Award Number 345
Docket Number TE-188

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE.—

"Claim of the General Committee of the Order of Railroad Telegraphers, Southern Pacific Company (Pacific Lines), that J. W. Hodge is entitled to the difference between his earnings at Kennet, Macdoel, and Dorris, California, December 20th, 1930, to December 2nd, 1932, inclusive, and what he would have earned as agent at Alturas, California, during that period had he been assigned."

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

The carrier and the employe 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.

As a result of a deadlock, Willard E. Hotchkiss was called in as Referee. On request of the carrier a second hearing was held on June 29, 1936, at which this case was argued with the Referee sitting with the Division as a member thereof.

The parties have jointly certified the following statement of facts, and the Division so finds:

"Mr. Hodge acquired a displacement right under Rule 21 (c), Telegraphers' Agreement, December 16th, 1930; on December 19th, 1930, he made application to displace Mr. H. A. McGhee, agent at Alturas, Sacramento Division, who was the junior assigned agent in Group 1 of Rule 21 (c). Mr. Hodge was not permitted to displace Mr. McGhee.

"November 26th, 1932, position held by Telegrapher Hodge as second telegrapher-clerk, Dorris, was abolished; he filed displacement against the agent at Alturas which was accepted and he assumed the position of agent at Alturas on December 2nd, 1932."

There is in evidence an agreement between the parties bearing effective date September 1, 1927, from which the following rules are quoted:

"RULE 19 (B)

"The Company, through the proper official, will determine the fitness of telegraphers to fill all positions in this agreement.

"Any telegrapher feeling dissatisfied on account of such decision will have the right of appeal to his Superintendent and if still dissatisfied with decision may make written appeal of his case direct or through the Order of Railroad Telegraphers in regular order to the General Officials of the Company.

"RULE 21 (c)

"A telegrapher losing his assigned position through no fault of his own, will, if ability is sufficient, be allowed one displacement of either the youngest assigned:

"Group (1)—Agent (Not required to telegraph).
"Group (2)—Agent (Small non-telegraph).
"Group (3)—Agent-telegrapher.
"Group (4)—Telegrapher, the greater portion of whose hours are between 8 a. m. and 4 p. m.
"Group (5)—Telegrapher, the greater portion of whose hours are between 4 p. m. and 12 midnight.
"Group (6)—Telegrapher, the greater portion of whose hours are between 12 midnight and 8 a. m.

"provided the telegrapher displaced is his junior in the service. This privilege must be exercised within a period of ten (10) days after loss of assigned position, except as provided for in Rule 20.

"RULE 44

"Positions marked with a star (*) are filled jointly by the Traffic and Operating Departments. These positions will be bulletined when vacancies occur, and telegraphers will have the right to make application for same, and their applications will be considered and given preference; all things being equal, fitness and ability, together with seniority, to govern.

"Where positions are designated by two stars (**) the concurrence of the Traffic Department shall be secured to appointments before assignments are made.

"Monthly rated positions are exempt from hours of service, overtime, and call rules. Positions followed by a cross (†) are exempt from hours of service, overtime, and call rules, but agents at such stations will not be required to perform service in excess of an average of eight hours per day in any one month, which, however, does not restrict such agents from attending meetings, etc., in connection with their official duties, outside of working hours."

The claimant, J. W. Hodge, who had held a position as third trick telegrapher-clerk at Costella, upon that position being abolished in December 1930, sought to exercise a displacement right to the position of Agent at Alturas. Alturas is designated as a two-star station subject to Rule 44 by a memorandum of understanding between the parties made in 1929, shortly after the acquisition by the respondent carrier of the Nevada-California-Oregon Railroad, upon whose line Alturas is situated.

Hodge was denied the exercise of the displacement privilege on the grounds that his experience did not qualify him for the position. He was first employed by the carrier as telegrapher in 1901. In 1907 he left the service of the carrier and entered the service of a mining and smelting company in the capacity of Trainmaster. In 1919 he returned to the service of the carrier and has since been in its continuous employment.

Upon the denial of displacement privilege in December 1930, Hodge elected to go on the extra board. While on the extra board he worked for a period of approximately three months as Agent at Macdoel, and for varying periods as telegrapher or telegrapher-clerk at other stations. In December 1932 the position of telegrapher-clerk, which he then held at Dorris, was abolished, and he was then permitted to displace the agent at Alturas, and was assigned to the position on December 2, 1932. On February 1, 1933, he was in turn displaced by a senior man.

The petitioners contend that Hodge had sufficient experience in December 1930 to qualify him for the position of Agent at Alturas, and further that the short experience as agent and telegrapher-clerk during the ensuing two years could have added little to his experience or qualification for the position. They further contend that the action of the carrier in denying Hodge the right to displace in December 1930 was arbitrary and unreasonable, and not in accord with the terms of the agreement.

It is the position of the carrier that paragraph (b) of Rule 19 reserves to the management the determination of the fitness of applicants for any position, and that the second Paragraph of Rule 44, dealing with two-star stations, provides specifically that as to such stations the concurrence of the traffic official must be secured before an assignment is made. The carrier further contends that Hodge did not possess the necessary fitness for the position of Agent at Alturas; that his experience as Trainmaster for the mining and smelting company between 1907 and 1919 was not such as to qualify him for agency work; that the positions he held after he returned to the carrier's service in 1919, to 1930, did not afford him sufficient experience to qualify him for the duties of the position of Agent at a station of the importance of Alturas; that during that period Hodge avoided making application for agency position, but chose rather to continue as telegrapher or telegrapher-clerk; that he had never applied for, nor been assigned to, an agency position until he undertook to make the displacement on the position of agent at Alturas. The carrier further contends that during the period December 1930 to December 1932 Hodge did avail himself of opportunities and did acquire some agency experience, and that in the meantime there had been a substantial decline in the business of the carrier at Alturas (shown to be as much as 65 per cent) and, consequently, in the importance of the position of agent. Therefore, in 1932, when Hodge acquired another displacement right and sought to exercise it to the position of Agent at Alturas, he was permitted to do so.

OPINION OF REFEREE.—Previous Awards of this division have dealt with displacement rights under a variety of circumstances.

In Award 96, CL–124 Referee Samuell laid down certain principles on the subject as follows:

> "Under the rules and in the first instance, the carrier has the responsibility of determining the fitness and ability of employees, and this Division should be reluctant to interfere with the Decision so made by the carrier so long as it acts in good faith, is without bias or prejudice, and indicates no disposition to purposely or carelessly evade or disrespect the rules as well as the spirit and intention thereof."

And further, in the same award:

> "And while it is true that the seniority rule is one of the major elements in the application of the rules between carrier and employees, yet seniority cannot be applied in every case and do justice to the successful operation of the railroad."

In Award No. 98, Docket CL–125, the same Referee condensed the whole subject in this sentence:

> "In other words, the agreement reserves unto the appointing officer the right to be the judge subject to appeal."

The purpose of making decisions of management subject to appeal is to give opportunity for an unbiased outside judgment upon matters which the parties with perfectly correct motives may, because of their respective interests and responsibilities see in a distorted light.

Reverting to another such outside opinion also by Referee Samuell in Award 108, Docket TE–91, he used this language:

> "The sole issue in this dispute is the competency of Mr. Holland. While it is true that he has never occupied a position with so much responsibility as would be required at Chester, yet there is nothing in the record before us to indicate that he has not discharged his duties faithfully and competently during his many years of service at smaller stations, in fact, his employer has advanced him slowly but gradually. Under the ordinary seniority rule it is reasonable to expect that employees will seek advancement and in most instances the applicants will not be entirely familiar with the position, and, therefore, it is incumbent upon the applicant to demonstrate his ability and capacity for such increased responsibility when and if appointed."

The participation of the Traffic Department in a decision in respect to the right of a senior employe to displace a junior employe does not give the final decision of management (the Traffic department having participated) any different quality in respect to the right of the employe to appeal than it would have if management had reached its decision in some other way.

There is nothing in the record to show sufficient difference in conditions between December 20, 1930, and December 2, 1932, either as to the duties of the position or as to the qualifications of the claimant, to justify different action at the earlier date from that taken at the later date.

Of the principles enunciated by this Division those expressed by Referee Samuell in Award 108 above quoted appear particularly applicable to this case. Although some of the testimony is conflicting, the weight of evidence indicates that the carrier was wrong in refusing to assign J. W. Hodge to the agency at Alturas on December 16, 1930, and the Referee so finds.

The claim as submitted is for the difference between the earnings of the claimant at Kennet, Macdoel, and Dorris and what claimant would have earned as agent at Alturas from December 16, 1930, to December 2, 1932, when he was assigned to the agency at Alturas.

Argument is advanced that, irrespective of the merits of the basic claim, the amount claimed is excessive inasmuch as claimant might have reduced the difference between his actual earnings and what he could have earned as agent at Alturas had he made better use of his seniority rights.

This Board has recognized in previous awards the obvious wisdom of discouraging excessive claims for back pay and, in at least one case, the amount of back pay awarded has been reduced because a claimant had not utilized his seniority rights to good advantage (Award 94, Docket TE–161). In another case in which back pay was involved, this language was used:

> "If these were claims in which back pay, in case of a decision against the carrier were accumulating, over a considerable period of time, it would be in order to consider whether any employee had piled up back pay claims needlessly. Aside from the small amounts involved, the Referee finds nothing in the record to indicate that any employee involved in this case purposely restricted his earnings. * * * (Award 289, Docket CL–322.)"

In considering the back pay to which the claimant in the instance case is entitled, the following general principles appear pertinent:

1. Reversal by this Board of one of the parties to a dispute carries no necessary implication of wrongful intent and the amended Railway Labor Act does not contemplate punitive awards; back pay is not punitive but remedial.

2. Reversal of an action from which an employe suffered loss of earnings creates a presumptive right to have earnings restored in full.

3. Clear evidence that a claimant had needlessly piled up back pay claims by restricting his earnings would justify giving consideration to what he would normally have earned by reasonable use of his opportunity to earn.

4. In cases in which restriction of earnings is alleged and the evidence is in doubt, the amount involved, the importance of the issue, and other pertinent factors in the particular case would naturally determine the extent to which the claimant's potential earnings would be subjected to further investigation.

The claimant under this award has the right to have his earnings restored in full unless the record shows, or creates such presumption as to justify further inquiry, that he has needlessly piled up his back pay claims by restricting his earnings. The carrier has the right to protection against willful imposition or a punitive award. The public has the right to have the issue determined fairly and in a way not to encourage inefficiency and waste in transportation.

The Referee, after deciding that the carrier was in error in refusing to assign claimant to agency at Alturas on December 16, 1930, has carefully reviewed the record for evidence bearing on the amount of back pay to which the claimant is entitled.

While the claim runs for nearly two years, and the total amount claimant would have earned as agent at Alturas is relatively large, the difference between the claimant's actual earnings at Kennet, Macdoel, and Dorris and any potential earnings would of course be much less. Searching the record for evidence concerning the claimant's attitude there are repeated statements by carrier as to claimant's lack of zeal in asserting seniority rights prior to December 16, 1930. As to his actions after that date, in "Carrier's Rebuttal to Items (A) to (F) seriatim" in final response to petitioners' contentions, the following language is used under Item (E): "That Hodge did not endeavor to reduce the amount of this claim is shown by Section 8 of carrier's original brief, in that he remained idle 13 days subsequent to December 19, 1930, and further that instead of accepting a regular assignment, he elected to work extra and thereby acquired only such work and earning as might occur." (Record, p. 95.)

In section 8, of original submission, carrier reverts back to Section 6 in which are listed five stations paying from 55 cents to 67¾ cents per hour, at which Hodge enjoyed displacement rights, his assignment at Costella having been rated at 66¼ cents per hour. Carrier then points out that Hodge laid off from December 19th to January 2, 1931, and then worked extra until February 12, 1931, when he was assigned to Macdoel at 67¾ cents per hour. Later, in section 13, carrier reiterates that claimant "did not avail himself of the opportunity of making some other displacement concurrent with being declined permission to displace the agent at Alturas" apparently referring to the same intervals of time previously mentioned in section 8, and later covered, as above noted, under Item (E) of Carrier's Rebuttal.

In section 11 of carrier's original submission, this language is used: "Subsequent to December 19, 1930, after he had been denied permission to displace agent at Alturas, Mr. Hodge availed himself of the first opportunity to perform work as an agent, he became assigned and served as agent at a small station, Macdoel, from February 23rd to May 18, 1931, in a satisfactory manner, following which he became assigned by bulletin to a position of second trick telegrapher at Dorris, remained at Dorris until November 27, 1932, when the position was abolished."

The record as above reviewed shows that the time covered by Hodge's lay-off over the Christmas Holidays, 1930–31 (13 days) plus the time he worked extra January 2nd to February 12, 1931 (40 days), was 53 days during which time he was idle only 13 days. At the end of this time, he secured assignment at the highest rated position among those listed by the carrier in section 6 of original submission.

While it is possible that the claimant might have improved his showing as to earnings, there is no proof that he could have reduced the total claim in any large amount. There is nothing in the record to indicate that he might have displaced at Alturas at an earlier date and any assumption that he could have secured some other higher rated position is conjectural.

From the standpoint of the amount involved in any revision of this claim, and of the attitude of the claimant, the Referee believes that no useful purpose would be served by reviewing and balancing the hypothetical earnings which would have accrued to claimant under different circumstances. The Referee is strongly of the opinion that the claimant did not purposely pile up back pay claims.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 17th day of November 1936.