Award No. 1600

Docket No. 1477

2-Pull-EW-'52

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 122, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Electrical Workers)

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That under the current agreement, the carrier on July 24, 1950, improperly promoted Electrician R. Goeltz, who was in seniority position No. 19 on the 1950 Electrical seniority roster.

2. That accordingly the carrier be ordered to:

(a) Promote Electrician F. F. Trapp, who is a senior qualified electrician to R. Goeltz.

(b) Compensate Electrician F. F. Trapp the difference in pay from what he did earn as an electrician and what he could have earned as a supervisor, retroactive to July 24, 1950.

(c) Give Electrician F. F. Trapp a seniority date as a supervisor as of July 24, 1950.

EMPLOYES' STATEMENT OF FACTS: Electrician F. F. Trapp, hereinafter referred to as the claimant, was in seniority position No. 17, and that Electrician R. Goeltz was in seniority position No. 19, on the 1950 electricians' seniority roster of the Chicago West District, a copy of which is submitted herewith and identified as Exhibit A.

The carrier on July 24, 1950, promoted Electrician R. Goeltz to a supervisory position.

The agreement effective July 1, 1948, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that the action of the carrier in the instant dispute is contrary to the provisions of the current agreement as the claimant was the senior electrician, qualified for a super-

The summation of the principle here involved is set forth in the language of Award 217, Fourth Division, National Railroad Adjustment Board, Docket No. 215, which states in part as follows:

> "We agree with the parties that the matter in dispute is not within the current agreement. It is not within the jurisdiction of this Board to either make, or amend, or nullify, agreements duly executed by a carrier and its associated employes. This limitation of the Board is bottomed upon the right of freedom of contract, sound principles of jurisprudence, and common sense. The Board has no authority to read into a contract that which its makers have not put there expressly, or by clear implication. The Board has said so many times. As noted in Award No. 5288, page 3 (1st Division, Hon. Edward F. Carter, Referee), the Board has no power to rewrite the contract or to relegate to itself the powers and duties of the parties. And in Award No. 5396, page 8, (1st Division, Hon. Robert G. Simmons, Referee): 'In the absence of rules clearly establishing the right it will not be held that the carriers and employes contracted to pay and to be paid two days' pay for one day's work. In the instant case, the established practice followed, without objection, by both carriers and employes over a long period of time supports the position taken by the carrier in the construction of the cited rules.' Of course, repeated breaches do not abrogate a clearly expressed contract provision, but where the contract is silent, or the meaning of a provision is not clear, the long-continued practice of the parties is most persuasive proof that the practice was within the purview of the contract, and the intention of the parties. Such practical construction of a contract should not be brushed aside by any tribunal. This tribunal may only determine the question of where the parties have placed themselves by their own agreement."

The Company submits that the instant claim for the reasons above stated should be denied and affirms that all data submitted herewith in support of its position have heretofore been presented in substance to the Petitioner or his representative and made a part of the question in dispute.

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.

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

In July, 1950, Claimant F. F. Trapp stood in seventeenth position and R. Goeltz in nineteenth position on the electricians' seniority roster of the carrier's Chicago West District. Effective as of the twenty-fourth of that month the carrier promoted Goeltz over Trapp to the supervisory position of temporary foreman in the Pennsylvania Yards of that district.

The organization contends that the carrier's action violated the intent and meaning of Rule 44 of the parties' agreement. This agreement became effective July 1, 1948, and superseded all previous agreements and understandings in respect to the criteria for and the methods of promoting employes, such as those here involved, to supervisory positions.

To us the language of Rule 44's first paragraph, controlling here, is plain in meaning. The paragraph says, in effect, the following: (1) When the carrier contemplates filling a supervisory position, the carrier shall give due consideration to promoting one of the electrical workers covered by the

agreement. (2) If the carrier decides to fill such position by promoting one of these workers, the carrier shall select the man highest on the relevant seniority roster who possesses in adequate degree the lawful qualifications that the carrier has decided to be necessary for properly filling the supervisory position.

In different words, to us the first paragraph of Rule 44 does not require the carrier to fill a supervisory vacancy by promoting one of the electrical workers covered by the agreement; i. e., the carrier may fill the position with some other kind of person. But, the paragraph also states that, if the carrier does decide to fill such a position by promoting one of its electrical workers, the carrier may not select the best man among such workers; it must choose the senior man who possesses the carrier-determined minimum lawful requirements for the job.

The wording of the paragraph also makes it clear that, however desirable consultation with the organization on such matters might be from the standpoint of good labor relations, the carrier is not bound by the agreement to engage in such consultation. That is, under Rule 44, the carrier retains the prerogative of initial unilateral action in determining the qualifications for supervisory positions and in filling them, by promotion or otherwise—subject, of course, to complaint by the employes under the grievance procedure and the Railway Labor Act in respect to factual questions as to whether the carrier fulfilled the interpretation of Rule 44 stated above.

In the case here before us, the organization must undertake to prove beyond reasonable doubt that the carrier failed to abide by the terms of the agreement as interpreted above. The record discloses no compelling, or even persuasive evidence, to this effect. On the contrary, the transcript of the so-called "remanded hearing" between the representatives of the carrier and those of the organization establishes that (1) the carrier went considerably beyond bare legal requirements in justifying to the organization its choice of Goeltz rather than Trapp; and (2) the carrier's selection of Goeltz did not come close to approaching the condition under which this Division would be reasonably justified in judging that (a) the carrier's decision was discriminatory, arbitrary, and unfair; and (b) we should substitute our judgment for that of the carrier.

In the light of this case's circumstances we think a denial award must issue.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December, 1952.