Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7046
Docket No. 6893
2-MKT-MA-'76

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Missouri-Kansas-Texas Railroad Company

Dispute: Claim of Employes:

1. That the Carrier violated the controlling Agreement when they promoted Machinist Apprentice R. R. White, Jr., a junior employe in seniority, to a Machinist position on January 18, 1974, by-passing Senior Machinist Apprentice G. W. Morris, in violation of DP-231 of the Agreement.

2. That accordingly Machinist Apprentice G. W. Morris be compensated at the current Machinists' overtime rate of pay eight (8) hours a day, five (5) days a week, plus eight percent (8%) interest, for Carrier having violated DP-231 of the controlling Agreement, commencing January 18, 1974 and continuing for as long as the violation exists.

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.

Claimant is a Machinist Apprentice employed by Carrier at Parsons, Kansas, with seniority date of June 17, 1971, and so indicated on the seniority rosters for 1974 and 1975. Co-employee R. R. White is employed by Carrier at the same location, originally as Machinist Apprentice, with seniority date of July 13, 1971, and so indicated on the 1974 seniority roster. However, the 1975 roster deletes White as an Apprentice and shows him as a Machinist with seniority date of January 18, 1974.

On March 7, 1974, the Organization sent a letter to Carrier protesting Claimant being bypassed. Additionally, the Statement of Claim sets forth in what respects it is contended Carrier violated the controlling Agreement, plus demand for compensation as detailed therein. Formal grievance was filed on March 11, 1974.

In rejecting the protest Carrier initially took the position on March 26, 1974 that:

> "Mr. White was hired as a machinist in accordance with Memorandum DP-231, having 938 working days experience with railroad and additional other related experience.
>
> "In my opinion, the advancement of Mr. White was in accord with the current agreement and that no charges need be made." (Emphasis added).

In its simultaneous letter rejecting the claim, Carrier stated further in respect to Claimant:

> "Mr. Morris has not acquired sufficient time in accordance with DP-231 to be advanced to permanent machinist."

Organization demand for verification of White's "additional other related experience" was not complied with, Carrier contending that it was not required to do so under the Agreement.

In its declination of the appeal on the property, Carrier stated in pertinent part that:

> ". . . When we promoted Machinist Apprentice R. R. White, Jr. . . . he had considerably more time served on his apprenticeship that did Mr. Morris and this is the reason that he was promoted. There were not any journeyman machinists available to hire at that time."

On futher appeal by Organization to the Manager of Personnel, the latter replied on August 12, 1974 as follows:

> "On January 18, 1974, Machinist Apprentice R. R. White, Jr., resigned as Machinist Apprentice in Parsons Diesel Shop and on that date he completed necessary application of employment forms for employment as Machinist.
>
> R. R. White, Jr. was employed as a Machinist at Parsons Diesel Shop on January 18, 1974, in accordance with Rule 44 of Agreement No. DP-315. At that time, he

"had combined mechanical experience of 650 days as Machinist Apprentice and the equivalent of 969 days prior mechanical work to qualify him for employment as Machinist. He was not advanced to Machinist under Agreement No. DP-231.

Contrary to your assertions, Agreement No. DP-231 is not involved nor applicable in the instant alleged dispute and the Carrier therefore has not violated that Agreement. Agreement No. DP-231 governs advancement of regular apprentices to positions of Machinists provided such apprentices have served three years or more of their apprenticeship. Neither R. R. White, Jr. nor G. W. Morris had completed the necessary three years for advancement under Agreement DP-231. Although G. W. Morris was employed as Machinist Apprentice on June 17, 1971, because of irregular work attendance, he had completed only 565 days of his apprenticeship on January 18, 1974. R. R. White, Jr. employed as Machinist Apprentice on July 13, 1971, had completed 650 days of his apprenticeship."

(emphasis theirs - employed)
(all other underscoring ours)

Here, for the first time, some five months after initial protest, Carrier took the position, among other assertions, that Agreement No. DP-231 was not applicable; that neither White nor Morris "had completed the necessary three years for advancement under Agreement DP-231"; and, most important, that White had "resigned" as Machinist Apprentice on January 18, 1974, and was "on that date" employed by Carrier as Machinist pursuant to Rule 44 of Agreement DP-315, the latter being the major Agreement between the parties.

The discrepancies between Carrier's initial claim rejection letters and that of August 12, 1974 are obvious and merit our consideration. Carrier contends, however, that the only claim which can be presented to this Board is that which was handled by the Organization "with Carrier's highest officer", (obviously referring to the letter of August 12, 1974), citing Third Division Award 18640 (Rimer).

We have no quarrel with the latter principle, but it is not germane here. The claim handled at the highest level of appeal on the property is precisely the same claim as presented throughout this dispute. The basis of denial was changed in Carrier's letter of August 12, 1974, but the claim itself remained unchanged. Additionally, we are aware of no restriction which forbids the Board from contrasting Carrier's denial letters at each level of appeal on the property.

Petitioner's basic contentions are that Carrier bypassed Claimant in violation of Agreement DP-231; that Carrier acted improperly and in violation of the Agreement when it permitted White "to resign" and be immediately "reemployed" as a Machinist under Rule 44; that White should be returned to his former position as Apprentice; and that Claimant should be compensated as demanded.

Carrier, on its part, disputes each of these contentions.

In resolving the merits of this dispute we do not consider the "evidence" submitted by Carrier in relation to Robert M. Workman who, it is contended, resigned and was reemployed under somewhat similar circumstances as those relating to White. Such information, as contended by Petitioner, is obviously "new matter" not previously raised on the property and is clearly inadmissible at this level of appeal. Prior Awards are legion on this principle in each of the Divisions of this Board; to such an extent that citations are hardly necessary. Accordingly, we sustain Petitioner's objection on this issue.

Agreement DP-231 is precise and unambiguous. We paraphrase it here solely in the interests of brevity, the entire context being quoted in the record. In pertinent part it states:

> "Section A. In the event there are no Machinists available and the Carrier is unable to employe journeyman machinists as required, apprentices . . . may be advanced . . . to fill vacancies . . . in the following order . . .:
>
> 1. Regular apprentices who have served three (3) or more years on their apprenticeship.
>
> X X X X X X X X X X X X
>
> "Section B. . . . . .
>
> 1. The selection of apprentices and helpers for temporary advancement to machinists will be made only upon written approval of the local chairman of the Machinists and local Carrier officer having jurisdiction over such points, a copy of such approval to be furnished the General Chairman of the Machinists." (Emphasis added).

The factual situation which existed at the time this dispute arose falls precisely within the purview of Agreement DP-231. An opening had arisen in the machinist class, no journeyman machinists were available for hire, and neither Claimant nor White had completed service of the required three year

period as apprentices. It was therefore necessary to temporarily advance an apprentice. Under Section B, subdivision "1", such "temporary advancement" could be made "only upon written approval" of the local Chairman and the local Carrier Officer.

The record is conclusive that no such written approval was obtained. Consequently the "advancement" or "promotion" of White was in clear violation of the Agreement. Nor, can we accept Carrier's contention as valid that White was properly advanced because he had more "working days experience" than Claimant. There is no such provision in the Agreement; the sole test set forth is service of "three (3) or more years on their apprenticeship".

In these circumstances, Carrier had no authority to unilaterally revise the Agreement, and "any deviation therefrom must be by agreement". See Award 4755 (Whiting).

Carrier maintains, nevertheless, as set forth in its letter of August 12, 1974, that DP-231 is not "applicable" and that White had "resigned" on January 18, 1974 and had been reemployed on the same date as a Machinist. Such contentions are diametrically opposed to Carrier's prior letters of rejection, in which it was conceded that DP-231 was applicable and that White had been "promoted" or "advanced" or "hired" as Machinist "in accordance with Memorandum DP-231." However, the required "written approval" was completely ignored.

On the record before us we are compelled to the conclusion that the letter of August 12, 1974 was an obvious afterthought and a belated assumption of a new position, Carrier having realized that its advancement of White was clearly in violation of DP-231. Additionally, we are impressed with the odd coincidence of White's "resigning" on January 18, 1974 and being immediately reemployed on the same day so as to enable him to fill the existing vacancy. These circumstances are far from persuasive as to the alleged inapplicability of DP-231.

Apropos Carrier's contention that it was not required to verify White's "additional other related experience", we quote from Award 6265 (Shapiro), in which this Board held:

> "The mere assertion by the Carrier that it was equivalent is not probative evidence necessary to enable us to make an evaluation of the two programs and reach a valid conclusion. This is not a holding that training and experience elsewhere, including such outside of the railroad industry, is not qualifying for the mechanic's classification. When challenged, the Carrier has the burden of proving that the contractual standards have been met. This was not adequately done herein." (Emphasis added)

Carrier cites as precedent on the merits Awards 967, 1908, 2338, 4294 and 6965. These Awards, however, are not germane to this dispute. The factual situations there involved were markedly different from those here. Additionally, none of these cases were concerned with an Agreement similar in content to Agreement DP-231.

Carrier further maintains that the Organization did not at any time question the "qualifications" of White. However, neither did Carrier question the qualifcations of Claimant, the only reference in the record being the comparative working time of both employees. In any event, the issue of "qualifications" is not before us in this dispute.

In reaching the foregoing findings and conclusions, we do not decide Claimant's qualifications or that he is entitled to the position of Machinist. Nor are we empowered to direct Carrier to restore White to his former position of apprentice. Neither of these issues are before us here.

We do, however, conclude and find that Claimant was the senior machinist apprentice under the controlling Agreement and, there being no eligible qualified journeyman Machinists available at the time, that Claimant, if anyone, was the first apprentice by seniority entitled to the opportunity for such advancement, subject to "written approval" of the principals under the precise and controlling provisions of Agreement DP-231. Accordingly, that Carrier's actions here bypassed Claimant in violation of the Agreement.

We deal now with the question of compensation as demanded in the Statement of Claim.

Firstly, there is no Rule in the Agreement supporting the claim for "interest". Hence, that portion of the claim is denied. Prior Awards are legion on this principle and we quote from Third Division Award 20919 (Norris), which is directly applicable to this dispute:

> "We find nothing in the Agreement to support such claim for 'interest", and, although several cases are cited by Petitioner as precedent, the overwhelming weight of authority in this Division holds to the contrary. Such demands have been denied consistently by this Board."

To the same effect, see Second Division Awards 2675, 6574, 6758 and 6830; Third Division **Awards 13478, 18433, 20014 and 20547; First Division Awards** 12989 and 13098; and Fourth Division Award 2368; among a host of others.

Secondly, Petitioner refers us to no Rule in the Agreement (nor can we find one) supportive of its claim for punitive pay at overtime rate. Claimant was fully employed during the period here involved and is not entitled to double compensation.

Accordingly, based on the entire record, we conclude and find that Carrier violated the controlling Agreement and that Claimant is entitled to compensation for all time worked at the difference between his regular rate of pay and that paid to White, commencing January 18, 1974 and continuing for as long as the violation exists.

A W A R D

Claim sustained 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 7th day of May, 1976.