

Award No. 3555

Docket No. 2971

2-T&P-CM-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

PARTIES TO DISPUTE.

**SYSTEM FEDERATION NO. 121, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

THE TEXAS AND PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

That at Texarkana, U.S.A. on or about November 12, 1956, the Carrier violated Rule 12, 18 and 20 of the Current Agreement by restoring to service Carman R. A. Phillips in preference to senior Carman Gene Ward.

2 — That accordingly the Carrier be ordered to properly assign Carman Gene Ward, ahead of Carman R. A. Phillips in line with his seniority and be compensated for all time last retroactive to November 12, 1956.

EMPLOYEES STATEMENT OF FACTS: Both R. A. Phillips and Gene Ward, were first employed by the carrier as carmen apprentices at Texarkana, Phillips finished his apprenticeship May 16, 1956, while working as a promoted carman on vacancy of Carman P. L. Dean, who was off account personal injury beginning April 12, to July 22, 1956, Phillips continued to work Dean's vacancy up to June 6, 1956, at which time he walked off the job and went to Fort Worth, and accepted position as a carman at Fort Worth, which he worked up to July 10, 1956 Phillips, was then permitted to return to Texarkana, and was assigned to vacancy created by Carman P. E. Duffey, resigning from service went to work July 14, 1956, and was furloughed August 12, 1956.

Gene Ward, completed his apprenticeship June 29, 1956, and established seniority as a carman on said date. Ward, was furloughed July 21, 1956, protest was made under date of July 27, and the case was handled up to and including the master mechanic. However, the local chairman failed to properly reject the decision of the car foreman within the 60-day time limit as set forth in the August 21, 1954, agreement so this violation was handled with car foreman December 1, 1956, and has been handled on up to and including the director of personnel.

Carman Phillips, was fully aware of the fact that he would lose his seniority date of May 16, 1956, at Texarkana, if he left his job and went to Fort Worth for the reason he called the undersigned by phone prior to going to Fort Worth,

employees themselves. To exact a form of penalty, i.e., notice and continuance of work, from management under the facts in this case where displacement arose solely through the exercise of seniority, would seem to lack justification unless clearly provided for by the rules. This clear indication of intent we find lacking here."

This brings us around to the simple fact that there is no rule in the agreement that provides for forfeiture of Mr. Phillip's seniority in the circumstances which existed in this case.

3. The claim for money should be denied in any event.

Even if the question as to Mr. Phillip's seniority date were still open to dispute, and properly before the Board, and even if the brotherhood's contention were sound, and even if the claim were not barred, it would be unjust for the brotherhood to ask the company to pay Claimant Ward for all time worked by Mr. Phillips.

This would be unjust because Claimant Ward suffered no such damages, as he was otherwise employed, and could have had other work for this company in any event if he had wanted it.

Also, it would be unjust, because, even if the proper seniority date for Mr. Phillips were properly in dispute, we would necessarily be required to grant seniority preferences in line with the established seniority dates, until the final settlement of the question as to whether or not the seniority dates should be changed.

For the brotherhood to try to hold the company responsible for damages for not having changed a man's seniority date, before the question of whether it should be changed has been adjudicated, is for the brotherhood to try to enable the employees to play Heads-I-Win; Tails-You-Lose whenever they create seniority disputes among themselves. One of the employees must be wrong in every seniority dispute. The brotherhood is not so free from internal politics and personal influence as to be qualified to be the sole judge as to which employe should get or keep what seniority date, even if such a situation would be proper or lawful. However, if the company were to be held financially responsible, every time it guessed wrong as to what this Board would later decide, in any seniority dispute, it would frequently be to the company's interest just to let the brotherhood have its way and change anybody's seniority date in any way that might suit the brotherhood's officials.

The management does not know whether the brotherhood is influenced by personalities in its present effort to impair Mr. Phillip's seniority, but the management did not think and does not think that the brotherhood's request in this case was fair or just. Even if the management were wrong about this,—and it can see no reason to suppose that it is,—the fact remains that the management has acted on this belief, which it has held in good faith, in an effort to operate the business efficiently and administer the labor agreement fairly and impartially. For the Board to undertake to impose a monetary penalty on the company, in such a situation, and to undertake to award the money to Claimant Ward as an unearned windfall, would be monstrous injustice. Even if the claim were sustained as to the seniority date of Mr. Phillips, the claim for money should be denied.

For the reasons stated, the carrier respectfully requests the Board to deny the claim in all respects.

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 were given due notice of hearing thereon.

This claim primarily rests on the proposition that the carrier violated Rule 12 of the agreement of September 1, 1949, as amended, by restoring Carman Phillips to duty at Texarkana, Texas on November 12, 1956.

Rule 12 provides:

“Employes transferred from one point to another with a view of accepting a permanent transfer, will, after thirty (30) days, lose their seniority at the point they left, and their seniority at the point to which transferred will begin on date of transfer, seniority to govern. Employes will not be compelled to accept a permanent transfer to another point.”

Robert Phillips established seniority as a Carman at Texarkana on May 16, 1956 and Gene Ward established seniority as a Carman at Texarkana on June 29, 1956.

Unless it can reasonably be said from the facts and circumstances surrounding his departure from Texarkana on June 5, 1956 that Phillips was moved to Fort Worth “with a view of accepting a permanent transfer” to that point, there would be no basis for a finding that his seniority date of May 16, 1956 had been forfeited.

The organization maintains that Phillips “walked off the job and went to Fort Worth” and that before he left Texarkana he was advised by the General Chairman that he would lose his seniority if he left his job and accepted employment at Fort Worth.

The carrier points out that Phillips was doing temporary relief work at Texarkana prior to June 5, 1956; that the duration of that assignment was uncertain; that temporary relief work was available at Fort Worth and that Phillips requested permission to perform such temporary work at Fort Worth which was granted. Phillips worked the temporary assignment at Fort Worth from June 7, 1956 through July 9, 1956, a total of 21 days. He was recalled about

July 8 to fill a regular assignment at Texarkana and began work on that assignment on July 14 having been granted four days' vacation between July 9 and 13.

The docket contains no testimony of Phillips in respect of his intention. It is unquestioned that his immediate assignment at Fort Worth was temporary and that he promptly accepted a recall to Texarkana about July 7. It is also established that he owned his home at Texarkana and there is nothing to suggest that he made any attempt to dispose of it after he went to Fort Worth. These facts are inconsistent with an intention to make a permanent transfer. The fact that he was absent from Texarkana for 38 calendar days, during part of which time he worked a temporary assignment at Fort Worth 21 days and vacationed 4 days, do not cancel his seniority at Texarkana without convincing evidence that he intended to make a permanent transfer.

The evidence of record and the reasonable inference to be drawn therefrom do not support a finding of the requisite intent called for in Rule 12 and accordingly a sustaining award is not indicated.

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AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1960.