



NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

In the Matter of the  
Application of the

TRANSPORTATION COMMUNICATIONS  
INTERNATIONAL UNION

alleging a representation  
dispute pursuant to  
Section 2, Ninth, of the  
Railway Labor Act, as  
amended

involving employees of

Illinois & Midland  
Railroad, Inc.

25 NMB No. 34

NMB CASE NOS.  
R-6555 and R-6556

DENIAL OF  
RECONSIDERATION-  
PROCEDURAL &  
ELIGIBILITY  
RULINGS

December 23, 1997

On December 26, 1996, the Transportation Communications International Union (TCU) invoked the Board's Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions, or Consolidations in the Railroad Industry, 17 NMB 44 (1990) (Railroad Merger Procedures) and filed applications for investigation of representation disputes among Carmen and Clerical, Office, Station and Storehouse Employees employed by the Illinois & Midland Railroad, Inc. (IMRR).

On October 28, 1997, the Board found that TCU had properly invoked the Railroad Merger Procedures and found separate crafts or classes of Carmen and Clerical, Office, Station and Storehouse Employees, and authorized elections. Mediator Samuel J. Cognata was assigned to conduct the elections. On November 4, 1997, IMRR filed a Motion for Reconsideration, alleging that the Board's determination contains material errors of law and fact. On November 12, 1997, TCU filed a response opposing IMRR's Motion.

25 NMB No. 34

On November 18, 1997, the Board sent Notices of Election and Sample Ballots to the carrier and the organization. On November 25, 1997, the Board mailed ballots in these cases. The ballots are scheduled to be counted on December 23, 1997.

On December 1, 1997, IMRR challenged the Notices of Election and ballots sent to employees and indicated that it would not post the Notices of Election and sample ballots. On December 4, 1997, TCU filed a response noting that the Board's Representation Manual required that the Notices be posted.

Also on December 4, 1997, Mediator Cognata ruled, in accordance with the Board's October 28, 1997 determination, that only the two individuals listed as Carmen were eligible to vote in the election among Carmen. In accordance with that determination, Mediator Cognata also ruled eligible all individuals on the Official List of Eligible Voters for the craft or class of Clerical, Office, Station and Storehouse Employees.

Finally, Mediator Cognata ruled:

It is the Mediator's determination that the UTU, by its request that it not be listed on the ballot in the above cases, has expressed its desire not to continue to represent the employees in question. Therefore, they have not been listed on the ballot in these cases.

On December 8, 1997, the IMRR appealed Mediator Cognata's eligibility rulings as well as his ruling that UTU was not placed on the ballot at its own request. In that letter, the Carrier indicated that it had, pursuant to Mediator Cognata's instructions, posted the Notices of Elections and sample ballots. In its appeal, IMRR also reiterated the arguments included in its Motion for Reconsideration.

#### ISSUES

Did the Board commit material errors of law or fact which, upon reconsideration, merit dismissing

TCU's applications? Specifically, did the Board apply the Railroad Merger Procedures properly and, should IMRR's employees be included in a single craft or class? Should UTU be included on the Notices of Election and sample ballots?

#### CONTENTIONS

IMRR asks the Board to grant its Motion for Reconsideration, and upon reconsideration, to dismiss TCU's applications. IMRR asserts that the Board committed errors of law by improperly applying the Railroad Merger Procedures, and by treating TCU as an incumbent labor organization. IMRR also asserts that the Board made material errors of fact, according to the Carrier, by finding that "the employees at issue were not cross-trained or cross-utilized" and by "implicitly" finding that IMRR payroll codes reflect the actual work performed. IMRR submits additional evidence in support of its factual assertions. IMRR does not assert that the additional evidence was not available earlier.

In addition to its Motion for Reconsideration, the Carrier again raised the issue of whether its employees in the Carmen and Clerical Office Station and Storehouse Employees crafts or classes should be included in a system-wide craft or class. Finally, IMRR challenges the Board's ballot and Notice of Election because UTU, the organization voluntarily recognized by IMRR to represent all of its employees, was not included on the ballot or Notice of Election. In the event that the Board does not dismiss TCU's applications, the IMRR challenges Mediator Cognata's eligibility rulings because the carrier cross-utilizes its employees who are all represented in a single craft or class.

TCU asserts that IMRR's reliance on the Surface Transportation Board's (STB's) definition of a merger for Railway Labor Act purposes is misplaced. According to TCU, the Board properly treated TCU as an incumbent representative on the Chicago & Illinois Midland Railroad (CIM) because TCU represented the Clerks and Carmen on CIM immediately before IMRR acquired its assets. TCU also asserts that the Board's factual findings are supported by the record.

On January 8, 1997, the United Transportation Union (UTU) indicated that it did not wish to appear on the ballot. On December 17, 1997, UTU clarified that its initial letter was a disclaimer of interest in representing the crafts or classes of Clerical, Office, Station and Storehouse Employees and Carmen employed by IMRR.

FINDINGS OF LAW

Determination of the issues in this matter is governed by the Railway Labor Act, as amended, 45 U.S.C. § 151, et seq. Accordingly, the Board finds as follows:

I.

Illinois & Midland Railroad Company is a common carrier by rail as defined in 45 U.S.C. § 151.

II.

TCU and UTU are labor organizations and/or representatives as provided by 45 U.S.C. § 152, Ninth of the Act.

III.

45 U.S.C. § 152, Fourth, gives employees subject to its provisions, ". . . the right to organize and bargain collectively through representatives of their own choosing. The choice of the majority of any craft or class of employees shall be in the representative of the craft or class for purposes of this chapter."

IV.

45 U.S.C. § 152, Ninth, provides that the Board has the duty to investigate representation disputes and to designate who may participate as eligible voters in the event an election is required. In determining the choice of the majority of employees, the Board is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such a manner as shall insure the choice of representatives

by the employees without interference, influence or coercion exercised by the carrier. In the conduct of any election . . . the Board shall designate who may participate in the election and establish the rules to govern the election. . . ."

DISCUSSION

I.

Section 18.0 of the Board's Representation Manual provides that when the Board considers a Motion for Reconsideration:

[T]he NMB will decline to grant the relief sought absent a demonstration of material error of law or fact or under circumstances in which the NMB's exercise of discretion to modify the decision is important to the public interest. The mere reassertion of factual and legal arguments previously presented to the NMB will be insufficient to obtain relief. (Emphasis added.)

A.

IMRR asserts that the Board committed a material error of law when it found that TCU's applications were validly filed under the Railroad Merger Procedures. According to the IMRR, its transaction was not a merger requiring the approval of the STB pursuant to the ICC Termination Act of 1995, 49 U.S.C. § 11323. Rather, it acquired the assets of the CIM pursuant to 49 U.S.C. § 10901. IMRR bases its argument upon the literal definition of "merger" used by the STB, that is, "the acquisition of one company by another". The Carrier asserts that only the STB has the authority to determine whether a transaction is a merger and the Board exceeded its authority by making such a determination.

TCU asserts that IMRR's reliance on the STB's definition of a merger is misplaced. TCU argues that the Board, for RLA purposes, appropriately applied its own definition of a merger under the Railroad Merger Procedures.

There is no doubt that the acquisition of assets is a different transaction from the acquisition of an entire company, and that those transactions may be treated differently by the STB. However, under the Board's Railroad Merger Procedures, these transactions receive the same treatment for Railway Labor Act purposes. The Railroad Merger Procedures define a "merger" for Railway Labor Act purposes as "a consolidation, merger, purchase, lease, operating contract, acquisition of control or similar transaction." Railroad Merger Procedures, 17 NMB at 50.

The Board addressed the application of the Railroad Merger Procedures to IMRR's acquisition of CIM's assets in its initial determination. Illinois & Midland Railroad Company, 25 NMB 57, 63-64 (1997). IMRR's argument in this case is simply a refinement of its initial argument that the Railroad Merger Procedures do not apply to its acquisition of the assets of CIM. As such, IMRR's reassertion of its initial argument does not raise a material error of law or fact which would cause the Board to change its original determination. The Board reiterates its finding that IMRR's acquisition of the assets of CIM is a transaction covered by the Board's Railroad Merger Procedures for Railway Labor Act purposes. Pursuant to Section 18.0 of the Board's Representation Manual, the Board finds no material error of law in its application of the Railroad Merger Procedures. Therefore, the Board declines to alter its original determination that IMRR's acquisition of the assets of CIM is a transaction subject to the Board's Railroad Merger Procedures.

B.

IMRR also asserts that the Board committed a material error of law when it treated TCU as an incumbent on CIM for purposes of the Railroad Merger Procedures. According to the Carrier, since TCU never represented employees on IMRR, it can not be the incumbent. The Carrier reasons that, since it recognized UTU as the representative of all of its employees before it purchased CIM's assets, TCU has never represented IMRR's employees and, therefore, can not be an incumbent. According to IMRR, it had recognized UTU as the representative of all of its

employees and they are covered by a collective bargaining agreement. Therefore, IMRR argues, if TCU seeks to represent its employees, it must apply to do so pursuant to Section 2, Ninth of the Act, and must submit a showing of interest from a majority of employees.

TCU argues that, following the Carrier's logic, it could not have claimed the status of an incumbent for purposes of filing under the Railroad Merger Procedures even by virtue of its status as the bargaining representative of Clerks and Carmen on the predecessor carrier, CIM, even on the first day that IMRR began operations.

The Board reaffirms its determination that TCU, as the incumbent representative of Clerks and Carmen, on the CIM, the predecessor railroad, appropriately invoked the Board's Railroad Merger Procedures. The purpose of the Railroad Merger Procedures is to ensure that "mergers and acquisitions are not in derogation of employee rights under Section 2 of the Railway Labor Act." 17 NMB at 44. In creating the Railroad Merger Procedures, the Board recognized that mergers and other transactions can "lead to significant changes" which "affect the craft or class designations." 17 NMB at 45. In recognition of these changes, the Board provided labor organizations with alternate means to raise representation questions. The alternate means, included in Subpart B (4)(b) of the Railroad Merger Procedures, generally provide that the showing of interest requirement may be met with seniority or dues check off lists instead of authorization cards.<sup>1</sup>

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<sup>1</sup> In this case, the Board applied the Railroad Merger Procedures for showing of interest purposes. Showing of interest standards are for the Board's administrative purposes only. Wisconsin Central Transportation Corporation Railroads, 24 NMB 307, 317 (1997). They are not statutory or jurisdictional. Eastern Airlines, Inc./Continental Airlines, Inc. & Continental Airlines Holdings, Inc., 17 NMB 432, 436 (1990).



The Carrier does not dispute that TCU was the incumbent representative of Carmen and Clerical, Office, Station and Storehouse Employees on the CIM. Rather, it argues that its recognition of UTU on IMRR supercedes TCU's status as an incumbent on the predecessor railroad for purposes of the Railroad Merger Procedures. The Railroad Merger Procedures and their provision for alternate means of providing a showing of interest were created in part, to permit the Board to sort out the representation consequences of mergers and other transactions. The Carrier's recognition of UTU has no effect whatsoever on TCU's status as the incumbent representative on the predecessor railroad for purposes of TCU's ability to invoke the Railroad Merger Procedures.

For all of the reasons stated above, pursuant to Section 18.0 of the Representation Manual, the Board finds no material error of law or fact based upon TCU's application under the Railroad Merger Procedures. The Board declines to dismiss TCU's application based upon its status as the incumbent on the predecessor railroad.

### III.

IMRR also asserts that the Board committed material errors of fact when it found that Carmen and Clerical, Office, Station and Storehouse Employees were not cross-trained or cross-utilized because the Board also found that certain employees working in "Clerk" positions "handle inbound and outbound trains in the yard and handle switches and signals and perform dispatch work". The Carrier also asserts that the Board erred when it "implicitly" found that payroll codes were evidence of work performed. IMRR also challenges Mediator Cognata's eligibility rulings on essentially the same basis. The Carrier provided additional evidence in support of these assertions, but did not provide evidence or argument as to why it had been unable to provide this information when provided the opportunity initially.

TCU notes that the Board's findings were based upon all of the facts and circumstances, including the preponderance evidence submitted by the Carrier and upon the Mediator's interviews with employees.



In response to the Board's initial request for preponderance information, IMRR provided the Board with payroll records. However, IMRR did not provide the Board with the payroll codes necessary to interpret those records.<sup>2</sup> Nor did IMRR provide additional evidence supporting its assertion that its employees were cross-trained and cross utilized. Illinois & Midland Railroad, Inc., 25 NMB at 66. The Board will not now, in support of a Motion for Reconsideration, accept documentation which the Carrier failed to submit at the proper time.

The Board's finding, in its initial determination, that employees in the Clerical, Office, Station and Storehouse Employees craft or class "handle inbound and outbound trains in the yard and handle switches and signals and perform dispatch work" reflects work typically performed by individuals in that craft or class. As such, that finding does not materially conflict with the Board's finding, based upon the record in this case, that those employees are not materially cross-utilized with shop or operating employees.

Based upon the record in this case, the Board finds no material error of fact pursuant to Section 18.0 of the Representation Manual and declines to alter its factual findings. The Board finds that Mediator Cognata's eligibility rulings were in accordance with the Board's determination and IMRR's reiteration of its earlier arguments are insufficient grounds for overruling his rulings.

#### IV.

Additionally, in its December 1, 1997 challenges to Mediator Cognata and in its December 8, 1997 appeal of Mediator Cognata's determination, IMRR asks the Board to rerun the election and to order UTU to appear on the ballots and Notices of Election as the incumbent. The Carrier relies on the Board's policy, as stated in Pan American World Airways, 5 NMB 38, 43-44 (1967) that an incumbent labor organization may not

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<sup>2</sup> TCU provided the Board with the codes necessary to interpret the payroll records.


relinquish its right to appear on the ballot without relinquishing its representation rights.

On January 8, 1997, UTU expressed its initial request not to appear on the ballot. Throughout this proceeding, UTU has not asserted its status as an incumbent and has not attempted to represent the employees at issue before this Board. In response to IMRR's appeal, on December 17, 1997, UTU has clarified the intent of its initial letter. UTU has disclaimed its interest in representing IMRR's Carmen or Clerical Office Station and Storehouse Employees. Since UTU has relinquished its representation rights, the Board finds no reason to require UTU to appear on the Notices of Election or ballots.

CONCLUSION

For all of the reasons set forth above, the Board declines to grant dismiss the applications as requested by IMRR in its Motion for Reconsideration. Based upon its determination in Illinois & Midland Railroad, Inc., 25 NMB 57 (1997), the Board upholds Mediator Cognata's eligibility rulings. Finally, the Board declines to rerun the elections in these cases with UTU on the ballot as the incumbent. The counts will take place on December 23, 1997 as scheduled.

By direction of the NATIONAL MEDIATION BOARD.

  
Stephen E. Crable  
Chief of Staff