

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25408
Docket Number MS-25248

George S. Roukis, Referee

PARTIES TO DISPUTE: (Gary D. Jones
(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

"1. The Norfolk and Western Railway Company (hereinafter referred to as 'Carrier') violated provisions of the Master Agreement between said Carrier and the Craft or Class of Employees represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as 'BRAC') bearing the effective date of April 1, 1973, as amended, when it declined Clerk Gary D. Jones' (hereinafter referred to as Claimant) request to exercise his rights pursuant to said agreement.

2. Carrier shall now reimburse Claimant for all wage loss suffered, all expenses incurred (including but not limited to travel, living, moving, cleaning and laundry) and all loss suffered in the sale of Claimant's residence in Lucasville, Ohio.

3. Carrier shall allow Claimant a minimum of ten working days off with pay and all his expenses and those of his family incurred for the purpose of finding suitable housing for himself and his family in Roanoke.

4. Carrier shall release Claimant of any and all cost of securing a home in Roanoke (including but not limited to difference between mortgage loan interest on home in Lucasville and mortgage loan interest on home secured in Roanoke), plus \$5,000.00 to cover incidental expenses incurred in making the involuntary move as a result of the violation herein specified.

5. Carrier shall allow Claimant to exercise his rights to a position in Seniority District No. 47 and pay him all wage loss suffered and all expenses of what ever nature incurred in connection therewith.

6. This claim shall commence August 8, 1981, and shall continue until the violation herein specified is corrected by the Carrier."

OPINION OF BOARD: Claimant entered Carrier's service as a Clerk in the C. T. Department, Scioto Division, Seniority District No. 47 on March 9, 1966. He cross-bid to a clerical position in the Zone Revision Bureau Accounting Department, Portsmouth, Ohio on June 3, 1968. The latter situs was located in Seniority District No. 1. According to Rule 3 of the April 1, 1973, Master Agreement, Claimant was permitted to accumulate seniority in Districts No. 47 and No. 1 respectively. Moreover, pursuant to Rule 3, Section (d), a covered employe was precluded from exercising transfer, bidding or displacement rights in seniority order to the Seniority District from which he last transferred, except as provided by this Rule. In essence, an employe affected by force reduction, exercise of seniority rights by another employe or his disqualification in the District to which he has transferred must exhaust all seniority rights to regular positions in that District before exercising seniority in his original Seniority District. Rule 3(d) is referenced in part as follows:

"An employe affected by force reduction, exercise of seniority rights by other employes or his disqualification in the seniority district to which he has transferred must exhaust all seniority rights to regular positions in that seniority district before exercising seniority in his original seniority district as herein defined. Such exercise must be made in accordance with the provisions of Rule 20(d)."

Under date of July 3, 1981, Carrier notified the BRAC General Chairman that it was transferring two non-protected positions from the Zone Revision Bureau, Portsmouth, Ohio, to the Accounting Department at Roanoke, Virginia, on or about October 5, 1981. Claimant's position was one of these planned transfers. By letter, dated July 7, 1981, the BRAC General Chairman requested Carrier to delay any transfer of positions until Case No. 1 of Special Board of Arbitration was decided. This request was acceded to by Carrier, and later when Award No. 1 (Case No. 1) was formally consummated by all the members of the Arbitration Board on November 11, 1981, the General Chairman did not further pursue his concern. In part, the Special Board of Arbitration held:

"The January 8, 1979 Memorandum Agreement is not designed to protect employees from the adverse consequences of position transfers, it is designed to protect employees from the disquieting effects of position abolishments. Any other conclusion would vitiate the force and effect of the April 7, 1965 Memorandum Agreement and create an unintended semantical distortion. The 1979 Protective Agreement was not meant to supplant the 1965 Agreement or relegate it to a superfluous role. It was meant to protect employees affected by permanent job abolishments. In this case, the sixteen (16) jobs were visibly and unmistakably transferred and the protective provisions of the April 7, 1965 Memorandum Agreement were applicable to this situation."

Meanwhile, Claimant responded to Carrier's July 10, 1981, notice officially aprising him that his position was being transferred to Roanoke, Virginia with the following answer: (in part)

"Effective August 10, 1981, I will follow my transferred position No. 91 Expert Rate Clerk to General Office Building, East Roanoke, VA, under protest. It is my position that your referred notice is improper and violates the provisions of the January 8, 1979 Memorandum Agreement. Notwithstanding, the notice and contemplated transfer falls squarely with the subject matter in Case No. 1 of Special Arbitration Board which was argued before Dr. George S. Roukis, Arbitrator, during session of the Board on July 15-16, 1981. In that the decision in Case No. 1 should be forthcoming shortly, it is suggested that any transfer of positions be delayed pending release of the Award."

The Division herein takes judicial notice that transferred positions were not deemed protected under the January 8, 1979, Memorandum Agreement. On July 8, 1981, in a parallel action, Claimant informed the Division Supervisor that he was exercising his seniority to displace a junior employee who was employed in the Clerk Supervisor Material Office, Portsmouth, Ohio. He noted that his seniority in the District was March 7, 1966. His transferred position was not located in this District. On July 10, 1981, Carrier responded that it could not accept his displacement notice as he had not exhausted his seniority in District No. 1, as required by Rule 3 of the Clerical Agreement. Claimant filed an undated claim which was received in the Office of the Assistant Comptroller - Revenues & Systems on September 24, 1981. He asserted that the April 1, 1973, Master Agreement was violated and requested several remedial and make whole remedies including the right to a position in Seniority District No. 47. (See Employee's Statement of Claim for complete test.)

In defense of his petition, Claimant contends that Carrier violated Agreement Rules 1, 3, 6, 21, 44, 51 and 70. In particular, he asserts that unless one of the defining conditions in Rule 3(d) is present, the Rule is inapplicable. In essence, he contends that he must exhaust all seniority in the District only if he is affected by force reduction, exercise of seniority rights by other employees or his personal disqualification. It is his position that in the absence of one of these explicit contingencies, Rule 3(d) does not prevent him from exercising seniority in accordance with the Rules of the applicable Controlling Agreement. He argues that Carrier also violated Rules 21 and 22 when Carrier allegedly failed to permit him to exercise rights provided by those Rules and Rules 44 and 51. Rule 44 pertains to temporary assignments when an employee is away from his headquarters' point, and Rule 51 requires free transportation for employees transferred by Management to positions which require a change of residence. In addition, he avers that Rules 1, 6 and 70 were violated. Rule 1 is the Agreement's Scope Rule, Rule 6 refers to exercise of seniority, and Rule 70 precludes Agreement changes or modification while the Agreement is operative except as provided by the Agreement or consistent with the provisions of the Railway Labor Act, as amended.

Carrier raises both procedural and substantive objections. Procedurally, Carrier maintains that his petition is invalid since he failed to progress the claim and hold conference with the highest designated Carrier Officer in accordance with Section 153, First (i) of the Railway Labor Act, as amended, and the correlative procedural requirements of the National Railroad Adjustment Board's Circular No. 1. It asserts that he failed to perfect his claim on the property as evidenced by its amendment when submitted to the Board and argues that he failed to cite any Rule requiring financial relief and assistance in connection with his transfer from Portsmouth, Ohio, to Roanoke, Virginia.

Carrier contends with respect to the dispute's merits that Rule 3(d) clearly requires employees to exhaust all seniority rights to regular positions in the incumbent's present Seniority District before exercising seniority to the original Seniority District. In the case herein, it avers Claimant failed to exhaust his seniority in Seniority District No. 1. It argues that the April 1, 1973, Master Agreement does not grant Claimant the right to displace a junior employee on his original Seniority District (No. 47) when positions are available in his transferred Seniority District (No. 1).

In our review of this case, we concur with Carrier's position. While Claimant's progression of the claim was perhaps not an orthodox example of a perfectly appealed grievance, the Board nevertheless finds the claim arbitrable. As such, we will consider it on its merits. Carrier's decision to transfer Claimant's position to Roanoke, Virginia was effectuated consistent with Agreement Rule 22. Claimant at the time was not a protected employee. Rule 22 - Change in Location of Positions - reads, in part, as follows:

"When the Company changes the location of a position from one location to another location within the same seniority district, the employee affected may move with the position or exercise displacement rights in accordance with the rules of this Agreement."

Claimant was not displaced from his position for reasons of coordination or force reduction; his position was merely transferred to a new situs within Seniority District No. 1. He was not being transferred to a position necessitating a change of residence, as this would presuppose by definition a totally new position, and thus, Rule 51 is inapplicable. Importantly, Carrier was not barred from transferring his position and he had the option of exercising displacement rights pursuant to the Rules Agreement. He was not protected or accorded rights vis-a-vis this personnel action under other Agreements. Accordingly, Claimant could exercise displacement rights in Seniority District No. 1 or in Seniority District No. 47 consistent with Rule 3(d). Initially, he sought protected benefits under the January 8, 1979, Memorandum Agreement, but Award No. 1 of the Special Board of Arbitration mooted any claim under the 1979 Agreement. In his letter of July 8, 1981, he sought to displace a junior employee on the Seniority District wherein he established his first seniority on March 9, 1966. This was Seniority District No. 47. Subsequently, when he formally filed a claim on or about September 24, 1981, he requested Carrier to allow him the right to a position in Seniority District No. 47. It was a request that was regulated by Rule 3(d). However, in order to transfer back to Seniority District No. 47, Claimant was required to comply with the specifying criteria of Rule 3(d). This Rule does not estop an employee from exercising displacement rights within his transferred Seniority District. It does preclude a perfunctory transfer to the first established Seniority District, unless the employee was affected by force reduction, exercise of seniority rights by other employees or disqualification in his transferred Seniority District. In essence, an employee electing to exercise displacement rights when affected by Rule 22, must first obtain a position in the Seniority District affected. The employee cannot as a first adjustment option seek to transfer back to his initial Seniority District. To be sure, Claimant is partially correct when he asserts that the specifying criteria are inapplicable to him, but he is not correct when he argues by selective exclusion that he has an implicit option not to displace in his transferred Seniority District. There is no inconsistency between the displacements contemplated by Rule 22 and the transferring of an affected employee to his initial Seniority District. In fact, there is a consistent symmetrical relationship between these provisions. For these reasons we find no plausible basis for sustaining Claimant's petition. None of the Agreement Rules cited was violated. It is indeed unfortunate that Claimant suffered financially from his predicament, but we lack jurisdiction to interpose an equity settlement. Our role under the Railway Labor Act, as amended, is to interpret and/or apply disputed contract provisions and not to rewrite or amend by judicial decision existing contract language. Our decision herein comports with that role.

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

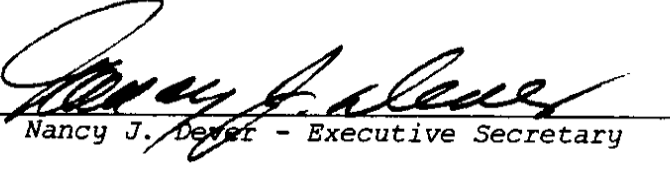
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of April 1985.