

The Second Division consisted of the regular members and in addition Referee Robert A. Franden when award was rendered.

Parties to Dispute: (International Association of Machinists
(and Aerospace Workers
(
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Norfolk and Western Railway Company violated the controlling Agreements when it furloughed Machinist W. B. Holliman effective at the close of business on Friday, February 28, 1975 without merger protection.
2. That accordingly the Norfolk and Western Railway Company be ordered to compensate Machinist W. B. Holliman an amount equal to the difference between actual earnings, if any, and the amount he would have received if fully employed at his current, protected rate of pay of machinist as well as be made whole for all other losses resulting from the improper furlough.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Carrier is the surviving party of a merger that became effective October 16, 1964. Pursuant to those provisions of the Interstate Commerce Act which relate to protecting the interests of employees the parties entered into a stipulation which provided that the agreement between the parties dated January 10, 1962, shall be applied for the protection of the employees should the merger be approved by the Interstate Commerce Commission.

Section 1 (d) of the agreement dated January 10, 1962, provides as follows:

"For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement is deleted and the following provision inserted in lieu thereof:

In the event any dispute or controversy arises between Norfolk & Western and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 11 thereof) or of any implementing agreement entered into between Norfolk & Western and individual organizations which are parties hereto pertaining to the said merger or related transactions, which cannot be settled by Norfolk & Western and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select one member of the arbitration committee and the two members thus chosen shall endeavor to select a third member who shall serve as chairman, in which event the compensation and expenses of the chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the two members be unable to agree upon the appointment of the third member within ten days, either party may request the National Mediation Board to appoint the third member, whose compensation and expenses shall then be paid in accordance with existing law. The decision of the majority of the arbitration committee shall be final and binding."

The claimant herein is claiming protection under the January 10, 1962, agreement and the October 16, 1964, implementing agreement. The claimant progressed his claim on the property and having been unsatisfied by the response of the carrier has appealed to this board.

The carrier has raised many issues in defense but at the outset challenges the forum to which the matter has been appealed. It is the carrier's contention that the arbitration provisions of the January 10, 1962, agreement are binding and that this board is without jurisdiction to hear the matter.

Various divisions of this board, along with certain public law boards, have properly held that when merger protection agreements such as those involved herein provide a mechanism for the appeal of disputes relating to the interpretation or application of said agreements this board is not the proper form of appeal.

Form 1
Page 3

Award No. 7353
Docket No. 7250
2-N&W-MA-'77

The word "may" as used in the January 10, 1962, agreement is permissive only as to the right to appeal and not as to forum. See awards 20764, 19055 (3rd division) 6641 and 6534 (2nd division) and award #34 PL Board 1790 among others.

We will dismiss the case.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of September, 1977.