NATIONAL MEDIATION BOARD

ARBITRATION BOARD NO. 548

BROTHERHOOD OF LOCOMOTIVE ENGINEERS	)
	) Case No. 1
and	)
	) Award No. 1
DULUTH, MISSABE AND IRON RANGE RAILWAY	)

Martin H. Malin. Chairman & Neutral Member
J. A. Cassidy. Employee Member
M. S. Anderson Carrier Member

Hearing Date: June 7, 2001

QUESTIONS AT ISSUE:

1. Does the enclosed document. as initailed by the pertinent parties. constitute an agreement between the B.L.E. and the railroad (DM&IR) thereby bringing closure to the issue of Interdivisional Road Switcher Service? (Exhibit #1)

2. If this Board finds in the negative to the question above what is the proper remedy for the implementation of the Interdivisional Road Switcher service?

FINDINGS:

Arbitration Board No. 548, upon the whole record and all of the evidence. finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended: and. that the Board has jurisdiction over the dispute herein; and. that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

At the hearing. the parties disagreed over whether both questions at issue should be considered simultaneously. The Neutral Chair of the Board ruled that the Board would consider Question 1 at this time and would reconvene for a second hearing to address Question 2 if the Board answers Question 1 in the negative. The parties agreed to submit Question 1 based on their submissions and attached exhibits, without the taking of additional evidence.

The basic facts are not in dispute. On May 23, 1994, Carrier notified the Organization of its desire to establish interdivisional road switcher service pursuant to Article IX of the 1986

National Agreement. Carrier served a similar notice on the UTU. The parties were unable to agree on certain terms related to such service and a hearing was scheduled before this Board, then chaired by Robert O. Harris, for Tuesday, April 25, 1995.

On Friday, April 21, 1995, A. M. Briski, then General Chairman for the Missabe Division, contacted R. E. Adams, then Carrier's Director of Labor Relations, and inquired about Carrier's willingness to offer the Organization an agreement comparable to that offered the UTU. Mr. Adams, Mr. Briski and R. V. Johnson, then General Chairman for the Iron Range Division, arranged to meet later that day. Meanwhile, Mr. Adams edited and retyped the UTU document to adapt it to the engineers' craft.

Section 2 of the UTU document was titled, "Crew Consist," and provided:

> I.D. R/S crews will be manned in accordance with the parties' crew consist agreements, except that a conductor-only R/S crew will not be required to handle loaded or empty propane cars, nor spot powder spurs.

The edited document that Mr. Adams presented at the April 21 meeting contained a Section 2 entitled, "Crew Consist," with the following typed:

> I.D. R/S crews will not be required to handle loaded or empty propane cars, nor spot powder spurs.

The word I.D. was crossed out by hand and the word, "No" written in its place. The word "not" was crossed out by hand. Thus, the version of Section 2 in the document that Mr. Adams presented to the General Chairmen read:

> No R/S crews will of be required to handle loaded or empty propane cars, nor spot powder spurs.

At the April 21 meeting, Mr. Johnson and Mr. Briski signed the document and Mr. Adams initialed it. The signatures of the General Chairmen appear under the words, "Accepted for: BROTHERHOOD OF LOCOMOTIVE ENGINEERS." The initials of Mr. Adams appear under the words, "Accepted for: DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY." Thereafter, Mr. Adams contacted Mr. Harris and advised him of the agreement and that the April 25 hearing had been cancelled.

On Sunday, April 23, Mr. Briski called Mr. Adams to discuss an unrelated matter. Mr. Adams advised Mr. Briski that he had made a mistake in editing the UTU document. He deleted more language from Section 2 than he had intended. Mr. Adams advised Mr. Briski that Section 2 should have read, "Conductor-only R/S crew will not be required to handle loaded or empty propane cars, nor spot powder spurs." Mr. Briski offered no answer.

On Monday, April 24, Mr. Adams called Mr. Briski who stated that the parties had signed

an agreement which the Organization would not change. According to Mr. Adams' undenied statement, Mr. Briski also stated that he had been waiting for Mr. Adams to make an error so that he could take advantage of it.

Carrier contends that no agreement resulted on April 21, because there was no meeting of the minds. Carrier never intended to agree to a provision precluding it from requiring road switchers to handle propane cars or spot powder spurs. Rather, it intended to preclude conductor-only crews from performing such tasks.

Whether a meeting of the minds resulted, however, is not judged by the parties' subjective state of mind. Rather, it is evaluated by an objective approach. That is, the relevant question is not whether subjectively Carrier intended to be bound but rather whether, judged objectively, a reasonable party in the position of the Organization would have concluded that Carrier manifested an intent to be bound by the proffered language.

The Organization invited Carrier to make a proposal comparable to the UTU resolution. Carrier drafted and presented the document containing Section 2. Section 2, as presented, made sense: that is, even with the restriction, there were tasks that interdivisional road switchers could perform. The Organization's representatives signed and Carrier's representative initialed the document expressly indicating their acceptance: that is, they initialed and signed immediately under the statement "Accepted for" followed by the names of their respective principals. Thereafter, Carrier's representative notified the Neutral Chair of this Board that an agreement had been reached and that there was no further need for the hearing that was scheduled for the following Tuesday. Viewed objectively, Carrier manifested an intent to be bound by the agreement, including Section 2 as presented in the document.

Nevertheless, Carrier maintains that the agreement was void. Carrier gave the Organization prompt notice of its position in its letter of April 25, 1995. Carrier contends that the mistake voided the agreement.

Courts have rescinded agreements when faced with mutual mistakes of facts that were material to the contract. The instant case, however, does not present an instance of a mutual mistake of facts. Rather, it presents a case of a unilateral mistake by Carrier in the language of its proposal.

A unilateral mistake in language generally is not a ground for recission unless the other party knew or should have known of the mistake. Accordingly, we review the record to determine whether there is evidence that the Organization knew or should have known of Carrier's mistake. Of course, as in any case involving recission, the burden of proof is on the party seeking recission.

Carrier's mistake was in deleting more words than it intended to when editing Section 2 of the UTU document. However, because Carrier retyped the document before presenting it to the Organization and because the document as actually drafted made sense, there was nothing in

the document to place the Organization on notice of Carrier's mistake. Furthermore, although the Organization had invited Carrier to make a proposal comparable to the resolution with the UTU, there is no evidence in the record reflecting that the Organization actually knew of the terms of the UTU document, particularly the terms of Section 2 of the UTU document.

We cannot say that Mr. Briski's reaction on Sunday, April 23 when Mr. Adams told him of the mistake evidences Organization knowledge of the mistake. Mr. Briski, in the words of Mr. Adams' statement, "offered no recognizable answer." This is of no particular probative value. Certainly, if Mr. Briski was unaware of the mistake and believed that the parties had an agreement on the terms specified, he would have been startled by Mr. Adams' revelation and might well have not known what to say in response. Mr. Briski's statement the following day that he had been waiting for Mr. Adams to make a mistake so he could take advantage of it was tactless and completely inappropriate. However, it does not evidence that he knew of the mistake at the time he signed the agreement; it is equally consistent with his learning of the mistake for the first time when Mr. Adams revealed it on Sunday.

As the dispute over whether there was a binding agreement developed, Carrier sought to reconvene this Board to resolve that dispute. The Organization objected to the Board's jurisdiction over that issue and represented that it was pressing claims over violation of the agreement which would be resolved by a public law board or the National Railroad Adjustment Board. That representation led Neutral Chair Harris to hold that this Board would not determine whether there was a binding agreement. Thereafter, the Organization failed to process the claims through to a public law board that the parties had agreed to establish. The Organization did so knowing that Carrier wanted to have the dispute resolved in whatever forum would resolve it, i.e. public law board or this Board. The Organization's actions were uncooperative and may also have been inappropriate. However, they do not manifest knowledge of the mistake at the time the agreement was reached.

The 1986 National Agreement allowed Carrier to establish road switchers on a trial basis pending the reaching of agreement or the outcome of arbitration proceedings, provided that they not operate through home terminals. Carrier has run interdivisional road switchers and taken the position that there is no agreement and it is running these assignments on a trial basis. By letter dated December 4, 1996, Mr. Briski objected to such runs through Biwabik, arguing that Biwabik was a home terminal. Carrier contends that in so doing Mr. Briski recognized that there was no agreement in effect.

Carrier's argument, however, reads the Organization's contention concerning home terminals out of context. By letter dated August 3, 1996, the Organization challenged Carrier to explain how it could assign any interdivisional road switchers without a binding agreement. Carrier responded by letter dated August 13, 1996, that it was running those assignments on a trial basis. Mr. Briski's December 4, 1996, letter stated:

> Carrier signed agreement between the BLE (Missabe and Iron Range) (sic) after it was signed the carrier stated that they would not honor the agreement. Carrier, then

implemented the ID Road Switcher between the Iron Range and Missabe Divisions. stating that these runs do not run through a home terminal. but as anyone can see carrier agreed that the ID Road Switcher did run through a home terminal.

Thus. on its face. the letter of December 4. 1996, did not evidence Organization recognition that there was no agreement or abandonment of its position that there was an agreement. Rather. the Organization took the further position that even under Carrier's view that there was no agreement. Carrier did not have the right to implement the assignments because they ran through a home terminal.

We have searched the record thoroughly. We can find no evidence that supports Carrier's claim for recission of the agreement. As developed previously. we have also found that the parties entered into a binding agreement on April 21. 1995. Accordingly. we answer question 1 in the affirmative. There is no need to consider Question 2.

AWARD

Question 1 is answered in the affirmative.

Martin H. Malin. Chairman

M. S. Anderson
Carrier Member

J. A. Cassidy
Employee Member

Dated at Chicago. Illinois, November 27. 2001.