SPECIAL BOARD OF ADJUSTMENT NO. 880

Award No. 78

Case No. 78

PARTIES TO THE DISPUTE:

Consolidated Rail Corporation

and

American Train Dispatchers Association

QUESTION AT ISSUE

1. Did Conrail violate Section 3-G-1 of the applicable Collective Bargaining Agreement and the 3R Act when it consolidated and transferred train dispatching districts, abolished train dispatching positions, and consequently displaced three train dispatchers without giving thirty (30) days advance written notice and without first agreeing in writing as to how the seniority of the adversely affected train dispatchers would be adjusted.

2. Did Section 503 of the 3R Act authorize Conrail without penalty to take this unilateral action in violation of the parties' agreement where the provisions of the 3R Act and the Railway Labor Act obligate Conrail to comply with existing labor agreements.

3. Do the circumstances presented here justify an award of interest on the claims of the three displaced train dispatchers which Conrail has refused to pay for an extended period of time.

OPINION OF THE BOARD

In late 1976 the Carrier made certain decisions regarding abolishment of positions or "desks" and in early 1977 the "C Desk" at Altoona, Pennsylvania, was abolished and the work was transferred to the "D Desk". This action resulted in displacement of three train dispatchers. Although the three Claimants continued to work after the transfer, the Organization asserts that the pertinent provisions of the controlling Collective Bargaining Agreement were ignored and consequently certain damages are due to the Claimants under the provisions of the Collective Bargaining Agreement.

Since the Organization contends that Section 504(a) of the RRR Act requires the Carrier to "assume and apply" all obligations under "existing Collective Bargaining Agreements," the Employees submitted claims alleging a violation of Section 3-G-1 of the allegedly controlling agreement which states that:

"3-G-1. SENIORITY AND DISPATCHING DISTRICTS — merged or separated. When seniority or dispatching districts or parts thereof are merged or separated, not less than thirty (30) days advance notice thereof will be given, in writing, by the Manager of Labor Relations to the General Chairman, and the manner in which the seniority of Train Disptachers affected is to be exercised shall be adjusted by agreement, in writing, between the General Chairman and the Manager of Labor Relations." (Effective 1960)

Subsequent to handling of the dispute on the property the three claims were submitted to the Third Division of the National Railroad Adjustment Board where the cases were docketed separately and were ultimately submitted to Neutral Referees. Two of the cases were submitted to Referee Mangam, whereas the third dispute was submitted to the undersigned who, at that time, sat with the Third Division as a Referee. In each case, the Carrier argued that the Third Division lacked jurisdiction because the dispute was properly submittable under Title V of the RRR Act and accordingly, this special Board 880 had exclusive jurisdiction over the disputes. Additionally, the Carrier denied that it had violated the Agreement. In any event, it urged that (even assuming a violation, Section 3-G-1 of the Agreement) the obligation was superseded by Section 503 of the RRR Act.

On February 18, 1981 Referee Mangam and the Third Division determined that Conrail violated the Agreement and essentially the Board rejected each of Conrail's defenses, including the jurisdictional defense. Nonetheless, in the third case, the Railroad Adjustment Board, with the undersigned sitting as Referee, decided that the Carrier's defense based upon Section 503 of the RRR Act converted the case into a Title V dispute and the Board concluded that Special Board 880 had the sole jurisdiction over the dispute. The Claim on behalf of the Employee was dismissed on jurisdictional grounds. Obviously, under those circumstances, the Board did not reach the merits of the dispute (See Third Division Awards 23174, 23175 and 23193.

The Carrier sued in United States District Court for the Eastern District of Pennsylvania seeking to set aside the NRAB decisions in Third Division Awards 23174 and

23175 on the jurisdictional question. The Organization submitted a counterclaim requesting the Court to set aside Award 23193 on jurisdictional grounds.

The District Court held that exclusive jurisdiction rested with this Board 880 and it issued a consistent opinion. On appeal, the United States Court of Appeals for the Third Circuit affirmed the District Court's decision.

Ultimately all three claims have been presented to this Board and are now properly before us for final resolution of the matter.

The Organization has set forth the basic work schedules and controlling actions upon which the claim is based and has asserted that the Carrier failed to give a required 30-day notice and failed to enter into an Agreement with the General Chairman which is mandated by Section 3-G-1. Moreover, the Organization has set forth, in detail, the positions held by the Claimants prior to the transfer and the positions worked subsequent thereto and it bases its request for damages upon the alteration in schedule and cited provisions of the Agreement which assertedly require additional payments.

In Third Division Awards 23174 and 23175 the Referee concluded that Conrail breached Section 3-G-1 of the Agreement, concluding that the initial notice given to dispose of the remaining territory on "Desk C" was set forth in a notice of January 21, 1977 which was timely answered by the Organization. Since there was no meeting of the parties or any agreement in writing reached between them as to the disposition of the remaining territory on Desk C, the Referee concluded that the Agreement was violated. Although the Organization concedes that the Awards were set aside on technical jurisdictional grounds it urges that ". . . the findings of the NRAB should be accorded considerable weight." (See footnote 6, p 17 of ATDA's Submission.) Moreover, in the District Court proceedings we find a citation that ". . .Conrail admits that the reorganiation was effectuated without the thirty (30) day notice to ATDA required under the Collective Bargaining Agreement. Nor was a written agreement reached between the parties with regard to the seniority of the affected Employees, also a requirement of the Agreement." (See Exhibit No. 5.)

The Organization argues that "In view of this Admission, Conrail is estopped or precluded from now making the inconsistent contention that it did not contravene Section 3-G-1" (See page 18 ATDA's Submission.)

The Organization argues that the Employees were "improperly ousted from their jobs when they were forced to fill positions which required work on days which had previously been rest days, required them to work on shifts other than the ones they had worked on their former jobs and prevented them from working on the days they had normally worked under their previously assigned positions. (See page 19 et seq of the Organization's submission.)

The Organization recognizes the existence of Rule 7-B-1 of the Agreement but it argues that the limitations of that section deal on a "day-to-day" basis and not on a cumulative basis. Finally, the Organization seeks an Award of interest on damages due.

Notwithstanding the assertions of the Third Division on the merits of the case as well as the claimed admission cited by the District Court, the Carrier denies that it violated Section 3-G-1 of the Agreement. But, in any event, the Organization argues that Section 503 of the RRR Act controls in this case. Section 503 states:

> "Assignment of Work Section 503. The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this act from a railroad in reorganization to any location, facility, or position on its system providedit does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, orconsolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of Section 508 of this title." (Effective 1973)

The Carrier argues that Section 503 specifically grants Conrail the right to reassign work to any position on its system, with two restrictions or conditions which are not applicable here. Thus, argues the Carrier, when the current activity took place the only viable requirement was an obligation to comply with Section 503. (See also Paragraph C of the implementing agreement of August 21, 1975:

> "When work is consolidated under the provisions of Section 503 of the Regional Rail Reorganization Act of 1973 an equity of work between separate seniority districts will be agreed to between the parties."

Prior to a consideration of the Carrier's position concerning the question of damages, we feel it appropriate to contemplate the legal defenses raised to the assertion of a contractual violation, and whether or not Section 503 of the RRR Act permitted the action even if it constituted a violation of the Agreement.

We have reviewed the record at length and have reached an independent determination that, in fact, the provisions of Section 3-G-1 were violated. Obviously, there is no resulting agreement and we find that the notice requirements were not satisfied as mandated by the Agreement. Although the Decisions expressed in Third Division Awards 23274 and 23175 similarly noted a violation, since the disputes were not properly there, the determinations are not binding upon the undersigned nor are they automatically controlling. Nonetheless, those findings are consistent with our independent determination of the violation made herein and, of course, are also consistent with the Order of the U. S. Court for the Eastern District of Pennsylvania. (See Exhibit No. 5).

Accordingly, we will now contemplate whether or not Section 503 of the Act permits the Carrier, in a case such as this, to ignore Collective Bargaining obligations.

The preceding Court determinations in this case do not assist us in that regard and in fact, the United States Court of Appeals for the Third Circuit specifically noted at page 5 of its Award that "the characterization of the claims as primarily involving Title V or the Labor Agreement implies nothing as to the merits, . . . " (See Exhibit VI.)

While an independent reading of Section 503 might tend to support the conclusions expressed by the Carrier herein, we do not have that luxury since we cannot ignore other provisions of the statute. We note that Section 502(a) of the RRR Act made the Carrier "subject to the provisions of the Railway Labor Act." However, of paramount significance is Section 504(a) of the statute:

> Congress mandated - "Until completion of the agreements provided for under subsection (d) of this section (8) the Corporation (Conrail) shall, as though an original party thereto, assume and apply on the particular lines, properties or facilities acquired all obligations under existing collective-bargaining agreements covering all crafts and classes employed thereon. . . ". (underscoring supplied)

Conrail asks the question of what Section 503 means if it does not permit the action taken in this case without reference to Section 3-G-1 of the Agreement. We may reply by asking a similar rhetorical question of the meaning of Section 504 since it imposes an obligation to assume and apply all contractual obligations of Collective Bargaining Agreements with certain exceptions not here applicable.

Both parties have urged that Award No. 30 of this Special Board is persuasive to the results sought. While certainly that dispute contemplated a particular set of circumstances which generated the dispute, it should be recalled that the Board stated that it was ". . . quite mindful of the requirements of Section 504(a) of the Act. . . and we have similarly been concerned with the provisions of the Railway Labor Act . . . " The Board noted that in order to sustain the Carrier's contention in Case No. 30, the Board must be convinced that Congress intended that Section 503 was intended to supercede and/or repeal certain cited requirements. The fact that the Board found that the Carrier did not have certain rights is indicative of the conclusion that the Board reached that Section 503 does not supercede the obligations of various Collective Bargaining Agreements. We determine that the Carrier was required to apply the mandates of Section 3-G-1 and its failure to do so resulted in a breach.

As noted above, the Organization seeks a rather extensive Award of damages and contemplates a significant payment to each Claimant far beyond that which the Claimants actually received and, as we review the evidence, far beyond that which the Claimants could have earned had they continued working their original desks.

Of course, the Carrier disputes the amount of damages and notes various aspects such as exercise of displacement rights under Section 3-F-1 and the fact that the Employees did not fill temporary positions. Further, as a practical matter the Carrier insists that the Employees have not been aggrieved. The A-Major thrust of the Carrier's argument however is Rule 7-B-1(a) which states:

> "Any adjustment growing out of claims covered by this Regulation (7-B-1) shall not exceed in amount the difference between the amounts actually paid to the claimant by the Company, and the amount he would have been paid by the Company if he had been properly dealt with under this Agreement. When a Train Dispatcher is improperly removed or withheld from the amount due him under this paragraph his outside earnings will be taken into consideration."

The Carrier argues that said section places a limitation on monetary claims and thus there must be a limitation of the amount due to the difference between the amount actually paid and the amount that would have been paid during the claim period. (See for example Third Division Award 19750.)

The Organization asserts that the Carrier has violated the Agreement and there should never be a violation without a remedy. Thus, the Organization argues that there should be a "day-by-day" setoff and not a total setoff.

The undersigned cannot agree with the Organization's contentions in this regard. Certainly, there is a long line of arbitration authority which agrees with the Organization's contention that violations should be remedied and the author of this Award has not, in the past, been reluctant to remedy established breaches. However, the Organization may tend to lose sight of the fact that there is specific contractual

language involved in the same Agreement which contains the contractual obligation that was violated. That language is rather clear in its application. We find nothing in the language, or any outside authority, which compels us to view the difference in a "day-by-day" context especially since the language is an attempt to limit the amount of liability to the Company. In the normal mitigation of damage situation, one does not contemplate a "day-by-day" setoff but rather contemplates the entire amount of money received as a setoff against the wages lost. Awards 23174 and 23175 of the Third Division sustained the claims "as provided in 7-B-1 of the Agreement." While the record is not entirely clear as to the intent of the author in that regard, the Award, en toto, suggests that there was to be a limitation on liability as suggested by the Carrier.

We will sustain the claim, however, the appropriate setoffs of Section 7-B-1 shall be applicable as stated in this Opinion.

AWARD

Item 1 of the Question at Issue is answered in the affirmative. Item 2 of the Question at Issue is answered in the negative. The Claimants shall be reimbursed for the difference in the amounts they would have earned and the amounts actually received during the claimed period. We see no basis for an Award of interest on the claims and accordingly Question at Issue No. 3 is answered in the negative.

Joseph A. Sickles
Chairman and Neutral Member

W. M. McCain
W. M. McCain, Carrier Member

M. A. Schwartz
M. A. Schwartz, Organization Member

John Raybuck
John Raybuck, Carrier Member

R. E. Johnson President BTDA
By Dissent
R. E. Johnson, Organization Member

5-14-86
Date