NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21870
THIRD DIVISION Docket Number CL-21214

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7827, that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rules 2-A-1 (e) and 3-C-1 (f) at the Mail and Baggage Department, Pittsburgh, Pa., by failing to assign senior qualified furloughed employees to work that they had requested on various dates in January and February, 1972, and assigning the work involved to junior employees.

(b) A. M. McConnell be allowed the wages paid to J. Lignowski for the following dates: January 3, 5, 7, 9, 11, 13, 17, 18, 19, 25, 27, and 30, 1972 account of violation.

(c) J. Gable be allowed the wages paid to L. R. Golembiewski for the following dates: January 4, 6, 7, 8, and 13, 1972, account of violation.

(d) A. M. McConnell be allowed wages paid to J. Lignowski for the following dates: February 2, 3, 4, 5, 6, 8, 9, 10, 15, 16, 17, 22, 23, 1972, account of violation.

(e) I. M. Rosa be allowed the wages paid to M. Kness for the following dates: February 7, 8, 9, 22, 23 and 29, 1972 account of violation.

(f) This docket is governed by Award 18446 of the Third Division of the National Railroad Adjustment Board.

OPINION OF BOARD: Claimants herein were furloughed employes who were not qualified as "present employes" under the provisions of the Merger Protective Agreement. This dispute arose when Carrier utilized employes junior to the Claimants for the performance of extra work in the Mail and Baggage Department at Pittsburgh. The employes utilized were

qualified and entitled to preservation of employment as "present employes." They were in a "utility employe" status at the time they performed the work complained of.

Carrier takes the position that under the provisions of Section V of the October 18, 1966 Implementing Agreement and Rule 9-A-2 of the Schedule Agreement it had the right to use utility employes who were "present employes" under the Merger Protective Agreement as opposed to nonprotected furloughed employes who had greater seniority.

Section V of the October 18, 1966 Implementing Agreement provides:

> "V. Regardless of any agreement to the contrary, a utility employe may be used to perform service for which qualified either in his own or any other seniority district within his home zone, provided such use does not result in the abolishment of any other regularly assigned position, except that such utility employe may be used in his home zone on any position for which he is qualified on his own seniority district to replace any employe hired subsequent to April 1, 1965." (Emphasis supplied)

Rule 9-A-2 of the Schedule Agreement states:

> "(a) The Merger Protective Agreement dated May 20, 1964, as amended, is reproduced in Attachment I hereto and is made a part of this Agreement. The Implementing Agreement dated October 18, 1966, to the Merger Protective Agreement is attached hereto as Attachment II and made a part of this Agreement.
>
> "(b) In cases where the application of any rule of this Agreement is in conflict with either Attachment I or II, the appropriate provision of Attachment I or II, as the case may be, shall be applicable and supersede such rule." (Underscoring added).

The Organization asserts that when the utilization of a "utility employe" conflicts with the rights of other employes whose seniority is greater, the utilization of the "utility employe" is improper. Carrier counters by contending that if the Organization's position is correct then the parties would not have employed the proviso to Section V: "Regardless of any agreement to the contrary, * * *." Carrier further contends that the whole purpose of Section V was to suspend the application of such schedule agreements in instances where their application would

conflict with the Carrier's right to utilize the services of a "utility employe."

The Organization relies strongly on Third Division Award No. 18446 between the same parties involving the same issue. In sustaining the claim, the Board considered the various provisions of the agreements (including the two quoted above),finding:

> "A careful reading of these provisions of the Rules Agreement and the Extra List Agreement indicates an acceptance and respect for a system granting preference in job security, promotions or other rewards to employes in accordance with their length of service. This Board has studied the whole agreement in an effort to reach its true intent and meaning.
>
> We find no conflict between the provisions of the Rules Agreement, the applicable extra list agreement or any of the protective agreements. We find no provision that reduces seniority rights and standings held by each individual employe at the time of the merger. It would be a contractual contradiction to undo seniority by stressing part of a clause and not consider the text and context of Article V of the October 18, 1966 Agreement."

In order for Carrier to prevail in the instant dispute, this Board would have no choice but to find that Award No. 18446 was palpably erroneous. We have given careful consideration to the record and are unable to do so.

As was stated in Award No. 9 of Public Law Board No. 1376 between these parties:

> "Finally, we consider the assertion that Award 18446 is a 'serious misapplication' of the existing Agreement. In this regard, the Employees have cited Third Division Award 15358. That Award recited the basic concept, adopted by numerous Referees, that a decision on the same, or closely similar issue, concerning the same parties should control subsequent disputes unless they are 'palpably erroneous'.

"Stated differently, even though a subsequent dispute might have been decided in a different manner had it been considered as a case of first impression; the concepts of a desirability of predictability of labor-management disputes dictates an acceptance of the earlier determination if possible under the concepts expressed in Award 15358.

While reasonable minds might differ, and reach conflicting conclusions, we are not able to state that Award 18446 is palpably erroneous."

Under the circumstances the claim will be sustained.

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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1978.