

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

(J. Marshall Fisher
PARTIES TO DISPUTE: (
(Southern Railway Company
(Carolina & North Western Railway Company)

STATEMENT OF CLAIM: "The position of Agent-Operator at Anderson, S.C. should have been awarded to J. M. Fisher because his seniority on that seniority district was greater than either H. G. Kateman or R. L. Coker and in addition J. M. Fisher has prior rights to positions on this seniority district nor should either of the above been allowed to displace J. M. Fisher."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On July 23, 1984, a claim was filed by the Claimant alleging that the Carrier was in violation of Rules of the Agreement for having assigned fellow employee R. L. Coker, rather than himself, to the position of Agent-Operator at Anderson, South Carolina "... as advertised in Greenville, S.C. Agency vacancy Bulletin No. 85, dated July 2, 1984."

There is a procedural question before the Board which must be dealt with first of all. After the claim cited above was denied the Claimant filed appeal with officers of the Carrier up to and including the one whom he thought was the appropriate officer for final appeal, Mr. R. S. Spenski, Assistant Vice President, Labor Relations. This appeal was answered by the Assistant Director, Labor Relations J. W. Staley who informed the Claimant that he was the appropriate person to handle such. This last denial was dated November 30, 1984. On May 30, 1985, the Claimant served notice to the National Railroad Adjustment Board of his intention to file an ex parte submission on the unadjusted dispute between he and the Carrier relative to the proper assignment of employees to the Agent-Operator position at Anderson, South Carolina.

The Board must underline that Section 2, Second and 3 First (1) of the Railway Labor Act requires certain procedures to be followed before a case can be properly considered by this Board. The statute states the following, in pertinent part:

"Section 2. Second:

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

"Section 3. First (1):

(1) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Circular No. 1 of October 10, 1934 issued by the National Railroad Adjustment Board, as well as numerous arbitral precedent emanating from Board, has consistently construed these provisions of statute in a strict manner; if the procedures outlined therein are not followed a claim filed before the Board is in procedural defect. Language taken from Awards issued by various Divisions of the Board is quoted here for the record. On the Second Division, Award 7330 states:

"...the dispute Claimant is asserting before this Board was not handled on the property in accordance with...Section 3, First (1) of the Railway Labor Act, nor in accordance with Circular No. 1...Therefore, the claim is barred from consideration by the Board...." (See also Second Division Awards 6941, 6953, 6992 inter alia).

The Claimant had never conferenced the case on the property prior to serving notice to this Board for adjudication of the dispute. In this respect, the Board here cites Third Division Award 20574 as precedent. What is stated in that Award essentially applies to this case. That Award says:

"...Section 2, Second...of the Act provides that all disputes must be considered, and if possible, resolved in conference between the parties on the property. Such a conference is an essential condition precedent to any case being referred to this Board. The purpose of this section of the Act is to encourage settlement of disputes between the parties, rather than the routine referral of disputes to the Board. The record of this case indicates that no conference relative to this claim was held on the property prior to its submission to this Board. For this reason we...have no alternative but to dismiss the claim based on this serious procedural flaw." (See also Third Division Awards 18107, 20977, 24259, 25676).

On procedural grounds, therefore, this case must be dismissed.

In studying the total record before it the Board notes the persistence of the Claimant in asserting his rights, on merits, relative to this claim and a similar one which preceded this one. Given the history of those efforts, and despite the Board's dismissal of the claim on procedural grounds, it will proffer an opinion on this case's merits in order to attempt to have the basic issue at bar laid to rest once and for all. The Claimant first hired into the industry as a cashier on the Carolina and Northwestern Railway Company (CNW) in 1973 and established seniority on September 17, 1973. Some three months later the CNW merged with the Norfolk Southern Railway Company (NS). The seniority rosters of those two companies were combined and the CNW Anderson Division was added to the Charlotte District of the Piedmont Division. The Memorandum of Agreement combining these rosters stated that CNW employees would have prior rights over NS employees and other employees hired after the Agreement date to positions which existed on December 23, 1973, in CNW Districts. The Agreement also provided that NS employees would have prior rights over CNW employees as well as new employees hired after the Agreement to positions which existed on NS Districts.

On August 2, 1982, the Carrier issued Bulletin No. 42 which advertised a new Agent-Operator position at Anderson, South Carolina. This was some nine years after the merger and the Memorandum of Agreement. Prior to this time the Agent-Operator position had been filled by an exempt employee. The new position was to be filled by a covered employee. The Claimant filed a claim before the one outlined in this case when he did not receive the position advertised by Bulletin No. 42 in 1982. Rather than pursue that grievance

to arbitration using normal procedures as mandated by the Railway Labor Act the Claimant filed suit against the Carrier when the grievance was denied. Ultimately a verdict on this question was given on April 25, 1985, when the U.S. Court of Appeals, Fourth District ruled that the Claimant had no entitlement to the position. Before this decision was rendered the Agent-Operator position at Anderson, South Carolina again became vacant and the Claimant again bid on the position. The position was given to fellow employee R. L. Coker who had some 27 years' seniority more than the Claimant on the combined roster. The Claimant again filed a grievance which is the instant one before the Board. This case, therefore, represents the second claim filed by the Claimant on the substantively the same issue.

In its letter dated November 30, 1984, to the Claimant wherein he denies the July 23, 1984, claim by the Claimant, the Carrier's Assistant Director of Labor Relations' J. W. Staley states the following:

"In your letter of appeal you allege that you have superior seniority over R. L. Coker and prior rights to all clerical positions on the former C&NW Anderson District, and that you should have been assigned to the agent-operator position at Anderson, S.C., advertised in Vacancy Bulletin No. 85 dated July 2, 1984.

To the contrary, however, there never has been a scheduled position of agent-operator at Anderson, S.C. to which you can claim prior rights. This position was first advertised by Bulletin #42 dated August 2, 1982 and assigned to the senior bidder, H. G. Kateman on August 27, 1982. Prior to this date, the agent at Anderson, S.C. was an appointed position filled by a non-scheduled employee and fully excepted from all BRAC Agreement Rules. However, it was agreed in the November 1, 1980 Supplemental Agreement between BRAC and this Carrier that when the present incumbent, T. W. McKee, vacated the position, a fully covered agent position at that location would be established. Therefore, the fact that the position may be geographically located 'wholly and completely' within the former C&NW Anderson and Albermarle Districts, is of no consequence.

The position at Anderson was properly established as a Charlotte District position, advertised as such and filled from the Charlotte and Charlotte Regional Center District Consolidated Seniority Roster. Your former C&NW Anderson and

Albermarle District was formally added to the Charlotte District under Article I, Section 2(a), paragraph 2 of the December 28, 1973 Coordination Agreement. On that current seniority roster, R. L. Coker is shown in seniority line no. 27 (3-18-46), and you are shown as no. 147 (12-28-73).

Since the position of agent at Anderson was not placed under coverage of the BRAC Agreement until August, 1982, almost nine years after the December 28, 1973 Coordination Agreement, it is evident that you do not have prior rights to such position because that position was not a 'former C&NW Anderson District position' covered by the BRAC Agreement at the time of coordination...

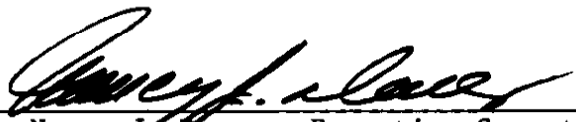
It is very obvious, then, that you were not the senior bidder for this advertised vacancy ..."

After studying the record before it the Board must conclude that the position of the Carrier as outlined in that letter to the Claimant is correct and the Board offers its opinion to that effect. Such coincides with the earlier ruling by the District Court of South Carolina.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of March 1988.