NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22045
THIRD DIVISION Docket Number DC-21543

Robert J. Ables, Referee

PARTIES TO DISPUTE: (Joint Council of Dining Car Employes
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(Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of Joint Council of Dining Car Employees, Local 465, on the property of the Union Pacific Railroad Company, for and on behalf of Robert E. Weir, and all others similarly situated, that they be paid the difference between what they received as a separation allowance and what they should have been paid. This claim is made under the provisions of an understanding made between the parties under November 27, 1973.

OPINION OF BOARD: This is the first dispute between the parties under a new agreement, thus, there are no awards by this Board and there is no precedent on the property for settling the dispute. But this is an important dispute because it is the first of its kind in the sensitive area of protection or compensation for displaced employes occurring as a result of the discontinuance, abandonment and realignment of passenger service following the creation of AMTRAK under the Rail Passenger Service Act of 1970.

The question in this hard fought, well argued, dispute is whether the senior employes who took a lump sum allowance are entitled to an increase in such allowance, in accordance with a general wage increase which took effect after the agreement on the lump sum settlement. In short, the claims are for the difference between what the claimants received as a separation allowance and what they would have been paid under the provisions of an understanding between the parties on November 27, 1973 if they were entitled to the later wage increase.

Some background to the dispute is required to unravel the complex terms, conditions and agreement of the parties on which this dispute rests.

The Rail Service Passenger Act of 1970 created a rail passenger corporation now called AMTRAK. Under Public Law 91-518, effective October 30, 1970, AMTRAK was granted authority to operate the passenger train service for individual railroads desiring to participate under the Act. Under this law, AMTRAK was to depend on the individual railroads for employes, as well as services incidental to train operation.

Public Law 93-316 mandated AMTRAK to assume direct control of passenger trains and to hire its own employes. Under the new law, protective arrangements were required for employes who are adversely affected by a discontinuance of inter-city rail passenger service. Such arrangements had to be fair and equitable to protect the interests of such employes.

The target date for AMTRAK to assume responsibility for service on the Union Pacific Railroad was January 1, 1974. In anticipation of and in preparation for assumption of control by AMTRAK, the Union Pacific and this union entered into special agreements taking effect on or after January 1, 1974.

In considering the development of a fair and equitable arrangement to protect the interests of employes adversely affected by changes in inter-city rail passenger service, it is pertinent to know that the basic protective arrangement covering all on-board train service employes is contained in Mediation Agreement Case A-7128, adopted February 7, 1965.

To implement the new law and to make arrangements to meet the new conditions, the parties agreed as follows:

-- The memorandum of agreement of November 27, 1973 permitted the Carrier to offer protected employes a lump sum separation allowance in the event there was no other employment, "in lieu of all other benefits or protection." The employe, however, could elect to remain in his protective status as prescribed by the Mediation Agreement of February 7, 1965.

-- The letter of understanding of November 27, 1973 permitted employes who were age 60, with 30 years of service (60/30) to reject an offer of employment with AMTRAK and instead be considered to be protected under the Mediation Agreement of 1965. In this event, however, they would be allowed the monthly protective benefits under that agreement only for the months of January through July, 1974. It was further stipulated in the letter of understanding of November 27, 1973, that any employe who had attained age 64 on or before July 1, 1974 and who had 30 years service, would retire or resign and, in lieu of all other benefits, be granted a separation allowance payment.

-- Paragraph 3(c) of such letter of understanding permits employes who are age 64 on or before July 1, 1974 and who have 30 years of service to retire and, in lieu of all other benefits, be granted a lump sum separation allowance:

> "equivalent to the amount of protective payments that would have been due to such employes, at the current rates of pay had such employe remained in service until he had reached the date of mandatory retirement" (which, on this property is age 65).

-- A letter of understanding of November 28, 1973 clarified a provision of the memorandum of agreement.

In an agreement dated June 6, 1975, there was provision for four general wage increases.

After the agreement of June 6, 1975, claims were presented on behalf of those employes who had retired under the provisions of the agreement of November 27, 1973, whose separation allowance computation period was based on the agreed standard of 2,880 hours divided by the number of hours per month on which the particular employe's monthly protective rate was based, which was to be increased, according to the employes, by the first general wage increase when it became effective.

The basic position of the employes therefore is that they are entitled to a wage rate adjustment to reach the hourly rate of pay in effect after the wage increase for the period of time required to reach 2,880 hours.

In support of their claims, the employes argued that the dispute involves only the specific agreements made on the property as required under the new law. To the employes, the letter of agreement of November 27, 1973 clearly contains a "look ahead" feature (i.e., "future projected earnings").

To support their argument that the letter agreement of November 27, 1973 does consider future projected earnings, the employes note that in Item 3(c) of the agreement, the employe who was close to the mandatory retirement age of 65 is to be granted a lump sum separation allowance equivalent to the amount of protection payments that would have been due to such employe, until he reached the date of mandatory retirement. On this predicate, the employes emphasized:

"It is not reasonable to consider the separation allowance amount as future projected earning amounts for duration only when it permits reducing the amount of the lump sum payable. These separation allowance amounts were expressed in hours for the very reason that the parties wanted to make them projected earnings. This was the reason for the application intended and this is different than the memorandum of agreement and/or the Washington Job Protection Agreement."

The net result of inducing the senior employes to retire was that the Carrier would pay for a shorter period of protection for the 60/30 employes than if junior employes had been displaced. Also, the number of surplus employes would be reduced. To compensate for this advantage to the Carrier, the 60/30 employes, according to the Organization, were to be paid a lump sum for projected future earnings to produce equitable monetary benefits, considering retirement benefits payable and tax advantages. That the Carrier accepted this principle of projected future earnings is demonstrated, according to the employes, by the fact that claimant Weir, had his payments decreased because there was not sufficient time between the point of actual retirement after age 64 and mandatory retirement age of 65 to qualify for separation pay on the basis of 2,880 hours.

The Organization makes a persuasive case, but they have not sustained the burden of showing that a new agreement on important new benefits clearly was intended to make wage increases applicable after an employe who has resigned or retired had accepted a lump sum separation allowance.

Paragraph No. 7 of the memorandum agreement in issue provides that the Carrier may offer a lump sum separation allowance "in accordance with the Washington Job Protection Agreement", in which case the employe may remain in his status, as described under the Mediation Agreement of February 7, 1965,

> "or resign and accept the separation allowance in lieu of all benefits and protection."

This provision makes two points clear. The first is that the Washington Agreement does apply with respect to the payment of the lump sum separation allowance. Second, the separation allowance, if accepted, was to be in lieu of all other benefits and protection.

Thus, the only remaining question in this dispute is the basis on which the separation allowance is to be paid. Paragraph 3(c) of the letter agreement of November 27, 1973 provides the best basis to make this judgment. That provision requires that the separation allowance -- once it has been calculated as to the amount of protection payment due -- is to be paid:

> "at the current rates of pay had such employee remained in service until he had reached the date of mandatory retirement."

The question in dispute is reduced to this: If an employe had attained the age of 64 on or before July 1, 1974, and if he had 30 years of service, and if he had surrendered all benefits to accept a lump sum separation allowance, at what rate should such protection payment be made after the pay increases become effective, considering that there was at least 1 year left before he would be required to retire, where the contract calls for payment at "current rates of pay until he had reached the date of mandatory retirement"?

Clearly the organization has an arguable case that in the overlapped period until such employe reaches age 65, the term "current rates of pay" could be construed to mean the rate of pay in the period between his actual retirement and the time he would have been required to retire. But, there is no record of negotiations to support this construction of the contract; rather, the words "current rates of pay" should be viewed in their ordinary meaning, which is related to the time that the employe actually retires or resigns.

Neither the Mediation Agreement of 1965, nor the Washington Job Protection Agreement, nor any other protection agreement discussed by the parties, make future pay increases available to the employe once he has begun to be protected under the agreement covering his situation. Thus, there is some presumption based on this precedent not to apply future wage increases in this case. If the employes had wished to change the practice and precedent in the payment of protection under prior agreements, it was incumbent on them to write the language in this agreement that would have given them such protection. This was not done.

To the argument of the employes that the memorandum agreement and letter of understanding of November 27, 1973, were drafted by the Carrier and, therefore, any ambiguity in the language should be resolved against the party drafting such language, it can be said that such general rule of construction of contracts is more than offset by the circumstances in issue, where the parties negotiated long and hard, and at very high levels, to hammer out this important agreement. Since the employes had such a vital stake in the agreement, and they participated intimately in its development, the employes were obliged to get the language in the contract which would give them the protection they felt they had to have.

Under all the circumstances, in a close case, it cannot be found that the parties agreed to apply future wage increases to lump sum separation allowances and it was the burden of the employes to include the language in the agreement to require such payment of future wage increases, but such language was not in the agreement, and the best construction of the phrase "current rates of pay" is of the time the lump sum separation allowance is accepted by the employe who resigns or retires under the terms of the agreement "in lieu of all other benefits and protection."

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 respectivly 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.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 12th day of May 1978.