Award No. 18345
Docket No. MW-18591

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LEHIGH VALLEY RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Claimant Clayre E. Matz pursuant to the Memorandum of Agreement dated August 25, 1958 for the service he performed as a track laborer subsequent to April 1, 1965.

(2) Mr. Clayre E. Matz be allowed the difference between what he should have received at the assistant foreman's rate and what he received at the track laborer's rate during the period referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Prior to September 15, 1958, the claimant held a regularly assigned position as assistant foreman within the Track Department.

On September 15, 1958, the Carrier effectuated a plan for an extensive rearrangement of its section forces, with said rearrangement subject to and governed by the provisions of a previously negotiated Memorandum of Agreement, which reads:

"Memorandum of Agreement
between
Lehigh Valley Railroad Company
and its Employes Represented by the
Brotherhood of Maintenance of Way Employes

In the rearranging of section forces, IT IS AGREED:

1. Effective September 15, 1958, the rates of pay, headquarters, number of area foremen, foremen, track patrol foremen and auto truck drivers as shown in Attachment 'A,' which shall become a part of this Memorandum of Agreement, shall not be reduced or area assignments changed except by agreement

ment which by its terms is of general system-wide and continuing application, or which is not of general system-wide application but which by its terms would apply in the future, may be preserved by the employe representatives so notifying the carrier within sixty days from the date of this agreement, and in that event this agreement shall not apply on that carrier to employes represented by such representatives."

The Organization notified the carrier under date of April 1, 1965 that the employes had elected to accept the terms of the February 7, 1965 Agreement.

Following receipt of this notification, the Carrier put into effect the provisions of the February 7, 1965 Agreement.

Article IV, Section 1 of that Agreement reads as follows:

"ARTICLE IV.
COMPENSATION DUE PROTECTED EMPLOYE

Section 1.

Subject to the provisions of Section 3 of this Article IV, protected employes entitled to preservation of employment who hold regularly assigned positions on October 1, 1964, **shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position on October 1, 1964;** provided however, that in addition thereto such compensation shall be adjusted to include subsequent general wage increases."
(Emphasis ours.)

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was paid a protective rate because of rearrangement of forces under the Memorandum of Agreement dated August 25, 1958. He continued to receive this protective rate until April 1, 1965.

A claim was presented to Special Board of Adjustment No. 605 which is the adjudicative body under the February 7, 1965 National Agreement. The question submitted to that Board was:

"Did the guaranteed compensation of Mr. Clayre E. Matz effective April 1, 1965 continue to be $472.18 per month or was it reduced to $2.4408?"

On June 10, 1969 SBA No. 605 issued Award No. 105 which held that "the claim is not properly before this Committee, but must be handled in another tribunal, in accordance with the rules" because that Board "can Award only the compensation which a protected employe is guaranteed by the 1965 Agreement."

The question before this Board is whether the 1965 and 1959 Agreements superseded the 1958 Agreement insofar as the latter provides for protective rates of pay. Article VI, Section 1 of the February 7, 1965 National Agreement reads as follows:

"Any merger agreement now in effect applicable to merger of two or more carriers, or any job protection or employment security agreement which by its terms is of general system-wide and continuing application, or which is not of general-system wide application but which by its terms would apply in the future, may be preserved by the employe representatives so notifying the carrier within sixty days from the date of this agreement, and in that event this agreement shall not apply on that carrier to employes represented by such representatives."

Mediation Agreement, Case No. A-5987 was entered into by the parties hereto and other Carriers under date of October 7, 1959 (effective December 1, 1959) providing for a master wage schedule and conditions governing positions, classifications and rates. Article V of that Agreement reads:

"This Agreement shall not be construed to make any change, in any existing rule on any individual railroad, or any portion of such a rule, that contains provisions identical with or more favorable to the employes than the provisions of this Agreement. The election thus made available to the General Chairman must be exercised in writing within thirty (30) days after the effective date of this Agreement."

Pursuant thereto, the General Chairman wrote to Carrier on December 30, 1959 as follows:

"In accordance with the provisions of Article V, Agreement dated October 7, 1959, this is to advise you that we desire to retain Sections 1, 5 and 8, Memorandum of Agreement dated August 25, 1958, covering track forces, and that Article I of Agreement dated October 7, 1959, will cover all other employes we represent."

Section 2 of the August 25, 1958 Agreement reads:

"This rate will remain in effect and will not be changed unless the employe secures a permanent position in a higher rated classification, the rate of which is equal to or exceeds the rate he has been receiving under this new arrangement, or until he retires from service under the Railroad Retirement Act, or leaves the service of the railroad."

This Section 2 is certainly "more favorable" to employes than the provisions of the October 7, 1959 Agreement Petitioner had the right to retain it by notice as provided in Article V of the latter Agreement. But Petitioner did not do so as it appears in the letter of December 30, 1959. Actually, the protective rate ceased to exist immediately after the date of that letter. Since it did not exist then it certainly did not exist on the effective date of the 1965 Agreement.

The mere fact that the Carrier continued to pay the protected rate until April 1, 1965 does not make it a valid existing rate. On the contrary, the 1959 Agreement only sets out a wage rate schedule which the parties were obliged to follow. It contains no protective rate clause. A mistaken rate application, no matter for what period of time, does not supersede a fixed agreed to contract

rate. Past practice may not change or alter a clear and unambiguous contract provision. The 1959 and 1965 Agreements superseded the 1958 Agreement.

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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December, 1970.

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