

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25901

Docket Number CL-24820

George V. Boyle, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-9653) that:

1. Carrier violated the Clerk-Telegrapher Agreement commencing August, 1981 when it failed and refused to remove the name of Mr. John J. Sell from Seniority Roster No. 74 of Carrier's Akron-Chicago Division in that Carrier, after promoting Mr. Sell to an official or fully excepted position on July 13, 1981, failed to require him to attain membership in B.R.A.C. as required by said Agreement, and

2. As a result of such impropriety, Carrier shall be required to remit to B.R.A.C. Local Lodge No. 114 the amount of fifty dollars (\$50.00) (in lieu of initiation fee), and twenty-one dollars and sixty cents (\$21.60) per month (in lieu of monthly union dues), beginning August, 1981, and continuing each subsequent month until the name of Mr. John J. Sell is removed from Carrier's Akron-Chicago Division joint Clerk-Telegrapher Seniority Roster No. 74."

OPINION OF BOARD: The Collective Bargaining Agreement currently in effect between the parties provides as follows:

"Rule 41

Seniority-Official and Fully Excepted Positions

(a) Employees promoted to an official or fully excepted positions on or before September 1, 1980 shall retain and continue to accrue seniority under this Agreement. Employees promoted to official or fully excepted positions subsequent to September 1, 1980 shall, as a condition of retaining and accruing seniority under this Agreement, be required to maintain membership in good standing in the Organization party hereto: In the event such employee fails to maintain membership in good standing, the General Chairman shall notify the Director of Labor Relations or his designated representative. If within thirty (30) calendar days after receipt of such notification the employee has not attained or regained membership in good standing with the Organization, the employee will forfeit all seniority under this Agreement." (Amended 9-1-80-Employees' Exhibit No. 1)."

In the instant case, Mr. John J. Sell had established and accrued seniority under the Agreement dating from June 1974 and was duly recorded as such on Seniority Roster No. 74. Subsequently he established seniority as a Yardmaster in August 1974. He was then promoted on July 16, 1981 to the official and fully excepted position of Assistant Trainmaster.

By letter of August 28, 1981, the Organization informed the Carrier that Mr. Sell had not attained or regained membership in BRAC nor had he paid an initiation fee or dues. They requested that his name be removed from Seniority Roster No. 74. By letter of September 26, 1981 the Organization claimed \$50.00, (in lieu of initiation fee) and \$21.60 per month beginning August 1981 (in lieu of monthly union dues) or alternatively Mr. Sell should be dropped from the Seniority Roster.

The Carrier's response to this claim contended that Rule No. 41 applied only to individuals covered by the BRAC Agreement who had been promoted from BRAC covered employment to non-contract positions. It was the Carrier's position that since Mr. Sell was a Yardmaster and covered by the Yardmaster Agreement when promoted, Rule No. 41 had no application. Rather they held that to be an "employee" within the meaning of Rule No. 41 the individual must be actively engaged in work covered by the BRAC Agreement.

The Carrier cites Rule No. 1, the Scope Rule, wherein it states:

"These rules . . . shall govern the hours of service, working conditions and rates of pay of all employees engaged in the work of the craft or class of clerical office, station and storehouse employees . . ."(Emphasis added.)

It is argued by implication, that the Rule applies to those "from which class are subsequently promoted to non-contract positions with the Carrier."

The Carrier contends further that a number of awards have shown that where an employee has attained dual seniority in two grades of service he is covered by the Agreement of the second craft or class. And since Mr. Sell was working under the second, the Yardmaster Agreement, and not the former, the Clerks Agreement, the requirements of Rule No. 41 are not applicable.

In their Rebuttal Carrier states, "It is clear . . . , that Mr. Sell was not bound by any provision, including Rule 41, of the B & O Clerks' Agreement."

In the same vein, the Carrier argues that the contracting parties had no authority to negotiate a provision placing an obligation upon employees not represented by BRAC and that the Employees' interpretation is contrary to the intent of the parties.

As to the remedy, the Carrier contends that the monetary claim is beyond the jurisdiction of the Board.

On the other hand, the Organization asserts that the language of Rule No. 41 is clear and unambiguous. It applies to all "employees" who have acquired seniority rights under their Agreement. Those promoted to official or excepted positions prior to September 1, 1980, retain and continue to accrue seniority without membership or payment of dues. But those promoted to such positions after the above date will retain and accrue the same rights only if they meet the conditions set forth by the Rule, i.e. organizational membership and payment of dues.

With this view the Board agrees.

If the Carrier's interpretation of the Scope Rule is accepted then no one is covered since it deals with those who are no longer "engaged in the work of the craft." Clearly this would render the Rule meaningless and its negotiation redundant.

A more reasonable interpretation of the Rule would argue that the parties are free to negotiate rights for those who had attained seniority in the craft but who are no longer engaged in it, having transferred to another craft or been promoted to more responsible positions outside covered employment. Such employees are not favored or penalized by their line of progression. Those who moved into excepted positions prior to the agreed upon date are "grandfathered" by virtue of prior Agreements but those who subsequently join their ranks must assume obligations as a condition for preservation and accrual of rights.

This interpretation is buttressed by reviewing changes from the previous Agreement. Rule 41, until revised, read that the affected employees would "retain and accumulate all seniority rights," without condition. Obviously, the parties agreed to a substantive change with the intention of conditioning future rights of such employees.

With respect to the prior Awards, Award No. 6213 dealt with leaves of absence wherein the Arbitrator indicates that the term "employee" has always referred to a certain craft and that the controlling factor is "acceptable past practice." In the instant case, the specific terms were changed by negotiation to alter a past practice of application.

Awards No. 1288 and 1441 deal with controlling work assignments and provide no clear precedents to the instant case.

In sum, it is abundantly clear that if Mr. Sell is to retain seniority rights he does so by virtue of the provision of Rule No. 41. If he "was not bound by any provision, including Rule 41, of the B & O Clerks Agreement", then he cannot simultaneously assert preservation and accrual of rights under that same Agreement and Rule. The parties negotiated and agreed to conditional rights for future promoted employees of which Mr. Sell is one and he is free to accept or reject the conditions imposed. He is not free to ignore the obligations and insist upon his rights.

Accordingly the Board sustains the grievance with respect to the removal of the name of Mr. John J. Sell from Seniority Roster No. 74. The monetary claim is denied since this is beyond the jurisdiction of the Board, would be illegal and non-specific as to Claimant.

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 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

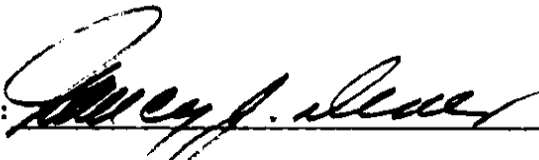
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.

