NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19953
THIRD DIVISION Docket Number CL-19661

John H. Dorsey, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Kansas City Terminal Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7076) that:

(1) The Carrier violated the Agreement when it solicited and assigned Employee R. A. Pope to train and work as a Crew Dispatcher with total disregard of the rights of eligible senior employes holding seniority in the class.

(2) That Carrier now be required to compensate Claimant Robert-L. Fry for the difference between the rate of Crew dispatcher and the position worked as Janitor for each day that Pope was used as a crew dispatcher

(3) Carrier shall now be required to pay six percent (6%) interest compounded annually on such difference in rate until such time the Claimant is made whole.

OPINION OF BOARD: R. L. Fry, Claimant, had seniority date Of April 13, 1970, on the Master Roster; and, R. A. Pope had seniority date of November 11, 1969, on the same Roster. Effective November 9, 1971, both Claiman and Pope were unable to hold positions in the Master Roster Department and being protected employes, under the February 7, 1965 Job Stabilization Agreement, each was faced with return to the janitor force. Claimant was returned to the janito force. The assignment which was given to Pope, the junior employee, is describe in a letter to him from W. R. Apple, Superintendent, dated November 9, 1971, whi reads, with emphasis supplied:

> This letter will confirm our conversation in my office Friday, November 6, 1970, when we requested you to report to the office of the crew dispatcher on Monday, November, 1970, at 11:59 P.M. to begin training for the position of crew dispatcher.
>
> You were assured by the undersigned that your protection would be guaranteed just as if you had used your displacement rights to displace someone as provided in the protection agreement.

The record supports the following findings: (1) Pope was in the so-called "training" for a position of Crew Dispatcher from November 9, 1970, to June 1, 1971; (2) on June 1, 1971, Pope was assigned to a Crew Dispatcher vacancy created by the retirement of E. A. Healey - - the vacancy was posted, no bids

were received; (3) Carrier knew on November 9, 1970, of Healey's upcoming retirement and was "training" Pope to qualify him to fill the vacancy; (4) while in "training" during the period from November 9, 1970 to June 1, 1971, Pope was being paid by Carrier at Least to the extent of the amount of compensation guaranteed him by application of the Job Protection Agreement; (5) Carrier did de facto create a new "training" position; (6) inasmuch as the occupant of a position of Crew Dispatcher performed work subject to the Rules of the Schedule Agreement, it follows that the occupant of a newly created position as a "trainee" with the objective of qualifying him as a Crew Dispatcher likewise occupies a position and performs work subject to the Rules; (7) it is the work of the position, not its title, which controls agreement coverage.

The question presented is whether Carrier was contractually obligated to bulletin the job of "trainee" to which it unilaterally and arbitrarily assigned Pope. Was its failure to bulletin the job violative of: (1) the Bulletin Rules as prescribed in Rules 6, 7, 8, 9 and 10; and (2) the contractually vested seniority rights of the employees within the collective bargaining unit, particularly:

RULE 5 - PROMOTION BASIS

> Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.
>
> NOTE: The word "sufficient" is intended to more clearly establish the right of the senior clerk or employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability.

We find that Carrier was contractually required to bulletin the "trainee" job in compliance with one of the following Rules:

RULE 9 - INDEFINITE VACANCY

> Positions or vacancies of indefinite duration need not be bulletined until the expiration of thirty (30) days from the date of employment or vacancy.

RULE 10 - LONG VACANCY

> Positions or vacancies known to be of more than thirty (30) days duration will be bulletined and filled in accordance with these rules.

Until it had done so any decision of Carrier as to what employes would bid for the job and comparative analysis of seniority, fitness and ability was, contract-wise, premature. Further, in arbitrarily placing Pope in a favored position to demonstrate fitness and ability for the forseeable upcoming vac-

ancy of Crew Dispatcher it acted in derogation of the contractual equal rights vested in employes within the collective bargaining unit to bid for the "trainee" job; not only Claimant herein.

We will sustain paragraph (1) of the Claim.

As to paragraph (2) of the Claim we will award compensation for each day during the period November 9, 1970 to June 1, 1971 - - as prayed for -- that Claimant was available to work in the place and stead of Pope.

Awards of this Board are in conflict as to whether the Board has jurisdiction to award interest as prayed for in paragraph (3) of the Claim. We look to decisions of the Supreme Court for guidance. The Court held, many years ago, that the National Labor Relations Board did not have statutory power to impose a penalty. Subsequently, that Board ordered an employer to pay interest on back pay which it found due to an aggrieved employe. Issue was raised as to the Board's power to issue such an order. When the issue was considered by the Supreme Court it held that the order to pay the interest was not a penalty; instead, it was a fulfillment of the "make whole" doctrine. We, therefore, will sustain paragraph (3) of the Claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

A W A R D

Paragraphs (1) and (3) of the Claim, sustained.

Paragraph (2) of the Claim sustained to the extent set forth in the Opinion, supra.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.

Serial No. 277

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 19953

DOCKET NO. CL-19661

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Kansas City Terminal Railway Company

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided. for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

Under date of January 7, 1975, Organization petitioned this Division to interpret Award No. 19953. The petition was received by the Executive Secretary of the Division on January 9, 1975. Carrier timely filed an answer to the petition; and, subsequently Organization timely filed a response to Carrier's answer.

Section 3. First (m) of The Railway Labor Act provides: "In case a dispute arises involving an Interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute." (Emphasis supplied.)

The Division lacks jurisdiction to: (1) police compliance with the Award; or (2) to seek its enforcement.

Section 3. First (m) of the Aft limits the Division's jurisdiction to interpreting the Award; otherwise stated, to clarify ambiguous language in the Award to make clear its intent.

The Claire adjudicated in the Award before us consists of three numbered paragraphs. There is no ambiguity found in the Award relative to paragraphs (1) and (3).

Paragraph (2) of the Claim, with emphasis supplied, reads:

> (2) That Carrier now be required to compensate Claimant Robert L. Fry for the difference between the rate of Crew Dispatcher and the position worked as Janitor for each day that Pope was used as a crew dispatcher.

The Award as to paragraph (2) of the Claim reads:

Paragraph (2) of the Claim sustained to the extent set forth in the Opinion, supra.

The referred to part of the Opinion reads:

> As to paragraph (2) of the Claim we will award compensation for each day during the period November 9, 1970 to June 1, 1971 -- as prayed for -- that Claimant was available to work in the place and stead of Pope. (Emphasis supplied.)

Paragraph (2) of the Claim prays that Claimant be compensated "for the difference between the rate of the Crew Dispatcher and the position worked as Janitor for each day that Pope was used as a crew dispatcher." We had no jurisdiction to expand the Claim. The Award does not as is shown by the use of the words "as prayed for" in the referenced paragraph of the Opinion; but, the use of the word "available" therein may be ambiguous.

The word "available" has no singular precise meaning in the parlance of railroad labor relations. When its meaning is the subject matter giving rise to a dispute the meaning is usual19 drawn -- on a cue-by-case analysis -- from the intent of the parties expressed in agreements and in collective bargaining history and practice on a particular property. The record in this case did not supply such aids.

in the Division's Award No. 19953 we used the word "available" in the sense that Claimant was not "available" on any day on which he for personal reason*, including illness, absented himself from his assignment. The excluded days -- designed to avoid Claimant being unjustly enriched -- do not include vacation days for which he was compensated at a lesser rate of pay than the rate earned by Pope.

Referee John H. Dorsey, who sat with the Division, as a neutral member, when Award No. 19953 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:: G. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1975.

Carrier Member's Dissent to Award 19953, Docket CL-19661

(Referee Dorsey)

This award is patently erroneous since the employes did not sustain their burden of proof that Carrier violated any rule or rules in the applicable Agreement There was no competent evidence in the record presented by the employes which would even remotely suggest that "the trainee" in case ever actually performed the work of a crew dispatcher however the majority simply assumed he did. In other words in holding that Carrier violated the contract, such holding was based on conjecture and assumption which is in flagrant contravention of principles which all divisions of this Board have followed for many, many years.

The referee compounded his error when he also awarded interest even though the employes stated in the record that there was no contract rule support for such demand The "amazing" facet of the award of interest is that in Award 19742, of this Division, which Award was adopted on May 11, 1973 this same referee stated:

> "As to paragraph 3 of the claim we will deny it. The preponderance of the case law of four Divisions of the National Railroad Adjustment Board, with only one or two exceptions, support the denial" (paragraph 3 of the claim in 19742 was a request for interest).

The instant Award, 19953, was proposed on June 20, 1973, and finally adopted with no change on September 28, 1973 and "the case law of four Divisions of the N.R.A.B.", relative to the awarding of interest, with no contract rule support for same, was completely ignored by this same referee. In other words the referee in a little over a month's time completely reversed his prior holding on the interest question which certainly must not only be "confusing" to this Board but also to the railroad industry at large. Consistency in decisions of this Board is a desirable element and the majority in this case most assuredly has contributed greatly to the undesirable element of inconsistency.

The entire award is palpably erroneous and we dissent.

H. F. M. Braidwood

H. F. M. Braidwood

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G M Youhn

W. B. Jones

W. B. Jones

P. C. Carter

P. C. Carter

G. L. Naylor

G. L. Naylor