Award No. 8235
Docket No. CL-7852

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY (Gulf District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that—

(a) F. W. White forfeited his clerical seniority when he failed to renew his leave of absence to continue work as Traffic Representative.

(b) Claim that Mr. F. W. White's name be removed from Seniority District No. 9 Seniority Roster.

EMPLOYES' STATEMENT OF FACTS: Mr. White was formerly Chief Clerk to General Agent Waldron, Forth Worth Freight Traffic Department.

Effective August 1, 1944, Mr. White accepted a position as Traffic Representative in the Houston Agency, a position not covered by the Clerks' Agreement.

On August 28, 1944, file 61-718, Mr. White requested one year's leave of absence in order to protect his clerical seniority.

On September 1, 1944, file 61-718-3, Mr. Falk, Freight Traffic Manager, granted Mr. White a leave of absence for one year effective August 1, 1944.

Mr. White's leave of absence expired August 1, 1945, and he did not, nor has he to date requested that his leave be continued.

POSITION OF EMPLOYES: On March 9, 1954, Division Chairman Williams addressed a letter to Mr. E. J. Falk, Freight Traffic Manager, copy of letter submitted as Exhibit A, advising there were four employes who did not have proper leave of absence to protect their clerical seniority while working positions not covered by the Agreement, and requested that their names be removed from the seniority roster.

We submit as Exhibit B, Mr. Falk's letter March 26, 1954, file C-4310-90.

Your Honorable Board will note that Mr. Falk attached a copy of letter dated March 25, 1954, file 953-5-(TJD) from Chief Personnel Officer, Mr. T.

It is most unfortunate, and difficult to understand, that this Organization should be so determined, putting forth the extreme effort that it is, to deprive these individuals of their justly earned clerical seniority. In what way, if any, these individuals have aroused the enmity of the Organization to the extent of prompting the representatives of the Organization to take the steps they are is a mystery to the Carrier—perhaps it can and will be explained by them in their submission.

In any event it was not and is not the intent, desire or purpose of the Carrier to be a party to any such scheme as here devised, having for its purpose the result here contended for by the Employes. Furthermore, the Carrier does not believe that either it or the representatives of the Clerks' Organization has the right or authority to do so. In this connection your Board in Award 3846 said:

> "We know of no rule in the general law controlling contractual relationships, the relation of employer and employe, or agency, or any provision of the Railway Labor Act, which would permit one acting in a representative capacity, in the absence of grant of authority so to do, to validly agree to an act the effect of which would be to destroy or take away the rights of the person represented. We think there is no such rule."

In Award 4987 your Board stated:

> "It has long been settled that seniority is a valuable property right."

This same Organization progressing the instant case has previously agreed with the foregoing quoted statement of your Board in Award 4987. In Awards 3416, 3417, 3418, 6661 covering previous cases on this property, the Employes, after quoting and explaining that Rule 3 provides the method under which seniority rights are established, went on to say that: "These seniority rights are very valuable rights * * *."

It is apparent, however, that the Employes do not consider that seniority rights are "valuable rights" so far as the several individuals here involved are concerned. It is likewise obvious, in view of the peculiar position taken by the Employes in this case, that the real purpose and intent of the parties in negotiating the Memorandum of Agreement dated November 11, 1952 (Exhibit "B") appear to have been as opposed as danger is to safety, as sickness is to health, as weakness to strength, and darkness to light. Again we can only wonder, and ask, why this strange and reversed attitude on the part of the Organization in attempting to deprive these particular employes of their valuable seniority rights?

In the light of all the facts and circumstances set forth herein it is the position of Carrier: (1) that the position of the Employes is unwarranted, unjustified and wholly erroneous; and (2) that to sustain this erroneous position of the Employes would result in irreparable damage to the individuals who would be adversely affected thereby.

Therefore, the contention and request of the Employes should be unqualifiedly denied.

The substance of matters contained herein has been the subject of discussion in correspondence and/or conference between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: Certain facts in this case are not in dispute. Briefly they are that Claimant F. W. White had accumulated seniority prior to August 1, 1944.

On that date he accepted a position as Traffic Representative (Freight Solicitor), a position not covered by the Clerks' Agreement.

Under date of August 28, 1944 Claimant asked for and received "one year's leave of absence in order to protect my clerical seniority from August 1."

That leave of absence, by its own terms, expired August 1, 1945. The parties are in agreement that at no time prior to August 1, 1945 did Claimant White request a renewal or extension of his leave of absence.

Here it is proper to produce a Memorandum of Agreement, proposed by Organization November 5, 1952, accepted by Carrier November 6, 1952, and made effective as of November 1, 1952. It is a revision of Rule 3 (d). The then revised rule read:

> "Employes now filling or hereafter promoted to official positions, **on the Carriers parties to this Agreement, or on the Missouri Pacific Railroad Company,** and who have established seniority under this agreement shall retain all their rights and continue to accumulate seniority in the seniority district from which promoted. When official positions are filled by other than employes covered by this agreement no seniority rights shall be established by such employment. **(The term 'official position' includes only positions that have been so defined by the Interstate Commerce Commission.)"**

The new material added to Rule 3 (d) by this Memorandum of Agreement has been emphasized.

One case had previously been handled by this Division covering Rule 3 (d). That was Award 3476 (Simmons) which held:

> "* * * We are of the opinion that it was intended by the agreement in the use of the term 'official positions' in Rule 3 (d) to include in that term all positions not covered by the applicable agreement to which employes are promoted from positions covered by the applicable agreement."

Thus, Award 3476, dated March 17, 1947, interpreted "official positions" to include all positions not covered by the applicable agreement. Yet, more than five years later the parties themselves, by their Memorandum of Agreement, stipulate that official positions "includes only" positions that have been so defined by the Interstate Commerce Commission.

Inasmuch as the Organization on September 23, 1955, served written notice on this Division of its intention to file within 30 days its ex parte submission in support of its present claim, and, in recognition of the fact the parties had agreed on July 19, 1955 to submit the claim of F. W. White, "and applying decision rendered by the Board (in the instant claim) to other individuals coming within the same category," we will treat only with the claims of the parties as they affect White.

At the time White accepted promotion to the post of Traffic Representative he was in a position covered by and subject to the terms of the Agreement then in existence.

Rule 3 (d) at that time referred only to "official positions." It was not until November 6, 1952—more than eight years later—that the title "official positions" was restricted to the definition of the Interstate Commerce Commission.

In essence then, White was under an agreement which said, having been promoted to an "official position", he "shall" retain all rights and continue to accumulate seniority in the Seniority District from which promoted. The

term "official position" had not then been interpreted by this Division, and such interpretation was not to come until March 17, 1947 in Award 3476.

Rule 35, however, was in existence on August 1, 1944. It covers Leave of Absence for an employe "desiring to remain away from service thirty days or more" and for a Leave of Absence "in excess of ninety (90) days in any twelve month period."

Such Rule provides for those desiring "to remain away from service" 30 days but not more than 90 days that they must "obtain written leave" from Management, with copy to the local Chairman. A leave of more than 90 days in any 12 month period "shall not be granted unless by agreement between the Management and the General Chairman."

We have already pointed out that White did request and obtain a leave of absence for one year. He did not seek a renewal or extension of that leave, and it is argued on behalf of Carrier that White "relied on the Carrier's assurance that such was not necessary under the Rule."

Was White obliged to seek a written leave of absence, as he did, and seek its extension at each expiration date?

We think not, for the simple reason that when he was promoted to the position of Traffic Representative he was not "remaining away from service." The only possible "service" he could remain away from was the service of the Carrier. If he was promoted to an excepted position, then he was excepted from the application of some or all of the Rules of the applicable Agreement, but he was not remaining away from the only service he could engage in, the service of his employer.

Rule 18 of the Agreement recognizes this distinction when it distinguishes between an "employe returning after leave of absence" or "when relieved of official position." It provides how either may return to a covered position in accordance with his seniority rights.

Having thus far held (1) that White's promotion August 1, 1944 was to an "official position" Award 3476; (2) that Rule 3 (d) automatically continued all his rights and seniority, and (3) that his new position in no way caused him to "remain away from service," consequently no written leave was required, we must now examine White's status at November 1, 1952 when the revisions to Rule 3 (d) became effective.

On that date, the parties agreed that employes "now filling or hereafter promoted to official positions" (only those so defined by I.C.C.) "and who have established seniority under this agreement shall retain all their rights and continue to accumulate seniority * * *."

We must and do conclude that as of October 31, 1952 White was filling what up to that time was considered an "official position," with accumulated seniority.

However, the language of Rule 3 (d) changed on November 1, 1952. As we have already noted the parties themselves agreed that

> "the term 'official position' includes only positions that have been so defined by the Interstate Commerce Commission."

We note the Organization advised its Chairmen and correspondents under date of December 2, 1952, in part, as follows:

> "The following, quoted from an order of the Interstate Commerce Commission, Ex Parte No. 72 (Sub. No. 1) dated July 19, 1946, should enable everyone to determine which positions are official—
>
> 'Generally speaking, railroad employes below the grade of division superintendent are considered to be subordinate

officials or employes, as the case may be. However, assistant superintendents, trainmasters, chief train dispatchers under certain circumstances, and others, who at times exercise the authority of a division superintendent, are looked upon as officials.'

"It will be observed from the above that, generally speaking, positions below the rank of Division Superintendent are not officials."

Argument in behalf of Organization holds that the revised Rule 3 (d) "definitely removed him (White) from protection thereunder, and since * * * having failed to secure a new leave of absence under paragraph (a) of Rule 35, the initial leave of absence which White secured and which, as already shown, terminated on August 1, 1945, should have been renewed. * * * Having failed to do so, White did then forfeit his seniority, as made mandatory by the specific provisions of the stated Rule, reading:

" 'An employe who fails to report for duty at the expiration of leave of absence will forfeit his seniority rights.' "

This question, however, is posed in behalf of Carrier:

"Did these parties, when they agreed to the revised Rule 3 (d), intend that employes promoted to official positions, but not specifically defined as such by the Interstate Commerce Commission, lose their seniority under the Agreement when they failed to obtain leaves of absence in accordance with the provisions set out in Rule 35?"

Also this statement:

"Since it (White's failure to renew his leave of absence upon its expiration in 1945) was not a violation then, it can hardly be held to be a violation seven years later. The same can be said of those involved employes who failed to obtain leaves of absence at the time of their promotion."

We cannot however agree with that portion of argument in Carrier's behalf which concerns itself with what the parties did or did not intend in revising Rule 3 (d). It is conjecture. The Rule itself is before us.

We do agree with Carrier's position, however, that Organization's concept of the Rule would leave certain persons, previously appointed to what then had been held to be "official positions," in a "sort of no man's land."

We have noted Organization's action on November 20, 1952 and December 2, 1952 in addressing bulletins to "all Chairmen and Correspondents," with copy to Carrier, advising of the revisions to Rule 3 (d). Organization directed that its first bulletin be "posted on your bulletin board." It included the same instructions in its second bulletin, with the additional instruction to

"call to the special attention of all who have been promoted and are now holding positions not covered by our agreement."

Thus, argument in Organization's behalf concludes, "the Employes left no stone unturned in their sincere effort to have all employes who had been promoted to positions outside the scope of the applicable Agreement, which were not 'official positions' as covered by Rule 3 (d), **protect their seniority rights by securing necessary leave of absence.** * * * It was only after sixteen months of waiting for those employes involved to request a leave of absence that this claim was filed." (Emphasis theirs.)

One conclusion is self-evidence from this record:

1. If White, at November 1, 1952 was, in truth and in fact filling an "official position," he automatically continued to retain all his rights and continued to accumulate seniority.

With respect to the term "official position," the Organization argues he was not in an official position because:

> "The Interstate Commerce Commission requires the Carrier to designate positions as official, subordinate official or employe. The Interstate Commerce Commission requires the Carrier to report all Executives, Officials and Staff Assistants in Divisions 1 and 2, and since Traffic Representatives (freight solicitors) are reported in Division 19, it is clear that they are not officials."

Yet the Organization, in this same record, wrote its chairmen and correspondents under date of December 2, 1952 and quoted the following from I.C.C. Ex Parte No. 72 (Sub. No. 1) dated July 19, 1946:

> "Generally speaking, railroad employes below the grade of division superintendent are considered to be subordinate officials or employes, as the case may be. * * *"

And so it might well be argued, that Claimant White, if he is "below the grade of division superintendent," would be considered as a "subordinate" official. Yet revised Rule 3(d) speaks of "official positions" without degree. It does not state "top official" or "middle official." It says simply " 'official position' includes only positions that have been so defined by the Interstate Commerce Commission." And, as the Record stands, the Organization has undertaken by unilateral action to define what it believes the Interstate Commerce Commission has defined as an "official position."

Since the parties themselves agreed on the revision to Rule 3 (d) they would have the authority to jointly interpret the I.C.C. definition of "official position" from the Commission's official pronouncements. Neither party, however, has the unilateral right to interpret such "definition."

So we must and do conclude:

1. The parties will be given thirty (30) days from the effective date of this Award to jointly agree on an interpretation of the Interstate Commerce Commission's definition of "official position", or within which to agree to a further revision of Rule 3 (d) which will be clear and explicit.

2. If such an agreement is not then reached, and only because 3 (d) now contains the language "so defined by the Interstate Commerce Commission," the parties shall address a joint communication to the Interstate Commerce Commission, quoting Rule 3 (d) as revised, and ask for a definition of the term "official position." Copy of this Award shall accompany such joint communication.

3. The definition given the parties by the Interstate Commerce Commission will then, upon its receipt by them, serve as the definition within the meaning of Rule 3 (d) revised, and shall have the same force and effect as an Award of this Division.

4. The claim of the Organization that F. W. White "forfeited his clerical seniority when he failed to renew his leave of absence to continue work as Traffic Representative" will be denied because it would only be in the event that he was not holding an "official position" that White's continuing seniority could be in jeopardy. Organization had no authority to rule unilaterally on what constitutes an "official position." For the same reason part (b) of the claim will be denied.

5. Until the definition of "official position" is properly determined in accordance with these directions, Claimant White and, because the parties so agreed, "other individuals coming within the same category" will retain the status they held at October 31, 1952.

6. Once such definition is determined, whether by the Interstate Commerce Commission or by joint agreement, the parties shall forthwith prepare a joint bulletin, with copies to the parties knowingly concerned, advising of the result and such instructions as may be necessary to inform such employes of their rights and obligations, if any. Beyond that, it will be up to Claimant White and those employes here concerned with him to protect their interests and rights, if such protection be then required, of their own motion.

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 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 the Agreement was not violated.

AWARD

Claims (a) and (b) as made denied and the issue involved is remanded to the parties for joint settlement in accordance with the directives of the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 7th day of February, 1958.