

NATIONAL MEDIATION
BOARD

APR 24 9 49 AM '90

ADJUSTMENT BOARD

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 978

Award No. 1-A

March 20, 1990

Referee Fred Blackwell

Labor Members: J. J. Parry (BRC) Carrier Members: G. F. Bent
G. Leitz (TWU) J. H. Burton

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND
CANADA, DIVISION OF TRANSPORTATION COMMUNICATIONS UNION
(BRC)

and

CONSOLIDATED RAIL CORPORATION

TRANSPORTATION WORKERS UNION OF AMERICA (TWU)
Third Party in Interest

APPEARANCES

For the BRC:

Mr. James L. Highsaw, Esq.

For the Carrier:

Mr. Jeffrey H. Burton, Esq.

For the TWU:

Mr. Malcolm A. Goldstein, Esq.

OPINION

QUESTION PRESENTED?

The question presented in this matter is whether Conrail violated the provisions of Section 706(a) of the Northeast Rail Service Act of 1981 (NERSA) by Conrail actions taken from 1981 through 1983 of abolishing Carmen positions at several locations

on Conrail property and transferring¹ Carmen work from those locations to other locations on Conrail property without negotiating an agreement with the Brotherhood of Railway Carmen of United States and Canada (BRC) which permitted the involved Employees to "follow their work"?

NATURE OF DISPUTE

This is a Third Party dispute wherein the Transport Workers Union of America (TWU), is a Third Party in interest to the claims and protests filed by the BRC. The TWU, after being duly notified of such Third Party interest, participated fully in this proceeding by submitting written submissions and oral argument to the Board.

The herein dispute involves several claims and protests which were filed on behalf of Employees represented by the BRC in respect to Conrail's actions from 1981 to 1983 relating to the abolishment of Carmen's positions at former Erie Lackawanna facilities which were shut down and the reassignment of work from those facilities to other Conrail yards.

In its protest of these transfers of Carmen's work, the BRC requested and demanded that such transfers not be made until Conrail and the BRC negotiated an agreement permitting the involved Employees to "follow their work", which BRC contended that Con-

¹ The pertinent details of these transfers are reflected in the parties' Joint Statement of Agreed Upon Facts and Joint Exhibits, attached hereto as Appendix "B", paragraphs 1 - 29.

rail was required to do by the provisions of Section 706(a) of NERSA. Conrail refused to comply with the BRC request for an agreement, contending that Section 706(a) of NERSA was not applicable to the work transfers in question.

The parties have considered this dispute on the property without resolving same, and this case resulted.

* * * * *

At a pre-hearing meeting of the Board on November 18, 1988, Conrail lodged procedural objections to the April 27, 1988 subject statement submitted by the BRC. Subsequently, by Opinion and Award dated April 4, 1989, and included herein as Appendix "A", the undersigned Neutral found the Conrail objections not supported by the record and denied same.

The parties' submissions on the merits of the case were submitted to the Board as now indicated.

04-27-88	BRC's Subject Statement/James Highsaw
03-31-89	Conrail's Initial Submission/Jeffrey Burton
03-31-89	BRC's Initial Submission/James Highsaw
03-31-89	TWU's Initial Submission/Malcolm Goldstein
04-27-89	Conrail's Rebuttal Brief/Jeffrey Burton
04-27-89	BRC's Rebuttal Brief/James Highsaw
04-28-89	TWU's Reply Submission/Malcolm Goldstein

The parties made arguments on the case on May 17, 1989, whereupon, the record on the case was closed.

POSITION OF THE PARTIES

BRC

The position of the BRC is that the language of Section 706(a) of NERSA required Conrail to negotiate "follow their work" agreements in behalf of the Employees who held Carmen jobs that were abolished by Conrail at the yards which Conrail shut down and from which carmen work was transferred to other locations; that Conrail failed and refused to negotiate such agreements; that Conrail's February 2, 1983 proposed agreement to the TWU and BRC, and the parties' March 22, 1983 meeting thereon, did not satisfy Conrail's Section 706 (a) obligation to negotiate "follow their work" agreements; and that in consequence, Conrail should be required to restore the abolished jobs, or in the alternative, that Conrail should be required to negotiate the required "follow their work" agreements with the BRC and compensate BRC Employees for all time lost as a result of Conrail's failure to negotiate said agreements.

Conrail

The position of Conrail is that because the Conrail actions in dispute in this case were permitted by the Single Agreement with the TWU and the BRC, effective September 1, 1977, such actions did not constitute the exercise of authority by Conrail provided by Section 706(a) of NERSA and Conrail therefore had no obligation to negotiate a "follow their work" agreement provided by the last sentence of such section.

Conrail says further that it attempted to negotiate a "follow their work" agreement, although not required to do so by Section 706(a) of NERSA; that such attempt is evidenced by Conrail's proposal February 2, 1983 proposal of a "follow their work" agreement to the joint representative of the Carmen craft, the TWU and the TWU, which proposal was the subject of a March 22, 1983 meeting of the parties; and that the joint representative did not accept Conrail's proposal, nor provide any counter proposal or alternative agreement for Conrail's consideration.

TWU

The position of the TWU is that if Conrail had the duty "to negotiate a "follow their work" agreement as contended by BRC, Conrail's February 2, 1983 letter of an agreement and the March 22, 1983 meeting of the parties on such agreement, discharged such obligation fully; and that since the Conrail single agreement with the TWU and the BRC, effective September 1, 1977, contains no prohibition concerning Conrail's right to move work from one location to another, Conrail had no need to consult with the TWU and the BRC about the transfers of work involved in the herein dispute and thus had no need to exercise the transfer of work authority specified by Section 706(a) of NERSA.

FINDINGS AND DISCUSSION

It is found on the record as a whole that Conrail was permitted and empowered under the single agreement between Conrail

and the TWU and the BRC, effective September 1, 1977, to make the work transfers in dispute in this case without restriction; that such work transfers were not made by Conrail by virtue of the statutory authority found in Section 706(a) of the Northeast Rail Service Act of 1981; and, therefore, that the language of Section 706(a) of NERSA, and the therein requirement on Conrail to negotiate "follow their work" agreements, was not applicable to the disputed transfers.²

Consequently, the question presented in this case will be answered "No".

* * * * *

The statutory text which must be construed to determine the outcome of this dispute is found in Section 706(a) of the Northeast Rail Service Act of 1981.

"Section 706(a)

With respect to any craft or class of employees not covered by a collective bargaining agreement that provides for a process substantially equivalent to that provided for in this section, 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

² Although the herein dispute is disposed of by these findings, it is appropriate to note that if, as suggested by the BRC, Conrail gained an advantage by not negotiating with the BRC separately and by insisting on dealing with both the TWU and the BRC as the joint representative of the Carmen, this is a matter which would not warrant a remedy except in highly unusual circumstances of a kind which are not present in this case.

railroad in reorganization to any location, facility, on its system if it does not remove such work from coverage of a collective bargaining agreement and does not impinge upon the existing classification of work rights of any craft or class of employees at a location or facility to which such work is assigned, allocated, reassigned, reallocated, or consolidated. Prior to the exercise of authority under this subsection, the Corporation shall negotiate an agreement with the representatives of the employees involved permitting such employees the right to follow their work."

The construction of this text urged by the BRC is expressed as follows at pages 12-13 of the BRC Submission.

"The language of Section 706(a) imposes two requirements with respect to the applicability of the 'follow their work' provision. These are (1) the Employees involved must not have available under their contract a process 'substantially equivalent' to a right 'to follow their work'; (2) the work of the Employees must be assigned, allocated, reassigned, reallocated and/or consolidated, i.e. transferred. If these conditions are present, Conrail is, by the specific language of Section 706(a), under an express statutory mandate to negotiate a 'follow their' work agreement with the representative of the Employees involved prior to its actions."

Conrail's construction of the provisions in Sec 706(a) of NERSA is that the section made a statutory grant of authority to Conrail to consolidate and transfer work in addition to the authority already possessed by Conrail under the Single Collective Agreement with both Organizations, the TWU and the BRC, as the

joint representative of Conrail Carmen, effective September 1, 1977; and that the statutory requirement provided by such Section 706(a) does not apply except when Conrail transfers work pursuant to the Section 706(a) grant of authority.

Conrail further submits that its Single Agreement with the TWU and the BRC did not restrict or impose any conditions on Conrail's power to make the disputed transfers of work, Conrail made the disputed transfers by virtue of that Agreement, and not by virtue of the language in Section 706(a) of NERSA; and that since the statutory authority granted by such Section 706(a) had no role in the transfers, the language of such Section, and its requirement respecting "follow their work" agreements, was not applicable to the disputed transfers.³

After careful study of these conflicting interpretations of the subject statutory text, in light of the record as a whole, it is concluded that the Conrail construction of Section 706(a), as applied to the facts at hand, is correct and that the BRC construction is not.

It is further found that Conrail was permitted and empowered under the Single Agreement between Conrail and the TWU and the BRC, effective September 1, 1977, to make the disputed transfers of work without restriction and without obligation to negotiate a "follow their work" agreement; accordingly, the disputed

³ TWU concurs with this construction.

transfers were made by Conrail independently of the transfer authority granted by Section 706(a) of NERSA and consequently, Conrail had no obligation to negotiate a Section 706(a) "follow their work" agreement as contended by the BRC.

The basic flaw in the interpretation offered by BRC is found in the BRC statement that the language of Section 706(a) provides that if the employees involved do not have available under their contract a process "substantially equivalent" to a right "to follow their work"⁴ Conrail is obligated to negotiate a Section 706 (a) "follow their work" agreement with the representative of the Employees. This suggested interpretation is patently "at odds with the plain language of the statutory text in question and hence, is unacceptable.

Nowhere in the text of Section 706 (a) is there any indication that the intent of the statutory language is to create for collective bargaining contracts which do not have one, a right of Employees to a "follow their work" agreement when contractually permitted transfers of work occur. Further, the second sentence of subsection (a) of Section 706, which creates the Employees' right to an agreement "to follow their work," plainly connects the right to such an agreement to the fact of Conrail's "exercise of authority under this subsection." Since the "subsection" referred

⁴ This is one of two requirements cited at page 12 of the BRC Submission; the other requirement is not pertinent to this analysis.

to here can only mean subsection (a) of Section 706 of NERSA, and since the "authority" spoken of in the quoted text can only refer to the authority found in the first sentence of said subsection (a) of Section 706, it is inescapable that the intent of subsection (a) of Section 706 is that the fact of Conrail's use of the subsection's authority to effect a transfer of work is a condition precedent which must be fulfilled, before the Employees' right to a "follow their work" agreement right provided by the second sentence of the subsection, becomes applicable.

Section 706(a) is thus construed to mean that the Employees' right to a "follow their work" agreement provided by the second sentence of the subsection is applicable to transfers of work made by Conrail when and only when Conrail effectuates the transfers of work by the "exercise or authority under this subsection", which authority is provided by the first sentence of the subsection (a) of Section 706.

The final consequence of this construction is that the clear, unambiguous text of the second sentence of Section 706(a) tells one that Conrail authority to consolidate and transfer work which is not provided by Section 706(a) is unrelated to the Section 706(a) Employees' right to a "follow their work" agreement; and since Conrail's 1977 Single Agreement with the TWU and the BRC permitted the herein disputed work transfers to be made independently of the Section 706(a) authority, the disputed transfers do not come within the purview of Section 706 and hence Conrail was

not obligated to negotiate a "follow the work" agreement as contended by the BRC.

An additional consideration negating the BRC interpretation is presented in the opening clause of the first sentence of Section 706(a). This clause, by its reference to employees not covered by an agreement providing a "process substantially equivalent to that provided for in this section," sets out a condition precedent which must be met before such first sentence becomes applicable. The "process" referred to in the opening clause is comprised of the Conrail right to move work from one Conrail location to another and of the employees right to have such work not removed from a collective bargaining agreement and not impinge upon the rights of any class of Employees at the location to which moved. The verbiage in the first sentence which describes this "process" begins and ends in the first sentence of Section 706(a); it does not connect with the second sentence of such Section in a manner which allows the "process" to be read as embracing the right to "follow the work" agreement created by such second sentence.

In consequence, if Conrail uses the Section 706(a) grant of authority to effect transfers of work on its system, Conrail is bound by the second sentence of such Section to negotiate a "follow their work" agreement with the involved employees. If Conrail effects transfers of work under collective bargaining agreements, independently of this statutory grant of authority, the statutory text in question has no application to or bearing on such trans-

fers.

More specifically, the condition precedent in the opening clause of the first sentence of Section 706(a), and the "process" defined in such first sentence, are separate and distinct from the right to a "follow their work" agreement created by the second sentence of such Section; and since the condition precedent was not met in this case because the work transfers were permissive under Conrail's Single Agreement with the TWU and the BRC, the second sentence of such Section did not become applicable and binding on Conrail. Consequently, the BRC contention concerning the meaning of Section 706(a) is found unpersuasive and the Board therefore rejects the BRC contention that the "language of Section 706(a) requires that Conrail, prior to any work assignment, allocation, reassignment, reallocation and consolidation of work to any location or facility on its system (i.e., work transfer) negotiate with 'the representatives of the employees involved an agreement permitting such employees the right to follow their work.'" (BRC Submission - page 12)

AWARD:

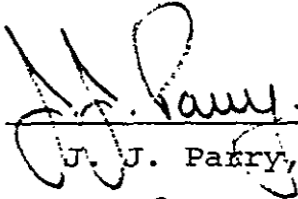
The answer to the "Question Presented" in this case is "No."

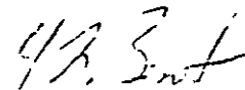
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 978.

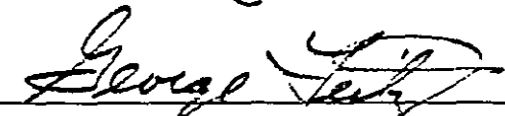


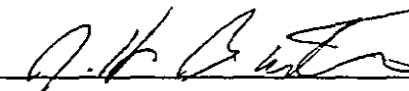
Fred Blackwell

Chairman Neutral/Special Board of Adjustment No. 978

 - DISSENTING
J. J. Paery, BRC Member


G. F. Bent, Carrier Member


George Leitz, TWU Member


J. H. Burton, Carrier Member

March 20, 1990

Conrail\978\Award.320