...claims of July 19, 1990 and July 23, 1991." (Employees' Exhibit O). There was no claim filed on July 23, 1991. On that date there was only an amendment of the relief requested of the claim which had been filed on July 19, 1990 (Employees' Exhibit M). The Claimant did write to his own General Chairman on June 10, 1991 stating to the latter that he was "...submitting the following claim in my behalf...". This was not a claim, separate from the original claim filed on July 19, 1990. There was no claim filed by the Claimant with the Carrier on June 10, 1991. On that date he only sent a letter to his union. This letter contains a listing of various dates which extend after January of 1991 which the Claimant wished to have tacked onto his original July 19, 1990 claim as amended relief. (Carrier's Exhibit L).

July 1990. Claims filed under labor contracts in this industry and under the protection of Section 3 of the Railway Labor Act must be well-defined, clearly understood, and they must request specific relief. Neither a claim, nor relief associated therewith, can be amended during the handling of the claim on property. A claim cannot be a moving target. A Carrier has the right to know the specificity of any given claim filed by an employee covered by the operant Agreement so that it can defend itself accordingly.

Secondly, it is true, as the Carrier argues, that settlements between parties have priority over rulings issued by a Board such as this. Such settlements cannot be vacated just because one or the other parties register dissatisfaction at a later point in time with the substance of the settlement. But there is no evidence in the instant case that settlements with respect to the Claimant were ever reached albeit there is evidence that the Claimant's representative attempted to negotiate certain relief in lieu of taking this case to arbitration. But it is clear that the Claimant rejected all such efforts and thereby was willing to risk arbitration. There are no signed agreements of record with respect to any settlements in this case. Proposed settlements are improperly before this Board. [3]

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[3]See Third Division 25107: "Arguments concerning settlement offers that were not agreed upon are not properly before the Board." Also Fourth Division 3298: "If we were to permit evidence of settlement offers to be used affirmatively against a party before us on appeal we would contribute to an undermining of the grievance machinery negotiated by the parties and mandated by Section 3 First of the Railway Labor Act, and this we shall not do."

Thirdly, the Carrier argues that from August of 1987 up to the time the instant claim was filed, no claims were filed by the Claimant on basis of Article II of the EPA Agreement even though a junior Machinist had been called for extra work positions and had worked in lieu of the Claimant. The Board can but observe that forfeiture of a claim cannot be based on the fact that an Agreement is not policed. Nor can an Agreement be policed absent information about an alleged violation. According to the Organization "...neither (the Claimant) nor the IAMAW had knowledge that (the junior Machinist) was working relief positions" during the time in question.

The Board will now address the merits of the claim. The Claimant alleges that the Carrier violated Article II (i) of the EPA Agreement when it permitted a fellow, furloughed Machinist with less seniority than he to work from November, 1989 through April 1, 1990 on extra positions. On basis of evidence of record, the Board must conclude that the Claimant is correct in this matter. The Claimant was not called to work during that five month period and a Machinist junior to the Claimant was allowed to work extra positions.

Argument by the Carrier, in denying the claim, is that the Claimant was not available to work even if he would have been called. First of all, according to the Carrier, local supervision stated that the Claimant told them, when he had been called for work after his 1985 furlough, that he could not work if called because he had found another job. But the Claimant told supervision

because he had found another job. But the Claimant told supervision that he still wanted to be called. Apparently, supervision concluded that if the Claimant was not going to respond to a call, it would not call him. The record states that someone in employee relations advised supervision that the Claimant did not need to be called. The Board must conclude, however, that the Claimant had the right of refusal, irrespective of his reasons, and he still should have been called whenever extra work was available. Local supervision acted improperly when it no longer called the Claimant for extra work, starting apparently sometime in 1987, if the Claimant was senior on the roster during the time-frame in question.

Secondly, the Carrier argues that even if the Claimant had been called, he would have been medically ineligible to work during the time frame in question because of a heart condition which he developed in 1987. The Board notes that it is true that the Claimant was not medically cleared to work as a Machinist in June of 1990, by the Carrier, which is some two and a half months or so after the end of the period claimed as relief on the July 19, 1990 claim. But while this is true, it is also moot. During the period from November, 1989 through April 1, 1990 the Carrier did not know whether the Claimant was medically unqualified to work or not and there is no information on this issue in the record before this Board. All that is known, from the record, is that the Chief Medical Officer found the Claimant medically unqualified on June 12, 1990 "...on review of recently received information...", at

that time,[4] and that the Chief Medical Officer reversed that finding some two weeks later upon receiving a more complete medical file on the Claimant. The Claimant was then cleared to work on June 27, 1990.[5] This Board is not able to deduce from this information, as the Carrier argues, that the Claimant was medically unqualified to work during the months of November, 1989 through April 1, 1991.

On basis of the record before it the Board concludes that there was a violation of the Article II of the EPA Agreement by the Carrier. The claim shall be sustained. The Claimant shall be paid, at pro rata rate, all hours worked by the Machinist junior to him, on extra work assignments, from the beginning of November, 1989 through April 1, 1990. All other relief associated with the claim is denied.

Award

The claim is sustained in accordance with the Findings. All monies owed to the Claimant shall be paid to him, by the Carrier, within thirty (30) days of the date of this Award.

Edward L. Suntrup, Neutral Member

M. K. Dougherty

M. K. Dougherty, Carrier Member

James A. Coker

James A. Coker, Employee Member

Date: August 30, 1995

[4]See Employees' Exhibit E.

[5]See Employees' Exhibit G.