PUBLIC LAW BOARD NO. 5552

Award No. 1
Case No. 1

Parties to Dispute: INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (LOCAL NO. 158)

and

CSX TRANSPORTATION, INC.

Statement of Claim:

Are Proposals A and D contained in Section 6 notices served by the Organization barred by the Moratorium of Article 7, of the Agreement of March 22, 1989.

INTRODUCTION

This matter came on for hearing before the Board on September 12, 1994, at the Raddison Plaza Suites located in Cleveland, Ohio. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are Carrier and Organization within the meaning of the Railway Labor Act, as amended. This Board is duly constituted by agreement between the parties ("PLB Agreement"), dated March 21, 1994, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second.

BACKGROUND FACTS

On July 30, 1993, the Organization served the Carrier with a Section 6 notice under the Act to amend portions of the current collective bargaining agreement covering bargaining unit employees working at an ore facility in Toledo, Ohio, commonly referred to as the Lakefront Dock. Subsequently, the Carrier challenged Attachments A and D to the Section 6 notice on the grounds each was barred as a subject of bargaining until June 13, 2018, pursuant to the terms of an agreement dated March 22, 1989, referred to herein as the March 22, 1989, Mediation Agreement.

In order to fully grasp the significance of the March 22, 1989, Mediation Agreement, and the scope of its effect upon the collective bargaining agreement between the parties effective January 1, 1987, it is necessary to briefly review various agreements which, when coupled together, comprise significant portions of the January 1, 1987, Agreement.

On June 22, 1979, the parties entered into a collective bargaining agreement which contained provisions pertaining to general wage increases; cost-of-living adjustments; vacations; dental benefits; and of relevance to the present dispute, job protection benefits. (Appendix I to the June 22, 1979, Agreement.) The protective benefits under that agreement were triggered in the event an employee was displaced from employment, voluntarily or involuntarily, for up to ten years, depending on

the employee's length of service, and included provisions for a separation allowance for employees who received and accepted offers of resignation. As consideration for the protective benefits, the Organization recognized the right of the Carrier to make and implement technological and operational changes, including the modernization of equipment.

The effect of the 1979 Agreement, according to both parties, was to eliminate a separate maintenance force on the property and alter the unloading operation of merchant ships from labor-intensive mechanical unloaders to a more economical, less labor-intensive conveyor belt system. The period during each calendar year when the protective benefits were payable commenced April 1 and continued through December 31. Finally, Section 9 of Appendix I precluded either party to the agreement from serving any notice or proposal for the purpose of changing the subject matter of the agreement prior to June 14, 1987. Appendix I was incorporated into the January 1, 1987, Agreement as Article 23.

Later, the technological and operational changes authorized by the June 22, 1979, Agreement permitted single shift manning for the new ore loading facility outlined in an agreement between the parties dated February 26, 1982. This agreement, referred to as the 1982 Manning Agreement, was incorporated into the January 1, 1987, Agreement as Article 3. The 1982 Manning Agreement set forth in detail nine (9) job classifications, the

work duties associated with each classification, and a rate of pay schedule. It further clarified that there would be two modes of operation at the dock: 1) loading of ore; and 2) maintenance and repair. The agreement prohibited the two operations from being performed simultaneously due to safety considerations.

On July 7, 1982, the parties entered into a memorandum of agreement which expressly authorized the Carrier to establish a second shift. The July 7, 1982, Memorandum of Agreement, later incorporated into the January 1, 1987, Agreement as Article 16, states, in relevant part:

> 1. Carrier may, at its discretion, establish a second shift at Lakefront Dock Pellet Terminal after notifying the organization of its desire. This force shall be comprised of the positions outlined in the February 26, 1982 Agreement and, provided such positions are established during the period April 1 through December 31, they shall remain in effect for a minimum of thirty (30) calendar days from the date of establishment.
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> 2. If, after establishment of the second shift, and during the period April 1 through December 31, there is no longer a sufficient amount of work to require a second shift, Carrier may abolish such force in accordance with Article XIV of the January 1, 1973 Agreement. However, should it then become necessary to reestablish the second shift during the period April 1 through December 31, Carrier shall allow any protected employee involved the difference between his monthly displacement allowance (60%) and his average monthly allowance (100%) as provided in the June 22, 1979 Job Protection Agreement during such interim period.

As of 1989 there remained, in the Carrier's view, an excess number of bargaining unit employees at the Lakefront Dock facility. The parties reached an agreement on protective benefits memorialized in the March 22, 1989, Mediation Agreement. Article 1 of the agreement, entitled "Funding For Separation Allowances and Work Guarantees," provides, among other items, for establishment of a fund of eight million dollars ($8,000,000.00) for severance of employees and to provide monies for work guarantees and other protective payments. By letter agreement the severance allowance was calculated at the rate of $8,000.00 for each year of service with a minimum allowance of $35,000 and maximum allowance of $100,000. After all severance allowances have been made from the fund, the remaining monies constituted a pool from which all unassigned employees unable to fill temporary or permanent vacancies on assigned positions were to receive payments in accordance with the remaining terms and conditions of the March 22, 1989, Agreement.

Article 2, entitled "Work Opportunities", designates that only employees protected under the June 14, 1979 Agreement (referred to above as the June 22, 1979, Agreement) will be offered work opportunities, assigned or unassigned; defines the unassigned work force; and limits the guaranteed work opportunities for unassigned employees not filling vacancies on assigned positions. Article 2, Section 7 limits guaranteed work

opportunities for unassigned employees not filling vacancies to "the April through December shipping season ... ." Article 3, captioned "Manning", describes a method "to review manning requirements as provided in existing working agreements," including a binding arbitration provision in the event the parties fail to reach agreement "on appropriate manning requirements", together with a limitation on the frequency of manning reviews.

Article 4 ties wage increases, lump-sum payments, and cost-of-living adjustments to negotiations between the Carrier and TCIU. Article 5, "Coordinations, Etc." recognizes in language similar to Article 23, Section 10(a) and (b) of the January 1, 1987, Agreement that the protective benefits under the Agreement are in consideration of the Carrier's ability to implement modernization of equipment, consolidations, coordinations and other transactions without additional protective costs.

Article 6, entitled "Effect of Agreement", provides in Section 1 that: "This Agreement modifies all existing Agreements to the extent provided or inconsistent herewith and specifically substitutes for and eliminates the provisions of Article 23 of the current collective bargaining Agreement." Finally, the moratorium provisions asserted by the Carrier in defense of

negotiations over Attachments A and D are contained in Article 7, Sections 2 and 3.

> Section 2. No Section 6 Notices may be served prior to April 1, 1993, relating to any subject matter. On or after April 1, 1993, either party may serve Section 6 Notices (not to become effective prior to July 1, 1993) for changing the terms of Article 4 of this Agreement or any other matter, except as prohibited by Section 3 of this Article 7.
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> Section 3. No Section 6 Notices may be served by either party prior to June 13, 2018 in any way relating to:
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> (1) Changes in Articles 1, 2, 3, 5, 6 and 7 of this Agreement;
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> (2) separation allowances, work guarantees, protective benefits or other employee security arrangements; and
>
> (3) manning requirements.

The Organization filed a claim on April 24, 1992, charging that the Carrier abolished a second shift established pursuant to Article 18, Section 1, and that the Carrier was liable for those hours the second shift employees would have worked had they worked the entire thirty days to which they were entitled under Article 18. The dispute was submitted to a public law board, P.L.B. No. 5333, which issued its decision on June 18, 1993.

In sum, P.L.B. No. 5333 determined that the March 22, 1989, Mediation Agreement was not intended to eliminate Article

16 of the 1987 Agreement, and the two were not inconsistent with one another. The board also concluded, however, that a letter dated May 10, 1990, modified Article 2, Section 7 of the March 22, 1989, Mediation Agreement, so that unassigned employees would only receive monies from the separation allowance and work guarantee fund after arrival of the first ore vessel on or after April 1. In turn, Article 16's second shift guarantee was similarly altered by means of language in Article 6 of the March 22, 1989, Mediation Agreement modifying all existing agreements to the extent inconsistent therewith. Since the second shift at issue before P.L.B. No. 5333 was established, operated and discontinued prior to arrival of the first vessel on April 14th, the board found the employees utilized on the second shift were not entitled to a minimum of thirty days of work. The Board went on to state that even if the duration of the work guarantee period set forth in the May 10, 1990, letter were deemed inapplicable to Article 16, the shift was not "established" within the protected period of April 1 through December 31.

CONTENTIONS OF THE PARTIES

The Carrier's initial position with respect to the Organization's Attachment A seeking to amend Article 16, Sections 1 and 2, is that the provisions of Article 16 are inconsistent with the language and intent of the March 22, 1989, Mediation

Agreement. The March 22, 1989, Mediation Agreement, in the Carrier's view, was intended to eliminate all prior and future protective arrangements as well as related provisions which were inconsistent with its provisions.

Further, the language of Article 16 which provides that the second shift remain in existence for a minimum of thirty days, and the overall time period for establishment of positions from April 1 through December 31, invokes manning and work opportunity issues, both subjects covered by Articles 1, 2, and 3 of the March 22, 1989, Mediation Agreement. Accordingly, Attachment A to the Section 6 notice is barred by the moratorium provisions contained in Article 7 of the March 22, 1989, Mediation Agreement.

Moreover, the Organization's Attachment D to the Section 6 notice proposing a productivity fund to provide pensions for employee retirement, financial support for disabled employees, surviving widows and dependents constitutes a "security arrangement" barred by Article 7, Section 3 until the date of June 13, 2018. In the Carrier's view, this latter proposal constitutes a "feeble alternative" to a request to increase the existing fund established under Article 1 of the March 22, 1989, Mediation Agreement -- action clearly barred by Article 7, Section 3.

The Organization submits that there is nothing more to its proposal contained in Attachment A than to change Sections 1 and 2 of Article 16, entitled "Bidding" in the 1987 Agreement, by increasing the minimum number of days for the second shift from thirty to sixty, and to delete outdated language. There is no prohibition contained in the moratorium clause of the March 22, 1989, Mediation Agreement excluding changes in the bidding rule. Contrary to the Carrier's assertion, the proposal does not address any "manning" requirement; rather, the Organization is well aware that any changes in manning must be initiated by the procedure established in Article 3 of the March 22, 1989, Mediation Agreement. In any event, the Carrier's assertion that Attachment A touches upon a "work opportunity" was not raised by the Carrier prior to its written submission before the Board.

Further, the Organization reasons that Attachment D to its Section 6 notice is intended solely to establish a pension fund for retirees or those employees who are injured and are unable to work. It does not create additional funding for a separation allowance, nor does it add monies to any fund or pool intended to pay employees unable to hold an assignment within the work pool. There is simply no such bar to this portion of the Organization's Section 6 notice.

FINDINGS

Attachment A

As a preliminary matter, the Board rejects the Organization's contention that the Carrier is precluded from asserting in support of its moratorium defense the claim that Attachment A involves work opportunities on the ground this portion of the defense was not raised prior to the written submission. First, the agreement establishing this Board contains no such restriction or waiver provision connected to a failure to raise this portion of Carrier's defense prior to hearing before the Board. Second, the defense of a moratorium bar, while expanded over the earlier reference of the Carrier relating solely to manning during the on property handling, does not broaden the fundamental issue raised by the claim before the Board: whether Attachments A and D contained in the Organization's Section 6 notices are barred by the moratorium provisions of Article 7 of the March 22, 1989, Mediation Agreement.

If the Carrier's sole contention with regard to Attachment A was premised on a moratorium as to changes in manning requirements, the Board would lose no time in rejecting such a defense. The actual manning requirements are dictated by the February 26, 1982, Agreement, incorporated as Article 3 into the January 1, 1987, Agreement. As the Board reads the series of

collective bargaining agreements, both Article 3 and Article 7, Section 3 of the March 22, 1989, Mediation Agreement, are intended to effect Article 3 of the 1987 Agreement relative to manning issues, rather than Article 16. The Organization's proposal, rather than implicating the manning provisions set forth in the January 1, 1987, Agreement and March 22, 1989, Mediation Agreement, impacts Article 16's provisions relative to the protected period during which establishment of a second shift generates a minimum duration period, the minimum duration period such newly established positions remain in effect from the date the second shift is established, and the protected period when reestablishment of the second shift after an initial abolishment triggers additional protective benefits.

The Board also rejects the Carrier's restatement in these proceedings of the same position found unpersuasive by the board in P.L.B. No. 5333, Case No. 1, _ie._, the elimination of Article 16 from the agreement by the March 22, 1989, Mediation Agreement. A portion of that board's analysis warrants repeating:

> To the extent that the Parties intended in the Mediation Agreement to eliminate entire articles of the Agreement, they expressly so provided - as in the case of Article 23. By omission, no such result was intended with respect to Article 16. Indeed, the 1989 Agreement to which the Carrier points as the operative instrument of removal of Art. 16 specifically addresses Art. 23 and does not address Art. 16, at all.

> Article 16 was enacted separately from any job protection provision, subsequent to the 1979 protective provision and prior to the 1989 Merger Agreement. Indeed, it recites that it was enacted to implement the Organization's obligations to allow technological and operational changes. Thus, the obligation was derived from the protective provisions, but the purpose of the Article was not directly related to job protection.(P.L.B. No. 5333, Case No. 1 at 7-8.)

However, the Board's analysis cannot stop there. For it is clear that while Article 16 has not been eliminated by the March 22, 1989, Mediation Agreement, this is not to say that it has not been modified by the March 22, 1989, Mediation Agreement, as amended by agreement of the parties. Article 16, set forth in the July 7, 1982, Agreement establishing the second shift, originated as part of the Organization's obligation to implement technological and operational changes in consideration of the protective benefits provided in Appendix I of the June 22, 1979, Agreement. The Board finds the intent of the parties was to protect the unassigned work force during a specific protective period - April 1 through December 31. (Section 2(d) of Appendix I; Article 23, Section 2(d) of the 1987 Agreement.) Indeed, the Organization acknowledges that the entire structure of the protective agreements was geared toward the nine month shipping season on the Great Lakes. The identical period of protection applied to second shift positions established pursuant to Article 16, paragraphs 1 and 2.

While the Board finds some confusion in the analysis of P.L.B. No. 5333 on this issue, it concurs with the result articulated by that board that a May 10, 1990 letter modified the terms of the March 22, 1989, Mediation Agreement, and thereby the Article 16 second shift guarantee period. The Organization acknowledged that the May 10, 1990, letter accurately reflects an agreement between the parties to apply the guaranteed work opportunities for unassigned employees pursuant to Article 2, Section 7 of the March 22, 1989, Mediation Agreement in the following manner:

> that 'unassigned employees' would not commence drawing monies from the 'fund' until the arrival of the first ore vessel on or after April 1 of every calendar year so long as sufficient monies remained available for payment from the 'fund.' It was further understood that these payments would cease immediately following the arrival of the last ore vessel during the April through December shipping season.

This means, in effect, that the base period of protective benefits and guaranteed work opportunities, identical in preceding agreements to the base protective period of Article 16's second shift language as a predicate to application of the thirty day minimum, was modified throughout the existing agreements pursuant to Article 6, Section 1 of the March 22, 1989, Mediation Agreement. It is this very period which the Organization's Attachment A seeks to modify through its Section 6

notice. The thrust of Article 16, when read in conjunction with the March 22, 1989, Mediation Agreement, is to permit a second shift to be created with specific work opportunities, and compensation upon discontinuance of the shift from the work guarantee fund established under Article 1 of the March 22, 1989, Mediation Agreement, during the identical base period. As P.L.B. No. 5333 concluded:

> The Carrier also argues that the change in definition of April through December necessarily changed the Art. 16 second shift guarantee period through the use of the Art. 6, Sec. 1 general language modifying "all existing agreements to the extent provided or inconsistent herewith". The Carrier's argument is persuasive. When the Carrier discontinued the second shift, the employees who had been assigned to man the positions reverted to unassigned status, and their compensation was, under the Merger Agreement [1989 Mediation Agreement], to be provided for through the Fund. But the May 10, 1990 letter modified Art. 2, Sec. 7 of the Merger Agreement. As modified, Art. 2, Sec. 7 only allows monies to be paid from the Fund for work opportunities occurring after the arrival of the first boat of the season.
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> Clearly, the shift was established, operated, and was discontinued and eliminated prior to the arrival of the first boat on April 14th. The Board concludes that, under such circumstances, the employees utilized on the second shift were not entitled to a minimum of 30 days of work.
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> P.L.B. No. 5333, Case No. 1 at 9.

Clearly, the Organization's Attachment A seeks to change the result of P.L.B. No. 5333, Case No. 1 through modification of the existing agreement. However, the effect of the Organization's Attachment A which proposes to modify the

protective period when establishment of a second shift, or reestablishment of the second shift, will provide either work opportunity or additional displacement allowance, is contrary to the agreed upon period for payment of monies from the fund to unassigned employees contained in Article I of the March 22, 1989, Mediation Agreement, as well as work opportunities pursuant to Article 2, Sections 3, 5 and 7 of the March 22, 1989, Mediation Agreement, as modified by the May 10, 1990 letter.

Thus, the Board must find that the Organization's proposal designated as Attachment A to its Section 6 notice of July 30, 1993, is barred by the moratorium provisions of Article 7, Section 3 of the March 22, 1989, Mediation Agreement.

Attachment D

The Organization's Attachment D seeks to establish a so-called "productivity fund" to provide pensions for employees upon their retirement, and financial support for disabled employees and deceased employees' widows and dependents. The proposed source of monies for the productivity fund is a Carrier contribution of twenty-five cents per ton of commodity handled. The fund would be established as an irrevocable trust administered and controlled by the Organization.

The Carrier emphasizes the significant sum already contributed to the fund for separation allowances and work

guarantees, and argues that because that fund has reduced the work force from 90 employees to the current work force of 23, with a corresponding depletion in the fund from the original principal balance of $8,000,000 to $500,000, the Organization's Attachment D seeks to circumvent the prohibition on modification of the fund. Moreover, the Carrier emphasizes the cost of the proposal represents an annual payment of $825,000 based upon the present ore tonnage of approximately 3,300,000 tons per year. In sum, Attachment D represents a "employee security arrangement" barred by the moratorium provisions of Article 7, Section 3 of the March 22, 1989, Mediation Agreement.

The Board finds that Attachment D to the Organization's Section 6 notice is not barred from negotiation by the moratorium provisions. First, the Carrier urges application by the Board of the lengthy, twenty-nine year moratorium contained in Article 7, Section 3, based almost exclusively on the broad rubric of "employee security arrangements." The Board concurs with the Organization that to accept the Carrier's position would place virtually the entire collective bargaining agreement under a similar moratorium period. Multiple provisions of the agreement may be considered to relate to or implicate "employee security" including, but not limited to: the work week, a day's work, and holiday pay in Article 2; insurance premiums pursuant to Article

8; leaves of absence in Article 12; seniority in Article 13; and the grievance procedure contained in Article 18.

The Board finds the March 22, 1989, Mediation Agreement was intended by the parties to fund a reduction in force and provide work guarantees and protective payments for unassigned workers as consideration for ongoing technological and operational changes implemented by the Carrier. While it addresses severance of employment, it does not deal directly with retirement and pension benefits. Indeed, Article 1, Section 4 of the agreement states that "[a]ny employee who accepts the separation allowance and is eligible for retirement will retain his retirement benefits as provided by applicable working agreements covering such employees." (Emphasis supplied) This provision only serves to highlight the distinction between the "employee security arrangements" covered by the March 22, 1989, Mediation Agreement, and whatever employee retirement or pension benefits may be found elsewhere.

The issue before this Board is not whether the Organization's Attachment D is economically feasible, reasonable, or warranted, or whether it should become part of the collective bargaining agreement in its present form or be modified. That question is for the parties themselves to resolve through collective bargaining with the assistance of the National Mediation Board where permitted. In conclusion, the Board finds

that Organization's Attachment D to its Section 6 notice dated July 30, 1993, falls outside the moratorium provisions of the March 22, 1989, Mediation Agreement.

AWARD

The claim is sustained in part, and denied in part. The Board finds that the Organization's proposal designated as Attachment A to its Section 6 notice of July 30, 1993, is barred by the moratorium provisions of Article 7, Section 3 of the March 22, 1989, Mediation Agreement. The Board further finds the Organization's Attachment D to its Section 6 notice dated July 30, 1993, falls outside the moratorium provisions of the March 22, 1989, Mediation Agreement, and is subject to collective bargaining between the parties. The Carrier and Organization shall comply with this Award immediately upon the date of issuance, noted below.

Earl F. Norton
EARL F. NORTON, Carrier Member

Thomas Kreger
THOMAS KREGER, Employee Member

Jonathan I. Klein
JONATHAN I. KLEIN, Neutral Chairman

Award issued at Cleveland, Ohio, the 26th day of September 1994.