

Award No. 677
Docket No. TE-631

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
PACIFIC ELECTRIC RAILWAY COMPANY**

STATEMENT OF CLAIM: "Claim of the General Committee of the Order of Railroad Telegraphers on the Pacific Electric Railway, that Towerman W. B. Annen shall be shown on the seniority roster of towermen with a date of February 16th, 1933."

STATEMENT OF FACTS: Towerman W. B. Annen was originally employed by the Pacific Electric as a conductor in the Transportation Department on September 9, 1907. He was transferred to the Engineering Department as a towerman on March 1, 1908 and served as a regular towerman until July 1, 1911, when he was placed as a signal maintainer in which capacity he served as signal maintainer at the Sixth and Main Street Station at Los Angeles, maintaining the signals and interlocking towers at that location and also served as emergency relief towerman many times during the period he was acting as signal maintainer, in instances operating the tower as long as six weeks at a time. On February 16, 1933, he was recalled as regular towerman, which position he has filled since that date.

An agreement with the Order of Railroad Telegraphers covering Station Agents and Towermen was negotiated and made effective September 16, 1934.

Subsequent to September 16, 1934, a towerman's seniority roster was prepared and Mr. Annen's seniority date was shown as March 1, 1908, this being the date his pay started in tower service.

POSITION OF EMPLOYEES: "Rules involved, Article 13 (b) and 18 (a):

ARTICLE 13—(b) 'Seniority begins at the time the employes' pay starts on the seniority roster and in the class to which assigned.

'Where two or more employes enter upon their duties at the same hour on the same day, employing officer shall at that time designate respective rank of such employes.'

ARTICLE 18—(a) 'An employe accepting an official position with the Pacific Electric Railway Company shall not forfeit his seniority, but may assert it only by displacing the junior regularly assigned employe in the branch of service from which promoted, or by resuming duty on the extra list.

Employes accepting other than official positions in other branches of the service shall forfeit seniority after having filled such positions more than one year.'

The employees also have contended that Mr. Annen should have been permitted to return to the signal maintainers service on account of his preponderance of service as a signal maintainer, namely between July 1, 1911 and February 16, 1933. As mentioned in our statement of facts, there was a mutual understanding when Mr. Annen was instructed to maintain signals, that his original seniority date of March 1, 1908, as towerman, would not be affected. As this definite understanding between employee and employers was made twenty-three (23) years before there was any agreement rule to the contrary, it is not reasonable to deprive Mr. Annen of his seniority as a towerman at this late date. The fact that while serving as a signal maintainer he was subject at any time to call as an emergency relief towerman and in fact served as emergency relief towerman many times during this period, in one instance, operating the tower for a period of six weeks, would in itself justify his retention of tower seniority.

We wish to again call the Board's attention to the fact that Mr. Annen was placed exclusively in tower service on February 16, 1933, and has been exclusively in tower service since that time whereas the agreement was not entered into until September 16, 1934.

With reference to the Committee's position as expressed on Page 2 of their submission quoting from an understanding on January 8, 1935:

"In preparing seniority roster issued November 10, 1934, the principle followed was to give each agent a seniority date as of the date he commenced regularly assuming the duties of an agent, either as a regular assigned agent or as a regularly established relief agent. Emergency or temporary work of short duration as agent, it is agreed does not establish a seniority date."

The discussions terminating with this understanding, dated January 8, 1935, has specifically to do with the question of Agents' seniority as it was concerned and as it might be involved in a case where a clerk, prior to formal promotion to the Agents' list by regular assignment, was in emergency needed to work as a Relief Agent. Granting the fairness of applying a fair principle in deciding a seniority case of a Towerman in the same manner as it would be applied in the case of an Agent, the fact still remains that it is not pertinent in the case of Mr. W. B. Annen as there is no question of promotion or temporary work of short duration as a Towerman. The questions of seniority and principle involved in the case of Agents, resulting in the understanding dated January 8, 1935, are not the same as the question and principle involved in the case of seniority as a Towerman, of Mr. Annen.

OPINION OF BOARD: The claimant, W. B. Annen, entered the service of the carrier in 1907 as a conductor in its Transportation Department. On March 1, 1908, he was assigned to duty as a towerman in the Engineering Department where he remained until July 1, 1911. At this time he was assigned to signal service, continuing in it until February 16, 1933, when the carrier again placed him in tower service and gave him a seniority rating as of March 1, 1908, the date on which he first entered tower service. Since February 16, 1933, the claimant has continued in tower service with the seniority rating indicated.

On September 16, 1934, the carrier entered into a collective agreement with the Order of Railroad Telegraphers dealing with the wages, hours, and basic working conditions of station agents and towermen. This agreement contains, among other provisions, certain rules relating to the seniority of employees.

On November 10, 1934, the parties in conference prepared a roster of employees in which they sought to establish equitable seniority ratings of employees who had been in the carrier's employ for various periods prior

to the making of the collective agreement of September 16, 1934. The record vaguely indicates that following the establishment of this seniority roster, discussions concerning the seniority of certain employees continued. On January 8, 1935, the parties entered into what the record describes as an "agreement" or "understanding". In this they apparently attempted to crystallize the substance of Article 13 (b) and Article 18 (a) of the agreement of September 16, 1934. This so-called agreement stated that in the preparation of the roster of November 10, 1934 "the principle followed was to give each agent a seniority date as of the date he commenced regularly assuming the duties of an agent, either as a regular assigned agent or as a regularly established relief agent." In the interpretation of this principle, although the memorandum contains no provision to that effect, it seems to have been agreed that an employee, working in one branch of the service for a period of twelve months before returning to his original service, should be given seniority as of the date of his return.

The parties in conference, in the application of this principle or formula, were able to agree upon acceptable seniority dates of all employees, including cases of towermen as well as cases of agents, with the exception of the seniority date of the present claimant. The petitioner insisted that under the principle agreed upon, the seniority rating of Mr. Annen should have been established as of February 16, 1933, the date when he was returned to tower service after more than twenty years of signal service. It particularly urged that the principle should have been applied in the case of the present claimant since it had been applied in at least two other cases involving towermen.

The Division concurs in the contention of the carrier that this claim should not be sustained under the collective agreement of September 16, 1934, which was entered into subsequent to the time when the carrier fixed the claimant's seniority date. It would be unfair to apply the agreement to an arrangement which had already been made. The claim, if it can be sustained at all, must be sustained under the alleged agreement of January 8, 1935, as a joint interpretation of Article 13 (b) and 18 (a) of the collective agreement between the parties.

Unfortunately from the point of view of an intelligent disposition of this dispute, the record is not as clear and as decisive as it might be with respect to the nature and scope of the so-called agreement of January 8, 1935. It is probably more accurate to describe this "understanding" as merely a memorandum embodying the terms of an informal agreement reached by the parties in connection with the establishment of a seniority roster on November 10, 1934. However this may be, the Division concludes that the parties on one or the other of these two dates entered into an agreement with a view of settling disputed cases of seniority, and that this agreement must be regarded as a joint interpretation of the sections of the collective agreement dealing with seniority.

It was urged that the agreement of January 8 was intended to apply only to disputes concerning the seniority of agents and not to those of towermen. In support of this contention it was pointed out that the portion of the agreement of January 8 included in the record, refers to "agents" but not to "towermen". It is also true that the petitioner in its submission refers to the agreement as one relating to the settlement of seniority claims of agents. On the other hand, the carrier nowhere in the record categorically denies that towermen as well as agents were intended to be included within the scope of the understanding of January 8. The carrier, as will be pointed out subsequently, chose to rest its defense on other grounds. Moreover, the record discloses that the agreement in question was applied in the settlement of the seniority claims of two towermen. The Division is accordingly of the opinion that the agreement of January 8, 1935 was intended to embody a principle for the settlement of seniority disputes of towermen as well as those of agents.

The carrier insisted that the claimant did not lose his seniority status in tower service because of his long absence from it. In support of this contention of the carrier stated that Mr. Annen was from time to time called for emergency and relief tower service, calling attention to one period of six weeks in which he worked in this service. The evidence in support of this contention is not convincing in the face of the undisputed fact that for a period of more than twenty years the claimant spent practically all of his time in signal service.

The carrier also urged that no action should now be taken to disturb Mr. Annen's present seniority rating because when he was transferred from tower service to signal service in 1911, it was mutually agreed between the carrier and him that he should retain his seniority in tower service. The Carrier, however, offered no evidence of such an agreement beyond its naked assertion. The record contains no evidence indicating that there was a definite contract of employment between the carrier and the claimant. From aught that appears to the contrary, the carrier might have arbitrarily dismissed Mr. Annen from the service at any time. In these circumstances it is difficult to see how there could have been a genuine, binding agreement between the parties looking to the preservation of the claimant's seniority in tower service.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employees involved in this dispute are respectively carrier and employees 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 the evidence of record supports the claim of the petitioner that Towerman W. B. Annen shall be shown on the seniority roster of towermen with a date of February 16, 1933.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division.

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of July, 1938.

DISSENT

This award without any justification sustains a collective demand, despite the injury it unlawfully inflicts upon an individual with service long preceding the existence of a collective contract bearing upon him or his position, which contract in any event contains no provisions that are or could be made restrictive in respect to his seniority earned and established many years prior to its existence.

The fact is patent that neither Article 13 (b) or 18 (a) nor any other provisions of the subsequently negotiated agreement could be given application to impair the seniority of an employee in the service prior to the negotiation of such an agreement unless there was specific provision in the new agreement which bore upon that issue, and in this agreement it admittedly did not appear.

Though the award recognized the schedule agreement between the parties could not apply to this dispute it tenuously connects an "agreement" or "understanding" of January 8, 1935 with Article 13 (b) and Article 18 (a) of the schedule agreement of September 16, 1934 through a conception of the January 8, 1935 understanding which is out of harmony with its wording. The only portion of that understanding which was entered into this dispute is quoted in the award in the preceding positions of both parties. Notwithstanding that the quoted portion refers to the preparation of a seniority roster issued November 10, 1934 specifically mentioning only **agents**, the award says that what the parties sought to do was to establish equitable seniority ratings of **employees** who had been in the carrier's employ prior to the making of the collective agreement of September 16, 1934. This expansion of the word "agents" to "employees" is without warrant from any evidence of record.

The award refers further to the application of the principle or formula of that understanding of January 8, 1935 to cases of towermen as well as cases of agents. The record did cite but two cases of towermen, Weston and Shay, but even the employees, as is shown in the position of the employees heretofore quoted, when referring to the case of those two towermen, continued in the next paragraph in these words, "In settlement of the seniority status of the employees in the agency department, it was agreed. . . .", thereby recognizing the agreement of January 8, 1935 to refer only to those named therein, viz, agents. As is shown in the position of the carrier herein quoted, the understanding, dated January 8, 1935, had specifically to do with the question of agents' seniority. Certainly, with the implication of the employees admitting that it referred to the "agency department," the carrier's direct statement that it "had specifically to do with the question of agents' seniority," and the wording of the only portion of that agreement that was placed before us mentioning none but "agents," this Board could not justly come to the conclusion that the parties meant "employees" (to include towermen), and specifically Towerman Annen in this case, by the terms of that understanding.

The award meets that situation by acknowledging that "it was pointed out that the portion of the agreement of January 8 included in the record" referred to "agents" but not to "towermen," and immediately preceding that acknowledgement admits that it was urged that the agreement of January 8 was intended to apply only to disputes concerning the seniority of agents and not to those of towermen, but then proceeds to declare that nowhere in the record did the carrier categorically deny that towermen as well as agents were intended to be within the scope of the agreement of January 8th. The introduction of the word "categorically" in the award only stresses the unequivocal statement made by the carrier in the last paragraph of the "Position of Carrier" quoted in the award which immediately precedes the Opinion of Board. If the statement by the carrier in that paragraph that "The discussions terminating with this understanding, dated January 8, 1935, had specifically to do with the question of Agent's seniority, etc. . . .", is not unequivocal statement in all respects a categorical denial that towermen were not to be included within the scope of that understanding, then words in the English language are useless, and yet it is upon such unwarranted assumption coupled by tenuous connection with a principle deduced from an understanding with restrictive application to agents only that an award proceeds to give application to provisions of a schedule agreement which, concededly, by reason of its latent character as related to towermen, could not have application.

The award is in error in the first instance because lacking contention by the petitioner that any schedule rule has been violated the case is not properly before the Division. Secondly, in order to have the award give effect to an "understanding" or "agreement" separate from the schedule agreement, it had to substitute for the word "agents" in that "understanding" the word "employees" in order to subject to its provisions, the towerman here involved.

If the slender threads of reasoning connecting the principle of the understanding of January 8, 1935,—which also were used to expand the reference to "agents" to mean "employees," and further extended to connect that understanding with the inapplicable schedule agreement,—had been used to protect this senior employe, Annen, the attempt to give application to agreements inapplicable to this dispute might have been understood though it was not justified by any agreement. When used, however, to place in jeopardy the status of a senior employe in the absence of a clear and unambiguous contract that would warrant such procedure, neither can the reasoning be understood nor can we refrain from expression of vigorous dissent against such decision, for the simple reason that there is no contract or agreement whose terms justify this award.

(Sgd.) C. C. Cook
(Sgd.) J. G. Torian
(Sgd.) A. H. Jones
(Sgd.) Geo. H. Dugan
(Sgd.) R. H. Allison