Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44211
Docket No. SG-45223
20-3-NRAB-00003-180620

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern (formerly Gateway Western):

Claim on behalf of R.J. Havlin, for Carrier to provide the Claimant and his spouse coverage under the Railroad Employees National Health and Welfare Plan (GA-23000) from the date he retires until he and his spouse reach the age of 65, at no cost, account Carrier violated the current Signalmen's Agreement, particularly Side Letter 1, dated August 28, 2002, when Carrier improperly found that the Claimant was not eligible to receive the aforementioned benefit, even though he possessed the criterion to qualify for said benefit. Carrier's File No. K0617-7172. General Chairman's File No. 17-028-GWRR-185. BRS File Case No. 15883-GWWR. NMB Code 155."

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 employee 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.

In August 1975 the Claimant entered service in the railroad industry with the Illinois Central Gulf Railroad (ICG). On or about March 19, 1998, the ICG became part of the Gateway Western Railway (GWWR) whereupon the Claimant became an employee with GWWR with an assignment to its Signal Department.

By decision dated April 28, 1997, the Surface Transportation Board approved the Kansas City Southern Industries and its subsidiary companies taking control of GWWR in Docket No. 33311. The integration of GWWR, its employees and associated labor agreements, within the Carrier's operations and structure occurred over the course of several years. The Claimant became an employee of the Carrier KCS with a March 19, 1998, seniority date.

On August 30, 2002, the KCS and BRS executed a Local Section 6 Agreement that converted GWWR signal employees, such as the Claimant, to the health and welfare (H&W) coverage under the National Health & Welfare Plan. The Claimant was age forty-five (45) with four (4) years of GWWR service when the conversion occurred.

As part of the Local Section 6 Agreement, the Carrier and Organization executed Side Letter No. 1 dated August 28, 2002, stating, in part as follows:

> **"*The Carrier* is agreeable to provide coverage (without cost to the employee) under the National Health & Welfare Plan to those employees who choose to retire at ages 60, 61, 62, 63 or 64, with 30 *years of service* until the retiree reaches age 65 or becomes Medicare eligible. This provision applies to the following individuals:**
>
> **Mr. James Butler and spouse**
> **Mr. Brett A. Hartline and spouse**
> **[Claimant] Mr. Rick J. Havlin and spouse**
> **Mr. Philip Morton and spouse**
> **Mr. Larry G. Pollard and spouse**
>
> **Both the employee and spouse will receive coverage under The Railroad Employees National Health and Welfare Plan (GA-23000)."**
> **[Emphasis added.]**

The Claimant intended to retire in April 2017. He was eligible for Railroad Retirement Benefits at age sixty (60) with at least thirty (30) years of railroad service. This "60/30" eligibility standard under Railroad Retirement Act (RRA) allows an employee to retire at a reduced level of benefits. An employee's railroad service - - considered for purposes of Railroad Retirement - - is not required to be earned with one (1) carrier or continuous.

In this proceeding the issue is whether the Claimant was eligible, under the Side Letter, for Carrier provided H&W benefits until age sixty-five (65) or until he was Medicare eligible. On February 14, 2017, the Carrier informed the Claimant that he was "not eligible for the early retirement benefit outlined in the [Side] letter as you did not work for KCS\GWWR for a combined period of 30 years[.]" The Organization filed a claim in April 2017 disputing the Carrier's interpretation of the phrase "*years of service*" and, thereafter, the claim was handled on-property in the customary manner followed by conference in February 2018 where the parties' positions remained unchanged. The BRS referred this matter to the Board. Two issues must be addressed before adjudicating the claim.

Issue one advanced by KCS is whether the Board lacks jurisdiction because the claim was filed in April 2017 when the Claimant remained employed, thus, "no benefit had been denied." The BRS states that the Claimant remained employed because the Carrier improperly determined the Claimant's eligibility on February 14, 2017. The Board finds that the Carrier's determination of the Claimant's eligibility\ineligibility opened the 60 day window for claim filing which the Organization satisfied by claim dated April 10, 2017. The Carrier's lack of jurisdiction issue is set aside.

Issue two is the BRS assertion that the claim must be allowed as presented because it received the Carrier's response one (1) day past the 60-day window for responding under Rule 35. Receipt of the response (June 12) is the standard for determining timeliness (BRS position) whereas the Carrier states date of mailing (June 9) is the standard. Each party submits arbitral precedent - - none of which are on-property awards - - supporting its position. The awards are persuasive for each party's position; however, since the Organization is the advancing party seeking to have the claim allowed as presented, the responsibility to establish its awards as dispositive on timeliness resides with BRS and it falls short. The Carrier's response is timely.

As for the claim, the Side Letter, BRS notes, clearly covers the Claimant as an employee "choos[ing] to retire at ages 60, 61, 62, 63 or 64, with 30 *years of service* until the retiree reaches age 65 or becomes Medicare eligible." The BRS states:

> **"This provision is obviously referring to the 60/30 requirement to become an age annuitant for railroad retirement. Railroad retirement eligibility does not mandate the [30] years be spent with the same carrier and neither did the Agreement provision [Article 8] this [Side] letter was intended to replace."**

The Claimant has combined railroad service of approximately forty (40) years with multiple carriers. When he intended to retire in April 2017, the Claimant had twenty (20) years of combined service with KCS\GWWR based on his seniority date of March 19, 1998.

The Organization maintains that the Claimant was not required to establish 30 *years of service* with KCS\GWWR when establishing eligibility for H&W benefits. The burden to prove that the Claimant is eligible based on 30 *years of service* as interpreted by BRS resides with the Organization.

The record shows that the Claimant's service with ICG is part of his 40 years of combined railroad service for qualifying eligibility under the 60/30 standard. His service with ICG, a foreign carrier, was not considered by GWWR\KCS for H&W benefits.

The record further shows that the Carrier provided H&W benefits in the Side Letter in the same pattern as in other agreements, that is, 30 *years of service* with KCS and its predecessors. This pattern follows agreements with MidSouth, South Rail and GWWR properties and crafts represented by the Brotherhood of Maintenance Way and Brotherhood of Locomotive Engineers and Trainmen. The MidSouth agreement ties H&W benefits eligibility for sixty-five (65) engineers to *years of service* with MidSouth; engineers combined years of railroad service was not considered. The Mid-South agreement does not identify the employees individually whereas the Side Letter identifies five (5) employees by name. KCS continued its pattern to tie *years of service* with KCS and its predecessor GWWR when calculating H&W benefits eligibility under the Side Letter rather than considering combined years of railroad service.

The Organization asserts that the phrase *years of service* is clear and unambiguous and must be interpreted to include combined years of railroad service. The Board finds that placing the phrase in the structure and context of the Side Letter as well as practice gives effect to its meaning. The first two words in the Side Letter are *The Carrier* indicating that KCS is the subject in the sentence where the phrase *years of service* appears. *The Carrier* KCS is tied to *years of service* without intervening modifiers which points to *years of service* as the employee's years with KCS.

Further context is reflected in the Carrier's pattern of acquisitions to exclude or not count combined years of railroad service for H&W benefits. The reason for confining eligibility for benefits to service time with a defined carrier was addressed in Award 1 of Special Board of Adjustment No. 1156:

> **"The Board can see no benefit that would be derived by the Carrier for affording such a benefit to employees who did not have long tenure with the Carrier and its predecessors. Rather, it makes perfect sense that the Carrier would extend this benefit to those employees who had been in its (and its predecessors') employe for thirty years or more.**
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> **If the parties intended to refer to the Railroad Retirement Act, which we note is never mentioned in Rule 55, it would have been easier for them to use a phrase such as "choose to take early retirement under the Railroad Retirement Act." That would have made it clear that it was the Organization's interpretation they were adopting, and length of service with KCS and MidSouth would be irrelevant. The Board finds it more reasonable to believe that the parties simply omitted the modifier "with the Carrier" when they used the phrase "30 years of service."**

Following the rationale in Award 1, if the KCS and BRS intended to define *years of service* as meaning and embracing the RRA's combined years of service, they could have readily stated so in the Side Letter but they did not. The Side Letter replaced Article 8 (Rule 33 - Health and Welfare) in the Agreement; Article 8 does not state that benefits eligibility are tied to the RRA.

In addition to determining the meaning of the phrase *years of service* based on structure and context there is the practice where the parties relied on the seniority date for determining the Claimant's *years of service* when earning and accumulating personal days and weeks of vacation benefits. Personal days and weeks of vacation are not esoteric benefits, seldom encountered or rarely invoked. They are intimately

connected to the employee's service with the Carrier and valued for their salutary and recuperative benefits away from work and contributing to safety and efficiency at work when the employee returns.

If the Claimant were short-changed on these benefits because his *years of service* was incorrectly interpreted, more likely than not the matter would have been brought to the Carrier's attention during the Claimant's 20 years at KCS. The Claimant earned and accumulated benefits for personal days and weeks of vacation based on his *years of service* with GWWR\KCS. In this claim the Organization advances a different interpretation for the H&W benefit tied to combined railroad service. There is insufficient evidence that the parties agreed to interpret and apply *years of service* differently for H&W benefits compared to other benefits or, as reflected in the Carrier's response denying the Organization's appeal, BRS "is attempting to carve out an exception for this claimant and there is none."

The Board finds that the Carrier's interpretation of *years of service* is reasonable based on practice and context. Since the Claimant did not have 30 *years of service* with KCS and its predecessor GWWR, the provisions in the Side Letter did not cover him. Thus, the Claimant was not eligible for the H&W benefits.

Based on the foregoing findings, there is insufficient evidence to support the Organization's interpretation of the phrase *years of service.* Therefore the Board will deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of September 2020.

LABOR MEMBER'S DISSENTING OPINION TO NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION AWARD NO. 44211 SG-45223

(REFEREE PATRICK HALTER)

The Majority in this case ignored clear facts and language within the record in arriving at its decision. Despite the clear and concise language, the Majority not only erred in its findings but overcomplicated a simple matter. As the Majority notes, the pertinent Agreement language states:

> "The Carrier is agreeable to provide coverage (without cost to the employee) under the National Health & Welfare Plan to those employees who choose to retire at ages 60–64, with 30 years of service until the retiree reaches age 65 or becomes Medicare eligible. This provision applies to the following individuals:
>
> Mr. James Butler and spouse
> Mr. Brett A. Hartline and spouse
> [Claimant] Mr. Rick J. Havlin and spouse
> Mr. Philip Morton and spouse
> Mr. Larry G. Pollard and spouse
>
> Both the employees and spouses will receive coverage under The Railroad Employees National Health and Welfare Plan (GA-23000)."

The provision states, "*employees who choose to retire at ages, 60, 61, 62, 63, or 64, with 30 years of service*" and, further, lists the Claimants an employee that the provision applies to. The record established that the Claimants were the age of 60 with 40 years of service and, therefore, is entitled to the defined benefits. The clear language should have been the foundation of the logical decision that the Claimants were entitled to the benefits as listed; however, the Majority decided to follow and join in the Carrier's surmise. The first errant finding by the Majority was its apparent disregard for the Claimant's continued service on a line of road, previously owned by the Illinois Central Gulf (ICG), which was bought by the Gateway Western Railroad (GWWR) and subsequently Kansas City Southern (KCS). The record contained Surface Transportation Board (STB) documents supporting this fact. Carrier's decision to purchase the line of road enveloped and merged the years of service under the Carrier, KCS. The Claimant's continued service for the railroad was the key factor considered in the development of the provision at issue.

The Majority further errs in delving into disputes and discussion of agreements between the Carrier and other parties. Those Agreements were made with separate parties, not included in the record, and the Majority's use of them for a basis of its findings was misguided. Moreover, the "pattern" reference by the Majority is a principle used under Section 6 negotiations under the Railway Labor Act (RLA), and should only be used narrowly as an interpretation aid under Section 3 of the RLA when evaluating Agreements between the same parties, which was not the set of circumstances nor facts here.

Notwithstanding the foregoing, the Majority properly realizes that unlike the other Agreements' "pattern", the provision at issue in this case specifically listed employees that would be afforded the benefit. Therefore, it was clear, unlike the other Agreements referenced in Awards, the authors of this Agreement were specific regarding who was covered leaving no room for interpretation. It is a well-recognized doctrine of contract construction that if a certain interpretation of the language of a contract will produce absurd results, then that interpretation should be abandoned in favor of one which does not produce such results. The Claimant under the Majority's erroneous findings could not have qualified to receive the benefits, as he would not have had the "30 years of service with KCS/GWWR" before the age of 65, and would not have been listed if that were the intent. The Majority's findings result in an absurd result, as the Claimant's, specifically named as being covered, could not be eligible.

Furthermore, the Majority's holds:

> "…if the KCS and BRS intended to define *years of service* as meaning and embracing the RRA's combined years of service, they could have readily stated so in the Side Letter..."

This follows the principle that the Board may not add language to the provision. This same logic, however, is disregarded by the Majority in adding the language "*years of service with Carrier*". The clear language states "years of service", of which the Claimants had 40. If it was Carrier's intent for it to only count years under the title of GWWR and KCS, they should have stated such or not included employees who could not attain 30 years with GWWR and KCS prior to age 65. The Majority's decision to effectively add language for the Carrier oversteps its jurisdiction and serve as a hinderance to the Section 3 and Section 6 processes. This is not a novel concept and previous Boards have laid out the principle including **Third Division Award No. 33632**, which held:

> "This case must be governed by the principle - Expressio unius est exclusio alterius, see Second division Award 12025, Third Division Award 29852. The inclusion of a proviso to the ability of a returning employee to displace a junior employee promoted in his absence must be interpreted to infer that the parties did not intend any other limitation. The Carrier's interpretation would place a further limitation on this displacement right to include the fact that the displacement can only occur within the same class of seniority, and would effectively exclude promotions outside the seniority roster from its terms. Had the parties intended such a narrow construction, they certainly would have used less broad contractual language." **(Emphasis added)**

In **Third Division Award No. 35715** it was held:

> "A basic tent of contract construction is that the clear meaning of language must be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved. Clear language exists in Paragraph I11 of the Memorandum of Agreement entitling the Claimants to the $32,000 severance allowance. The Board has no authority to change or ignore that clear language." **(Emphasis added)**

The next faulty assumption upon which the Majority based its findings dealt with the "practice" of applying the National Vacation Agreement and its decision to imply that those benefits are interrelated to the provision at issue. It must first be noted that the National Vacation Agreement was never made a matter of the record, therefore, the Majority's decision to consider it, let alone leverage it, in its decision was improper. The use of past practice is only considered an interpretation tool in the application of the provision at hand, and to use an alleged past practice regarding a completely separate Agreement as the foundation of findings in this case was illogical and improper. Moreover, the Majority selectively applies the principle of context by implying that the Railroad Retirement Act (RRA) has no application to the provision but then, in turn, implies that the National Vacation Agreement has application in arriving at the interpretation. Any issues or applicability of the National Vacation Agreement are handled in their own respect and the language differs between the two, as the National Vacation Agreement provides requirements in terms of "compensated service" and other factors that govern. The Majority's assumption that there was no grievance made regarding vacation benefits is not only irrelevant but lacks any merit to use in its justification that this alleged concession would alter the clear language of a separate provision. The Board has dealt with alleged past practices in similar situation before, one such example is **First Division Award No. 28155**, which held:

> "Moreover, the Carrier states, the parties never agreed to pay the certification allowance effective December 2, 2012; indeed, their longstanding practice is that economic benefits become effective only upon contract ratification. That was the parties' understanding with respect to this benefit as well, the Carrier concludes, and the claim lacks merit.
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> The Board carefully reviewed the record in its entirety. While the Carrier's argument is logical in light of the parties' practice as to implementation of economic benefits upon ratification, we are limited by the Side Letter's plain language, regardless of what the parties may have intended."

This was also dismissed in **Third Division Award No. 35566**, which held:

> "In our considered judgement the Carrier's so-called "past practice" defense is a non sequitur because, by plain language not by "past practice," Rule 39(c) has always applied to "Welders" but has never applied to "Welder Helpers." Stated

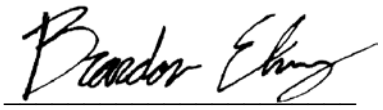
another way, the language of Rule 39(c) is not ambiguous but rather crystal clear in its application to "Welders" without further qualification. Thus, the Carrier's attempt to read into the word "Welders" in Rule 39(c), after January 1, 1995, a distinction between "Class A Welders" and "Class B Welders" simply has no support in contract language or past practice. Nothing in the language of Rule 39(c) or in the December 27, 1994 Letter of Understanding supports a conclusion that the Parties to the latter document intended that, for purposes of Rule 39(c), Class B Welders would not be counted as "Welders" on welding gangs composed of six men or less, in which two or more Welders are employed, but rather would be treated as Group 6, Class 3 Welder Helpers.

The revisionist interpretation of the plain contract language of Rule 39(c), which the Carrier now seeks in arbitration but did not achieve in negotiations, would be contradictory to the second sentence of the second paragraph of the December 27, 1994 Letter of Understanding: " Except as set forth herein, welder (Class A) and welder Class B positions are subject to the provisions of the rules of the current Maintenance of Way Agreement." Moreover, it is not at all uncommon that subsequently disputed language is construed against the Party which drafted the language, in this case the Carrier" **(Emphasis added)**

Additionally, the Majority's findings ignore the context in which the side letter was agreed to, which involved the Organization conceding to new employees covered under the Agreement, moving forward, moving from a more beneficial and long term Health and Welfare Plan to the Nation Health and Welfare Plan. In exchange the prior retiree coverage was agreed to apply to the listed employees.

Moving to the Majority's decision to follow and cite a prior award between other parties. In **Public Law Board 1156 – Award No. 1**, referenced by the Majority, the Board was faced with similar Agreements language which **omitted** the specific employees covered. This "omission" led that Board to follow the "bargaining model" as referenced in Elkouri & Elkouri, How Arbitration Work, 6th ed. We must note again, there were no omission in the provision at hand and, therefore, no need to delve in to surmise and interpretations outside the clear provision. Furthermore, the Board in this case disregards the fact that the Claimant's time with ICG was time on a predecessor railroad through the purchase and acquisition chain. The Majority succinct citation of the Award includes the language "*The Board can see no benefit that would be derived by the Carrier for affording such a benefit to employees who did not have long tenure with the Carrier and its predecessors.*" This is indicative of the biased mindset to seek benefit for the Carrier in provisions rather than understanding the benefit it received in moving employees under the National Health and Welfare Plan. As noted, the Claimants had 40 years of service with the Carrier and its predecessors and the Side Letter provided them the quid pro quo of the benefits for the change in healthcare plan moving forward.

In conclusion, the Organization respectfully dissents to the Majority's finding in this case. For all of the foregoing reasons, this Award is devoid of precedential value for use by any Arbitration Board created under the Railway Labor Act.



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