NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25937

THIRD DIVISION Docket Number CL-25793

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes (
(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9885) that:

CLAIM NO. 1. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on June 20, 1980 it failed to call and use Mr. P. E. DeShazer, Clerk, Coos Bay, Oregon for 8 hours overtime work on Position No. 16 and instead shoved Clerk J. W. Carson from Position No. 2 to Position No. 16.

CLAIM NO. 2. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on October 6, 1980 it failed to call and use Mr. E. L. Faulk, Clerk, Brooklyn, Oregon for 8 hours overtime work on Position No. 190 and instead shoved Clerk R. V. Moore from Position No. 192 to Position No. 190.

CLAIM NO. 3. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on August 25, 1982 it failed to call and use Ms. Helen Wilson, Clerk, Yuma, Arizona for 8 hours overtime work on Position No. 003 and instead shoved Clerk D. D. Tucker from Position No. 31, (Relief Assignment No. 153), to Position No. 003.

CLAIM NO. 4. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on August 6, 1982 it failed to call and use Mr. J. A. Lawson, Clerks, Klamath Falls, Oregon, for 8 hours overtime work on Position No. 40 and instead shoved Clerk G. G. Vlahos from Position No. 53 to Position No. 40.

CLAIM NO. 5. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on September 5, 1982 it failed to call and use Mr. J. A. Lawson, Clerk, Klamath Falls, Oregon, for 8 hours overtime work on Position No. 37 and instead shoved Clerk L. J. Griffin from Position No. 50 to Position No. 37.

CLAIM NO. 6. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on September 5, 1982 it failed to call and use Mr. J. M. Durbin, Klamath Falls, Oregon for 8 hours overtime work on Position No. 105 and instead shoved Clerk J. Corpus from Position No. 53 to Position No. 105.

CLAIM NO. 7. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on September 17, 1982 it failed to call and use Mr. R. L. McKune, Clerk, Klamath Falls, Oregon, for 8 hours overtime work on Position No. 37 and instead shoved Clerk T. O. Seater from Position No. 15 to Position No. 37.

CLAIM NO. 8. The Southern Pacific Transportation Company violated the current Clerks' Agreement when on September 18, 1982 and on October 2, 1982 it failed to call and use Mr. R. L. Westman, Clerk, Klamath Falls, Oregon, for 8 hours overtime work on Position No. 109 on each date and instead shoved Clerk C. L. Stevenson from Position No. 32 to Position No. 109 on each date.

The Southern Pacific Transportation Company shall now be required to compensate each of the individuals named in Claims 1 through 8 a days pay (8 hours) at the overtime rate of time and one-half at the rate of the position involved for each date designated in the claim as provided in the November 24, 1982 Arbitration Award of Arbitrator I. M. Lieberman involving BRAC and the Southern Pacific Transportation Company."

OPINION OF BOARD: This is a contract interpretation dispute initiated by the Organization on behalf of eight Clerks and involving nearly identical issues and facts surrounding Rule 34(f). That rule reads:

> "(f). When a vacancy exists on an assigned work day of an established position or a new position, it will be filled as follows, when the Carrier elects to fill the vacancy:
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> 1. Senior, qualified, available Guaranteed Extra Board employe on a straight-time basis in accordance with the provisions of this Rule 34.
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> 2. In the absence of a qualified Guaranteed Extra Board employe on a straight-time basis, by the senior, qualified, available assigned or Guaranteed Extra Board employe on an overtime basis, or where applicable under the provisions of Section (c) of this rule. In the case of a vacancy on a relief assignment, by the incumbent of the position to be relieved on that date, then by the senior, qualified, available, assigned or Guaranteed Extra Board employe. Calling will be from the volunteer overtime list, where maintained.

3. In the event the vacancy cannot be filled under Items 1 and 2, then the Carrier may instruct an employe, scheduled to work the same hours at the vacant position, to vacate his regular assignment and fill the vacancy. An employe so removed will be paid the rate of his regular assignment, the rate of the assignment worked, or his protective rate, whichever is higher. However, if it is found the Carrier could have filled the vacancy under Items 1 or 2 and failed and/or neglected to call employes referred to in Items 1 and 2, then the Carrier will pay the employe removed from his assignment eight hours' pay at the straight-time rate of his regular assignment, or eight hours straight-time pay at his protective rate if such rate is being paid for service on his regular assignment and, in addition, will be allowed eight hours straight-time pay at the rate of the position worked.

4. In the event the vacancy cannot be filled under Items 1, 2 or 3, the junior employe who has been called on an overtime basis may be required to fill the vacancy in accordance with provisions of Letter of Agreement of March 11, 1971."

In each of the cases at bar the following circumstances took place. Carrier found itself with a vacancy to be filled under Rule 34(f). Under the provisions set forth above, Carrier found no qualified Guaranteed Extra Board employes as set forth in Section 1. Each of the Claimants in the instant case was available as per Section 2. Carrier did not call them to fill the vacancy, but went instead to Section 3. Carrier filled the temporary vacancy by moving another employe from their regular assignment to the temporary vacancy as per Section 3 and compensated the shoved employe as per the Agreement Rule 34(f), Section 3.

The Organization argued that each employe run around in the shove (as per Section 2) was due compensation and as such, filed Claim. The Carrier argued that it had followed the Agreement and as such, there could be no Claim for compensation. Unable to reach agreement, this Board is now asked to resolve the issue.

The circumstances surrounding this Claim are somewhat unique in that Carrier and Organization have previously set this same impasse before Arbitration. In a November 24, 1982 Arbitration Award, Referee Lieberman ruled for the Organization and against the Carrier. In that Arbitration ruling Lieberman reviewed and considered at length the same issues which this Board in its Appellate function is now being asked to review. In fact, to rule for the Carrier we must find that Arbitration Award palpably erroneous

and non-precedential. In that Award, Lieberman quotes a Carrier letter of July 28, 1980, and correctly notes that the "Carrier conceded that it had made an error in this respect" and as such paid for that error as per Agreement. In the case at bar no error or "oversight" is being conceded or claimed by Carrier. In the instant case Carrier maintains a clear right by Agreement to move around Section 2 and shove an employe by Section 3 as long as it pays double pay. The Lieberman Award does not support such an interpretation.

Carrier therefore argues in the instant case that the Lieberman Award is palpably erroneous and should not be followed by this Board (see Third Division Award 15740). In addition, the Carrier notes the following: that it followed the Agreement; that the history of the new contract provision documents wording inclusion from Section 6 Notices; that historically there had been no prior payments of any kind to either the shove position or the person run around; and that specification of payment to the shoved employe acknowledges by contract no intent for additional pay to the employe run around. In line with this last point are numerous Awards, including Third Division Award 4439 which stated that "when a rule specifically lists the situations to which applicable it thereby excludes all those not included therein" (see also Third Division Awards 21772, 20277, 14531). A more recent precedent for its contract interpretation is noted by the Carrier in Third Division Award 24527.

This Board has meticulously evaluated the Lieberman Award, Carrier Dissent and Organization Rebuttal as well as the numerous Awards cited by both parties. In the mind of this Board the central issue at bar is the interpretation of Rule 34(f) in light of the evidence as presented on the property and made a part of this Claim. A written rule consummates a long tedious bargaining history and is important only to the degree that the contract lacks clear and unambiguous language. This Board, in carrying out its primary function under the Railway Labor Act, must begin by evaluating the contract language in its attempt to determine the intent of the parties. This Board turns to bargaining history, past practices, issues of parol evidence, promissory estoppel and the like only after evaluation of language ambiguity and only when the language is so ambiguous that such past negotiations and practices help to determine the mutual intent of the parties. If the mutually agreed provision includes clear language, then the provision as written governs. It is a standard principle of arbitration that anytime a new contract is developed it is presumed that when parties reduce to writing clear sequential steps or change language, that they intended a change in process or meaning. Past history becomes relevant only to the degree that one must determine the intent of the parties because the language or sequence is vague and the controlling Agreement ambiguous.

This Board therefore focuses first upon the Agreement sequence and language finding it clear and unambiguous. The language of the Agreement specifies in Rule 34(f) an order of Sections 1, then 2, then 3, and then 4. In Section 3 it states:

"...if it is found the Carrier could have filled the vacancy under Items 1 or 2, and failed and/or neglected to call employes referred to in Items 1 and 2, then ...."

The language does not state that the Carrier could have filled the vacancy under Items 1 or 2 and chose or elected instead to call other employes, it states "failed and/or neglected." Failed is defined as being "negligent in a duty (or) expectation". Neglected is defined as "to ignore or disregard, to fail to attend to properly" (Webster's New World Dictionary). The language clearly states that the Carrier is expected to attend properly to calling employes under Sections 1 and 2, before it moves to Section 3. As such, an employe bypassed by Carrier failure to follow the written agreement is directly affected and due recourse. If it was Carrier's interpretation that the negotiated rule would be followed in the manner in which Carrier now applies it, such clear and convincing evidence is lacking. There is no language or other evidence (such as Letters or Memoranda) that Section 3 was meant to provide the only remedy, or to shift entitlement in such fashion as to give the Carrier the right, if desired, to avoid the sequence of Sections 1 and 2, going to Section 3. The circumstances and rules are not similar to those cited as precedent in this case by Carrier (Third Division Award 24527). Although specifying pay in one circumstance could well suggest the intent to exclude all other possibilities, this Board cannot conclude in these instant circumstances that the Organization would have bargained a sequence of Section 1, then 3, then 4, then 2 or agreed by contract to directly bypass seniority. On the whole of the evidence, clear language prevails.

This Board therefore holds with the Lieberman Award. It finds the language of the Agreement clear and unequivocal. It assumes that parties to a contract negotiation of such language are charged with full knowledge of the possible significance of Rule outcomes and as such, must be prepared for those eventualities. Finding such language as "failed and/or neglected", we have no authority to reconstruct or construe the clear and unambiguous language and sequence of Rule 34(f) into some other order or meaning. This Board finds that the Organization's case must be sustained, even though it is clear that the results are presently discordant to the Carrier. This Board agrees with the Lieberman Arbitration Award and in effect agrees it has precedential value and should be considered res judicata.

As for compensation, the Claimants are entitled to be compensated as they should have been called to perform service as per Rule 34(f) Section 2. Under the circumstances at bar, Claimants DeShazer, Faulk and Wilson are to be compensated at time and one-half whereas all other Claimants at their straight-time rate of pay in accordance with their initial claim request on the property.

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 holds:

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 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.