

Award No. 1960
Docket No. 1779
2-AT&SF-CM-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)**

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY (Eastern Lines)**

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the current agreement Carmen Helpers Joe E. Eads, Joe Fulton, H. J. Hickman, E. G. Moreno, E. B. Coleman, Pedro Ybarra, Paul Wargo, J. F. Epp, J. H. Williams, J. P. Martin, E. E. Roberts, S. A. Dunavant, A. G. Prichard, B. W. Cooper, N. Gumm, J. C. Hall, R. Vandermotten and M. Barkett were unjustly removed from the Carman Helper seniority roster and denied their seniority as such since January 25, 1954.

2. That accordingly the Carrier be ordered to:

- a) Restore these employees to the Carman Helper seniority roster with their proper Carman Helper seniority dates.
- b) Permit these Claimants to exercise their proper Carman Helpers' seniority rights over junior employees working in the classification of either Carmen Helpers or Upgraded Carmen Helpers.
- c) Make these employees whole by compensating them at the applicable rate for the difference in rate received and rate entitled to receive or for any loss suffered by them retroactive to January 25, 1954.

EMPLOYEES' STATEMENT OF FACTS: The employees whose names appear in the employees' claim above, and hereinafter referred to as the claimants, until January 25, 1954, were regularly employed, bulletined and assigned by the carrier at their West Wichita, Kansas, refrigerator car shop, assigned hours 8:00 A. M. to 12:00 Noon, 12:30 P. M. to 4:30 P. M., work week Monday through Friday, and assigned as upgraded carmen helpers working as carmen and receiving the carmen's rate of pay for that service. These claimants have all established carmen helpers' seniority in accordance with the current agreement and were placed on the carmen helpers' seniority roster by the carrier at the West Wichita Shops, each with a date as of the day he first performed carman helper work.

late seniority, until they have acquired four years of experience as helpers in the particular craft to which promoted . . ." (Emphasis supplied)

Look at the next paragraph, paragraph (i) of Memorandum of Agreement No. 4. The meat of that paragraph insofar as the instant dispute is concerned is this:

" . . . its (this paragraph) sole purpose is to preserve unimpaired the seniority rights of laborers and coach cleaners when selected to fill helpers' positions." (Emphasis supplied.)

These two quotations from Memorandum of Agreement No. 4 are not filled with ambiguity. They leave no doubt as to their meaning. Their lucidity is beyond question.

The position of the National Railroad Adjustment Board with respect to claims of this nature, that have absolutely no support in any agreement, is not cloaked in mystery nor is it susceptible to any doubt. Numerous awards bear out the principle so well stated in Third Division Award No. 6595 which contains the following:

"We find no uncertainty or ambiguity in these Sections of the Agreement. They appear to be the product of close negotiation down to points of considerable detail. To interject our notions of what is practical or reasonable would involve torturing plain language and interfering with the understandings of the parties as reduced in writing."

The Board has consistently held that the burden is upon the employees to show that the carrier has misapplied the agreement. The organization has made no attempt in the instant dispute to assume its proper burden. In Second Division Award No. 1655 there is found in the "Findings" of the Board this statement:

" . . . The burden is upon the employees to show that the Carrier misapplied the agreement. . . ."

See also, the "Findings" in Award Nos. 1595, 1599, 1608, 1609, 1610, 1611, 1613, 1614, 1615, 1616, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, all of which are Santa Fe awards, applying to one or the other of the four grand divisions of this carrier. These awards reflect the failure of the organization in the past to assume its proper burden of supplying proof, just as it is now doing in the instant dispute.

In conclusion, the carrier would point out that, **the Board is limited in its consideration of this dispute, to the interpretation and application of agreements as agreed to between the parties, without authority to add to, take from, or write rules for the parties.** See Third Division Award No. 5079 and numerous others.

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 employees 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.

The parties to said dispute were given due notice of hearing thereon.

This dispute arose at the carrier's Refrigerator Car Shop, West Wichita, Kansas, when force reductions brought the conflicting views of the parties into play.

Claimants contend that they were unjustly removed from the carmen helpers' seniority roster and denied their seniority as such since January 25, 1954. These employees were among a number of others who had been upgraded to carmen helpers from the laborers' ranks between the effective date of Memorandum Agreement No. 4, December 16, 1950, and June 11, 1953. They were reduced from carmen helpers to laborers by carrier in January, 1954.

It is carrier's contention that these employees were upgraded with the understanding, as provided by paragraph (h) of said Memorandum No. 4, that they would not immediately establish seniority as carmen helpers but would retain and accumulate seniority as laborers until they had acquired four years of experience as helpers. At that time, carrier asserts, and not until that time, they could elect to continue as helpers with dates on the carmen helpers' seniority roster as of the date first so assigned and forfeit all seniority previously acquired, or, return to the laborers' classification and forego any claim to helpers' seniority.

Contrary to its understanding, above expressed, of the operation of the upgrading plan and without authority, carrier states, its superintendent at this point afforded opportunity to the interested employees to exercise their option prior to the expiration of the four year period mentioned in the memorandum. Claimants took advantage of the proffered option and in writing sought to waive their rights as laborers and continue as helpers with seniority dates as such as of the dates assigned.

The employees contend, on the other hand, that the method outlined in Memorandum No. 4 is not the exclusive method for a laborer to relinquish his rights as a laborer and obtain seniority as a carman helper. It points to Rule 28(d) of the 1945 Agreement which provides that seniority shall start from the time the employee first performs actual service in the class or craft in which employed. It reviews the carrier's needs which prompted the negotiation of Memorandum No. 4. It then argues that the four year provision of Article (h) thereof was included simply to make it attractive for the laborers or coach cleaners, who did not want to take the chance of giving up their rights, as such, to take promotion to carmen helpers. It states that it was merely an added way for the carrier to use their experienced railroad forces on jobs which were required to be filled and was not intended to be the only way to effect a promotion.

First, we find that the carrier was in no way bound by the actions of its superintendent in implementing the plan in the manner now contended for by the organization. If the contract and agreements in fact provided to the contrary, such officer was not in a position to ignore and set those provisions aside. There is no evidence before us that his actions were affirmed by responsible and authorized representatives of the carrier. (See Award No. 1782 of this Division.) Accordingly, the dispute will be considered upon its merits.

Our problem devolves simply into a question of which were the parties' intent when they adopted Memorandum No. 4. Was the latter agreement intended as a complete temporary replacement of existing rules bearing upon the subject of promotions, or was it only an alternative and additional means of handling such matters?

Prior to the execution of Memorandum No. 4 and by virtue of paragraph 13 of Appendix "B" to the General Agreement, a laborer electing to transfer to the helpers' craft forfeited all retained seniority as a laborer. This rule, it is contended, deterred laborers holding early seniority dates and the more cautious from considering a temporary upgrading to helper positions to relieve the man power problem created by the Korean emergency. Memorandum No. 4, we find was intended in its pertinent provisions to meet this dilemma. Keeping this overall purpose in mind, we examine the agreement subject of this dispute.

The expressed purpose of Memorandum No. 4 appears on page 1 of the Memorandum itself and reads:

"Due to the increasing shortage of skilled man power and in order to permit the filling of positions of Mechanics and Helpers of the various crafts—IT IS AGREED: * * *."

The background and reason for entering into the Memorandum Agreement appears in carrier's letter of December 6, 1950, posing the man power problem to the chairmen of the various crafts (Carrier's Exhibit A). In the proposals made by the carrier's representative, we find reflected a singleness of method, in other words, a thought that certain stated rules of the two agreements "should be temporarily suspended." The letter also reflects the temporary character of the proposed agreement. But when we examine the subsequently negotiated Memorandum No. 4, we do not find a "suspension" of the named rules of the prior agreements, but rather an intent that they be "temporarily amended." (See (a)). An exception to this general pattern is sub-paragraph (g) where an earlier letter of understanding was completely cancelled. Thus we attach some significance to the parties' use of the terms "suspended," "amended," and "cancelled." Sub-paragraphs (h) and (i) are directly concerned as they involved the carmen helpers and laborers' classifications. There in sub-paragraph (h) we find expressed an intent "to extend" this Memorandum to the general agreement to make provisions for the four year plan. In spelling out such plan the terms used lend support to carrier's argument of exclusiveness of method. However, in the following sub-paragraph (i) we find expression of the "sole purpose" sought to be served, namely, "to preserve unimpaired the seniority rights of laborers and coach cleaners when selected to fill helpers' positions," and a further statement of understanding "that the provisions of this paragraph do not contemplate any change in the practice of selecting applicants for positions of helpers of the crafts."

Considering the purpose sought to be achieved and after a painstaking study of the means resorted to effectuate that purpose, we are compelled to conclude alternative methods of gaining helper seniority prevailed during the period Memorandum No. 4 was in effect.

In carrier's Exhibit E is an assertion that Claimant Barkett was not furloughed in January, 1954, but was reduced to a laborer. It is also stated that Claimant Vandermotten had on September 28, 1953, forfeited all seniority rights as a laborer and carmen helper by accepting promotion to apprentice. Further, that Claimant Roberts resigned from service on April 30, 1954. These assertions are not controverted and should be recognized in applying the within award.

AWARD

Claim sustained except as conditioned in opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1955.