Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7882
SECOND DIVISION Docket No. 7405
2-CMStP&P-MA-'79

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employes:

1. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the agreement effective September 1, 1949, as subsequently amended and the April 1, 1972 Upgrading Agreement when it employed Kenneth Pearson and Eugene Wayrynen who had not acquired seniority at Tacoma to fill positions of Machinists in the Locomotive Department, Tacoma, Washington on February 17, 1975.

2(a). Francis Kruse, Machinist Helper, Tacoma Locomotive Department be assigned to the position of Machinist assigned to Eugene Wayrynen in the Tacoma Locomotive Department.

(b). Francis Kruse be paid eight (8) hours per day at the Machinists' rate and in addition thereto, payment at time and one-half the Machinist Helpers' rate commencing with February 17, 1975 and each working day thereafter until assigned to the position of Machinist assigned to Eugene Wayrynen in the Tacoma Locomotive Department.

3(a). Bruce Mowrey, Machinist Helper, Tacoma Locomotive Department should have been assigned to the position of Machinist during the period February 17, 1975 to March 13, 1975 assigned to Kenneth Pearson in the Tacoma Locomotive Department.

(b). Bruce Mowrey be paid for eight (8) hours per day at the Machinists' rate and in addition thereto payment at time and one-half the Machinist Helpers' rate commencing with February 17, 1975 and continuing on each workday thereafter until March 13, 1975, because of not having been assigned to the position of Machinist assigned to Kenneth Pearson in the Tacoma Locomotive Department.

4(a). D. G. Strasser, Machinist Helper, Tacoma Locomotive Department, be assigned to the position of Machinist assigned to Kenneth Pearson in the Tacoma Locomotive Department commencing with March 14, 1975.

(b). D. G. Strasser be paid for eight (8) hours per day at the Machinists' rate and in addition thereto payment at time and one-half the Machinists Helpers' rate commencing with March 14, 1975 and

continuing on each workday thereafter until assigned to the position of Machinist assigned to Kenneth Pearson in the Tacoma Locomotive Department.

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.

The question involves rights of seniority under the Shop Craft's agreement effective September 1, 1949, as amended, and the upgrading agreement effective April 1, 1972. The carrier filled machinists vacancies at the Tacoma Locomotive Department Shop by the transfer of Machinists Regular Apprentice Pearson and Machinists Helper Wayrynen from Deer Lodge, Montana. Both had acquired seniority dates at Deer Lodge located some 700 miles east of Tacoma. On the other hand, the claimants are machinist helpers with Tacoma point seniority. While the claim was in process on the property, one claimant resigned and another claimant was substituted.

The key issue here is whether or not the rules in the above agreements authorize the advancement to positions of machinists in Tacoma in accordance with the carrier's actions.

There are threshold objections which seek dismissal of the claims on procedural grounds. It is alleged there is a variance in the amount claimed on the property and the amount claimed as it progressed to this Board. In addition, the substitution of claimants is asserted to be improper in that the resignation of the original claimant and substitution required that an initial claim should have been filed again. In effect, it is alleged the claim was never presented to the carrier officer authorized to receive claims in the first instance. The procedural issues may be boiled down to the question whether there has been a substantial variance between the claim handled on the property and that presented to the Board. We believe not. The interpretation of collective bargaining agreements requires that they be read fairly and liberally, disregarding strict technicalities and undue legalism. Here we do not believe the variances are substantial and warrant dismissal on the grounds asserted. The substance of the claim was known from the outset as one questioning the application of the seniority provisions and that claim remained essentially unchanged. Award 3954

(Anrod). The crux of the claim is the Rule violation with the monetary claim incidential. Third Division Award 20090 (Lieberman). Carrier also maintains the claim is improper in that it calls for payment of a penalty. We defer consideration of that question pending consideration of the seniority question on its merits.

We are persuaded that Rule 31(a) of the agreement controls here. In pertinent part it provides:

> "Seniority of employes in each craft and subdivision thereof covered by this agreement shall be confined to the point employed and begins at the time the employe's pay starts at the point and in the craft or subdivision thereof in which employed."

In the Special Board of Adjustment No. 570, Award No. 417, Referee O'Brien dealt with the other employees furloughed in Deer Lodge, albeit a different issue, and stated with respect to those employees:

> "It is undisputed that claimants had seniority only at Deer Lodge Montana...."

and further:

> "... Rule 29 of the Schedule Agreement, relied on by the Carrier, did not allow the claimants to exercise their seniority elsewhere."

The upgrading agreement provisions under Sections 2, 3 and 5 provide a scheme permitting the advancement for apprentices and helper apprentices and helpers under specified conditions absent a furloughed machinist. One of the conditions under Section 2 and 5 permits advancement "in line with their seniority".

Clearly, seniority is personal to the employee and it has a definite and clear meaning as defined by the underlying agreement. Here the Deer Lodge employees could have no seniority other than at that point (Rule 31(a) quoted above). They never acquired seniority at Tacoma and on this basis carrier's position loses force.

Section 3 of the upgrading agreement related to apprentices and does not include a specific reference to seniority. However, we believe the whole tenor of the agreement, in keeping with Rule 31(a), contemplated the same seniority concepts and the proper construction of Section 3 contemplates similar seniority considerations.

On this basis, we hold the transfer of the Deer Lodge employees to Tacoma was improper in that it deprived eligible Tacoma Shop employees of these assignments. It remains to be determined the proper amount of the monetary award. The claimants base their claim on a penalty and rely upon

certain awards cited, Awards Nos. 1269 and 4256. In addition, they assert that carrier withheld employees from their assigned positions constructively and the claimants are entitled to eight hours pay per day at the full journeyman's rate. We do not agree. We do not read the agreements to provide for a penalty. Moreover, the basis for a money award where there is a Rule violation, and in the absence of a specific penalty provision, is compensatory damages for their actual monetary loss. Third Division Award No. 15062 (Ives). The claimants, therefore, are entitled to pay at the machinist's rates for the days worked offset by the compensation earned in their classification during the same time period. It follows that claimants are entitled to the differences between the amount actually earned and the higher machinist rate they would have earned for the same period.

A W A R D

Claim sustained and monetary award in accordance with the foregoing findings.

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 4th day of April, 1979.

Dissent Of Carrier Members
To
Award 7882, Docket No. 7405
(Referee Wallace)

Dissent to this Award is necessary because the Majority has failed to give due regard to the procedural requirements of this Board as well as pertinent requirements of the contract.

At page 2 of this Award, the author says:

> "The procedural issues may be boiled down to the question whether there has been a substantial variance between the claim handled on the property and that presented to the Board. We believe not.*** Here we do not believe the variances are substantial and warrant dismissal on the grounds asserted."

The factual situation was that after the Employees' request that Claimants Kruse and Mowrey be "set up" was denied because of the lack of qualification of Kruse, (Mowrey had resigned), the Employees on March 12, 1975 submitted the following claim to the Master Mechanic:

> "Frank Kruse and Bruce Mowrey should be set up and paid the difference in salary starting February 17, 1975. They are the claimants of this time slip."

Subsequent appeal of this matter resulted in the Employees claiming both compensation at the overtime rate as a machinist and as a helper; and an undetermined amount of overtime in addition to the compensation claimants received in their helper positions. The addition of Mr. Strasser was only because he was the next senior helper behind Kruse and Mowrey. The Carrier vigorously objected to the modifi-

cation of the claim in this manner. Under similar factual circumstances this Board has held:

Third Division Award 17476 (McCandless)

"A careful review of the record supports the Carrier's position that Employes altered its claim as to claimants and amounts claimed several times on the property, as well as in its submission to this Board. The burden of proof is on Employes to specifically identify the claimants and to substantiate by a preponderance of the evidence that they are entitled to the exact sums they claim. It is not necessary to look to the merits of the claim in this instance because the claimants here have failed in this burden, and consequently this claim must be denied. (Emphasis added)

Third Division Award 13235 (Dorsey):

"It is our opinion that the phrase "usual manner" as employed in Section 3, First (i) of the Act and the prescribed procedures found in the August 21, 1954 Agreement, contemplates an orderly process, either prescribed or customarily adhered to, for considering the merits of a claim as presented; and, during pursuit of the process Petitioner may not amend the particulars of the claim without agreement by the Carrier. To hold otherwise would destroy the appeals procedure on the property, in that in amending the claim in successive steps of the procedure, the claim develops into a new and different claim which was not presented "to the officer of the Carrier authorized to receive same;" and, therefore, could not be considered on the property in the "usual manner up to and including the chief operating officer." .... (Emphasis added)

The record in this case manifestly substantiates that the claim was amended and altered at each level of appeal. And at each level of handling the Carrier vigorously objected to such

machinations. As was stated in Award 13235 supra., the successive amendment of this claim did not provide the "orderly process" sought for rational and reasonable grievance resolution. It has convoluted such a purpose into its opposite!

The author's conclusion "that the claim remained essentially unchanged" is asserted to be supported by Second Division Award 3954 (Anrod) in which the following dicta is found:

Award 3954:

> "It is a well-established rule of law generally observed in the application and interpretation of a collective bargaining agreement that such an agreement, as a safeguard of industrial and social peace, should be given a fair and liberal interpretation consonant with its spirit and purpose -- disregarding, as far as feasible, strict technicalities or undue legalism which would tend to deprive the agreement of its vitality and effectiveness."

The spirit and purpose referred to in the above citation was that the parties would attempt to settle disputes in successive handling on the property. That purpose is effectively frustrated when at each level of handling one party interjects changes, amendments and makes wholesale revision of the claim that has been handled. As was stated in Award 19147 (Cull):

> "On the basis of the foregoing we find that the claim before the Board was not handled on the property in accordance with Rule 25. As Carrier timely raised its objection and there being no evidence of an expressed or implied waiver by the Carrier we will dismiss the claim. Awards 12490, 13235, 18322, and others."

The handling of this claim on the property was substantially altered and amended. By the conclusion of the author of this Award that such permutations were not substantial encourages similar chaotic tactics in the handling of future disputes. Such a conclusion can only inhibit the process of orderly grievance resolution in this industry.

If the conclusion that the claim "remained essentially unchanged" is to be accepted, then the dispute was and continues to be one of the determination of qualifications.

It is a principle of this Board, enunciated in so many Board Awards, that the Carrier determines an employee's qualifications and that such action will not be reversed unless there is substantial probative evidence submitted supporting the employee's qualifications or the arbitrariness of the Carrier's actions. (See Third Division Awards 21328, 21243, 20361, 19129, 16871, 15494; Second Division Award 7415 as representative).

The facts are that Claimant Kruse was found to be not qualified for a Machinist position, and Claimant Strasser who had only fifteen (15) months of service at the time was less qualified than Kruse. Nowhere in the entire record of this dispute was there any evidence

presented to refute the Carrier's determination of qualifications. The result of Award 7882 is that the Carrier's determination of qualifications is not relevant and is unimportant in the assignment of machinist positions on this Carrier. Such a conclusion is absurd.

The April 1, 1972 Agreement, that was allegedly violated in this case, sets forth its purpose as follows:

> "When new positions or vacancies of machinists occur and no machinist bids on the bulletin as provided for in the agreement of September 1, 1949, there is no furloughed machinist responding upon recall, and no qualified mechanics are available for hire, apprentices, and then helpers may be advanced to position of machinist in the following procedure:" (Emphasis added)

There were no furloughed machinists or qualified mechanics available for hire. Claimants were Helpers at Tacoma while Pearson and Wayrynen were upgraded apprentice and machinist respectively under the provision of the April 1, 1972 Agreement at Deer Lodge, Montana (Section 2 and 3). As noted above, the Agreement stipulates that the order of advancement was first apprentices "and then helpers" to fill vacancies.

Sections 2, 3, and 5 of the Agreement state:

> "Section 2. If no furloughed machinists transfer to the vacancies, regular apprentices and helper apprentices who have com-

pleted three years of their training may be advanced in line with their seniority."

"Section 3, Apprentices who have completed 366 days of their training may be advanced next."

"Section 5. If machinists are still needed, then machinist helpers with two (2) years seniority may be advanced in line with their seniority."

While the Author of this Award states "one of the conditions" necessary for advancement under this Agreement, he has ignored the phrase immediately preceeding the quoted condition i.e., "MAY be advanced...."

The permissive nature of Sections 2, 3, and 5 clearly supports the conclusion that, upon completing the stipulated training period, first apprentices and then helpers may be considered for advancement. Carrier complied with Sections 2 and 3 in this case in filling the vacancies while Claimants could only be considered under Section 5, (Claimant Strasser, at that time, did not meet the two years seniority requirement of Section 5 having only 15 months of service; a point specifically made in the panel discussion of this case, that was simply ignored by this Award).

The point seniority argument, in this case, is valid only if it is determined that it is only those employees at the specific location of the vacancy that may be considered for advancement. But the April 1, 1972 Agreement deals with furloughed machinist trans-

ferring to the location of the assignment.

Such individuals per Rule 31(a) would not carry their prior seniority with them, but the fact that they may not already have seniority at the location of the assignment does not prohibit the assignment.

While it is "albeit a different issue," the Author of this Award has nevertheless erroneously relied upon Award 417 of Special Board of Adjustment 570 on this point. (This was also New matter first raised before this Board and should have been ignored).

Finally, while the argument that "qualifications are of no import" was apparently accepted by the Author of this Award, he found, at the bottom of page 3, that the Carrier's action:

"deprived eligible Tacoma Shop employees...."

Such a conclusion is not supported by the record. There were no eligible (qualified) Tacoma Shop employees available for the machinist positions; certainly not the claimants in this case.

If nothing else, the record clearly substantiates that Claimants were not shown to have been entitled to the machinist positions vacancies at Tacoma.

This Award reflects a clear misunderstanding of the facts and the principles established by this Board for resolution of disputes.

On that basis we register our dissent.

P. V. Varga

J. W. Gohmann

J. E. Mason

B. K. Tucker

G. H. Vernon