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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6355
SECOND DIVISION Docket No. 6138
2-BN-CM-'72

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: (System Federation No. 7 (Formerly System Federation No. 95), Railway Employes' Department, AFL-CIO (Carmen)

(Burlington Northern, Inc. (Formerly Chicago, Burlington & Quincy Railroad Company)

Dispute: Claim of Employes:

1. That the Burlington Northern Inc. violated the current agreement, particularly Rule 24(c), when it failed to notify or call Carmen E. L. King and C. O. Bilyeu to service at Sheridan, Wyoming between March 3, 1970 and July 23, 1970 where junior carman, Mr. J. E. Myhre, was called for service at that point.

2. That accordingly the Burlington Northern Inc. be ordered to compensate Carmen E. L. King and C. O. Bilyeu eight (8) pro rata hours for each work day between, March 3, 1970 and July 23, 1970 inclusive.

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 parties agree that following a serious decline in business at Sheridan, Wyoming four positions were eliminated. The most senior man of the four found work until he retired so he is not involved. The next two, claimants herein, continued their employment with this carrier at other locations, Rule 26. The less senior carman left the employ of the carrier. It is also agreed that the Northern Lines Merger Agreement of December 29,1967 became effective on January 2, 1966 and was consummated on March 3, 1970, p. 4, Employes' Submission. The Merger Protective Agreement,

Section 1 (b) (1) signed December 29, 1967 required that as of March 3, 1970, the New Company take into its employment all employes of the carriers involved, p. 5 Carriers' Submission. The less senior man was called to Sheridan but declined; the claimants were not recalled to work at Sheridan, Wyoming until July 23, 1970 when work became available.

At this point, the parties part company. The carrier maintains that there were no vacancies at Sheridan, Wyoming on March 3, 1970 so that Rule 24 (c) of the basic agreement does not apply. It argued that the less senior man was recalled only as a formality to comply with the Merger Protective Agreement. Since the claimants were working for the carrier, there was no need to recall them. In addition, the carrier asserts that the Second Division does not have jurisdiction because the Job Protection Agreement, a part of the Merger, provides a different forum for the settlement of disputes, p. 7 Carriers' Submission. In any event, the carrier says that the claimants suffered no loss of compensation.

On behalf of the claimants it is argued that the basic agreement remained in force because the Merger Agreement, Section 8, required the New Company to assume the contracts and agreements between the carriers and labor organizations, p. 5 Employes' Submission. It follows that Rule 24 was still in effect and that subdivision (c) required the carrier to recall the claimants before recalling the less senior employe. Additionally, the Organization contends that unless a penalty is imposed, the carrier would violate rules with impunity. Since the controlling agreement is in effect, the Second Division has jurisdiction.

We believe that Second Division Award No. 5135 is in point. In that case an I.C.C. decision approved an acquisition. A seniority question was involved. The carrier argued in effect that while the I.C.C. decision was being litigated, a determination by the Second Division would require an interpretation of the Commission's employe protective conditions which would intrude upon the Court's consideration of such matters pending before the Court. The Award held that this Board has exclusive jurisdiction under the Railway Labor Act of grievances involving seniority. It would be unrealistic to wait until all litigation was completed, p. 23 of Award. However, we do not agree with the arbitrary imposition of a penalty in that Award.

We approve the reasoning set forth in Third Division Award No. 10963, and the Court decisions quoted in Carrier's Submission, p.p. 11-13. In substance, the Award and the Courts state that damages and compensation, if any, must be the proven loss arising from violation of contract provisions or agreements.

This Board has not the power to fashion remedies or to create sanctions other than as set forth in or flowing from the agreements of the parties. The National Labor Relations Board was granted authority by Congress to fashion appropriate remedies to redress wrongs committed in violation of the Act. Even so, the Courts have at times been critical of remedies created by the Labor Relations Board

as exceeding the authority granted to it. The distinction, and the care to be exercised in carrying out the function entrusted to this Board is self-evident.

The merits of this situation require discussion if only for the purpose of protecting the principle of seniority. Under Rule 24 (a), the claimants were furloughed from their positions where they enjoyed seniority on the roster at Sheridan, Wyoming. Under Rule 26 they obtained other work with the carrier. To recall a less senior employe for any reason without first recalling claimants could lead to confusion or question in the future concerning their rights at Sheridan. To advise them of their rights to seniority when vacancies might occur at Sheridan is not a positive method of recognizing or certifying these rights in the face of a recall of a less senior employe, last paragraph of Carrier's Exhibit No. 3., p. 1. The carrier's opinion that it was carrying out the condition imposed by the Merger Protective Agreement while at the same time preserving the rights of the claimants is understandable but is not correct. The claimants should have received notice of recall on March 3, 1970, subject to the existence of a vacancy.

A W A R D

Claim disposed of in accordance with above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois this 14th day of July, 1972.