Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28804
THIRD DIVISION Docket No. MS-27640
91-3-87-3-183

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Steven P. Dula
(
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"System File NEC-BMWE-SD-1464: The Carrier failed and refused to permit Steven P. Dula to displace junior employes C. J. Cortez, or W. Hamer Jr., or J. L. McCord and or P. J. Colliere on the former Washington Terminal property prior to the start of the tour of duty on January 10, 1986 and on January 13, 1986 and on January 21, 1986 as provided in the July 16, 1984 Memorandum of Agreement between Amtrak and the B.M.W.E. and Rule 18 of the B.M.W.E. Agreement."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant established seniority as a trackman on September 20, 1976. This claim involves his unsuccessful attempts to displace three junior employees of the Carrier at Washington Terminal. The Carrier disallowed those attempts on the ground that the junior employees had prior rights to their positions pursuant to the July 16, 1984 Agreement between the Carrier and the Brotherhood of Maintenance of Way Employes (hereinafter referred to as "the BMWE"). The background of the claim is as follows:

The Carrier assumed the operation of the former Washington Terminal Company effective September 1, 1984. Before doing so, the Carrier opened negotiations with all the labor organizations representing Washington Terminal Company employees, including the BMWE. The object of those negotiations was to reach agreement with each Organization on the terms under which the Washington Terminal Company employees would be assumed by the Carrier.

The Carrier reached an Agreement with the BMWE dated July 16, 1984. That Agreement was prefaced as follows:

> "In view of the assumption by Amtrak of all Track and Bridge and Building work formerly performed by employees of the Washington Terminal Company effective August 1, 1984, the parties agree to the following:"

Among other things, the Agreement contained the following substantive provisions:

> "3. Employees formerly employed by the Washington Terminal Company accepting an offer of employment from Amtrak on August 1, 1984, shall have their Washington Terminal seniority in classes consistent with those in the BMWE-NEC Agreement dovetailed into the existing appropriate Amtrak BMWE Southern District Seniority Rosters.
>
> 4. Employees formerly employed by the Washington Terminal Company accepting employment with Amtrak on August 1, 1984, will retain full prior rights to positions headquartered within the former Terminal Company property limits. Likewise, employees presently possessing rights on the Amtrak BMWE Southern District Seniority Rosters as of August 1, 1984 shall have full prior rights to positions headquartered within previously existing Southern District territory."

It is apparent that at the time the Agreement was being negotiated, the Parties believed that the Carrier would assume the Washington Terminal Company operations and employees as of August 1, 1984. However, that did not actually occur until September 1, 1984. Even though there was a delay in its implementation, the Carrier and the BMWE did not renegotiate or revise their Agreement. Instead, they have continued to regard the Agreement as effective and binding, as if Paragraphs 3 and 4 referred to September 1, instead of August 1, 1984.

The four junior employees mentioned in Claimant's claim were hired by the Washington Terminal Company during August 1984. They then became employees of the Carrier as of September 1, 1984. The four employees occupied positions which were represented by the BMWE and, once they became employees of the Carrier, the Carrier and the BMWE regarded them as "retain[ing] the full pr[ior] rights to" their positions, as provided in Paragraph 4 of the July 16, 1984 Agreement.

However, over three days in January 1986, Claimant attempted to exercise seniority to displace the four employees from their respective positions on the former Washington Terminal property. The Carrier rejected Claimant's efforts, relying on the July 16, 1984 Agreement. By letter dated January 24, 1986, Claimant filed this claim with the Carrier's Assistant Chief Engineer.

At the outset, the Claimant stated: "Please consider this grievance in accordance with Rule 75 of the current Agreement between NRPC and the BMWE." Rule 75 provides:

> "When it is considered that an injustice has been done with respect to any matter other than discipline, the employe affected or the duly accredited representative, as defined in Rule 83, on his behalf, may within fifteen (15) days present his case in writing, to the Chief Engineer."

Claimant's letter went on to argue that the Agreement of July 16, 1984, did not protect the employees in question so as to prevent him from displacing them. Claimant wrote:

> "The Agreement referred to ... does not provide Super-seniority to the above named employee(s). The Agreement provides protection to Washington Terminal employees who were hired prior to August 1, 1984. The above named employee(s) were hired subsequent to August 1, 1984 and as such would only accrue active seniority on the applic-able Southern District roster. Since I was trying to displace any one of the trackman positions our trackmen seniority dates would be controlling and because I am senior to all of the listed employee(s) above by eight years I should have been allowed to displace [per] Rule 18 of the Agreement.
>
> Assuming arguendo that the July 16, 1984 Agreement does include the above listed employee(s), and I emphatically state that it does not, the above listed employee(s) had in effect no seniority to dovetail into the Southern District roster. In that the Washington Terminal Agree-ment Rule 3-C-1-B requires employees to have 155 days of service before they are shown on a seniority roster and as such all of the above names could not have been shown on a roster that could be dovetailed with prior rights on the former Washington Terminal...."

The Assistant Chief Engineer responded to Claimant in writing on February 12, 1986. The response explained about the unexpected one-month delay in the assumption of Washington Terminal Company operations contemplated in the July 16, 1984 Agreement, and concluded:

> "Thus, the Carrier's position on this issue is that those employees who held positions at the Washington Terminal Company prior to September 1, 1984 were not subject to displacement by Southern District employees based upon their Southern District seniority. In this instance, all of the employees cited in your protest held positions in the Washington Terminal Company prior to September 1, 1984 and therefore, we can find no basis on which to honor your request for remuneration."

The Carrier also argues that the claim has not been properly progressed by Claimant. It is the position of the Carrier that Rule 75 does not apply to this case, because the claim is concerned with the application of the BMWE Agreement and not with a matter of unjust treatment arising outside the Agreement. Since the claim presents a controversy over the proper application of the Agreement, it is a grievance which must be filed and progressed in accordance with Rule 64, according to the Carrier. This is a distinction which has been drawn repeatedly by this Board. See Third Division Awards 7412, 6066. Rule 64 requires that such claims be filed at the first level which in this case would have been the Division or Terminal Engineer. Instead, Claimant filed the claim with the Assistant Chief Engineer. Consequently, there is support for the Carrier's view that the claim is procedurally defective.

More importantly, however, the claim is flawed on its merits. Claimant relies entirely on the fact that the junior employees whom he sought to displace did not become employees of the Carrier until after August 1, 1984, the critical date specified in the Agreement of July 16, 1984. It is obvious, however, that the references in that Agreement to the date of August 1, 1984, reflect a mutual mistake by the Parties. When they executed the Agreement, they anticipated that the Carrier would take over operations of the Washington Terminal on August 1, 1984. Due to an unforeseen delay, the takeover did not occur in fact until September 1, 1984. The Parties to the Agreement nevertheless mutually intended that their Agreement continue in force just as if it recited the correct date instead of the date which was initially contemplated. They have made this intent manifest by their subsequent behavior. They have not treated the Agreement as void or of no effect merely because it recites a date on which the expected transaction did not in fact take place. To the contrary, they have proceeded in accordance with the substance of the Agreement, just as if the mistaken date had been corrected on the face of the document.

There is no question that the Parties to a contractual agreement can, explicitly or implicitly, reform their Agreement to correct for a mutual mistake of fact. A contractual Agreement must be enforced according to the substance of what the Parties intended. Were the Board to interpret this Agreement literally and hold the Parties to the written words notwithstanding the obvious mistake, it would do more than produce an absurd result. It would nullify the contract and hold the Parties to a bargain that they never intended. Namely, such an interpretation of the Agreement would ignore the prior rights of all former Washington Terminal employees to the positions which they held at the time the Carrier took over the Terminal. There can be no question that the Parties intended just the opposite. They undertook to assure those rights as of the date of that takeover, whether it occurred on August 1, 1984, or a month later. The Board must give effect to that intention, and conclude as did the Carrier that the employees whom Claimant sought to displace were protected against such a displacement.

Neither is there merit in Claimant's argument that, under Rule 3-C-1(b), the employees whom Claimant sought to displace actually had no seniority rights until 155 days after they became employees of the Carrier. Although Rule 3-C-1(b) governs when an employee's name must appear on the Carrier's seniority roster, Rule 3-A-1 unambiguously states: "Seniority begins at the time the employee's pay starts...." Rule 3-C-1(b) itself recognizes that the seniority with which an employee is credited when his name appears on the

roster "will date from the first day [of his work]." Therefore, Rule 3-C-1 in no way limits or defeats the rights those employees had to be immune from Claimant's attempted displacements. Accordingly, the claim must be denied.

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 May 1991.