SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees
and
Atchison, Topeka and Santa Fe Railway Company

QUESTION AT ISSUE: Did Vera F. Hackelman cease to be a protected employe under the terms of Article II, Section 2 of the February 7, 1965 Mediation Agreement No. A-7128, when under the terms of an Implementing Agreement dated July 25, 1969, made pursuant to Article III of the February 7, 1965 Agreement, she elected to exercise her seniority to a position held by a junior employe in her seniority district rather than transfer to a position at Argentine, Kansas and/or Amarillo, Texas or resign and accept a separation allowance?

OPINION OF BOARD: On July 25, 1969, the parties executed an Implementing Agreement providing for the discontinuance of Centralized Accounting Bureaus at a number of locations and to transfer certain other accounting functions to different locations. Section 3 of the Implementing Agreement, states as follows:

> The protected employes referred to in Section 1 hereof, are hereby requested by the Carrier to transfer under this implementing agreement to Kansas City (Argentine), Kansas and Amarillo, Texas effective September 1, 1969 except those protected employes at Chicago (Corwith), Illinois who will transfer October 1, 1969. The protected employes herein involved shall notify their respective agents at Wichita, Fort Worth and Corwith in writing, in duplicate, which must be received by no later than 5:00 p.m. August 11, 1969 5:00 p.m. September 2, 1969 for employes at Corwith) of their election to:
>
> (1) Transfer to Kansas City (Argentine), Kansas or Amarillo, Texas respectively.
>
> (2) Exercise seniority to a position held by a junior employe in their respective station seniority districts.
>
> (3) Resign and accept the separation allowance, if qualified therefor, under provisions of Article V of Mediation Agreement No. A-7128.
>
> Carrier will furnish a copy of each employe's election to the Vice General Chairman of the Organization, and it is understood such election

> shall become effective at the close of work August 31, 1969 (September 30, 1969 for employes at Corwith).

The parties are in agreement that during the negotiations they failed to resolve their dispute as to whether a qualified protected employee who was requested by the Carrier to transfer, would lose his protected status if he exercised seniority on a position held by a junior employee in his seniority district and did not transfer as requested. The Carrier concedes that, "(A)lthough the parties adopted opposite positions on this point in their discussions, the Implementing Agreement was nevertheless signed by both parties calling for identified employes who were to be requested by the Carrier to transfer to the new work locations."

On this point, we would merely voice our misgivings as to the efficacy of such negotiations. Thus, it is evident that the parties were loathe to come to grips with their disagreement and, instead, preferred to cast the burden upon some other forum. In view of their awareness of contrary positions, the matter should have been resolved at the time of negotiations leading to the execution of the Implementing Agreement.

Nevertheless, the issue before us is whether the Claimant and eight other employees lost their protected status when they exercised their seniority under option No. 2 of Section 3, of the Implementing Agreement, instead of transferring as requested by the Carrier?

Involved herein is Section 2 of Article II, of the February 7, 1965 National Agreement, hereinafter quoted:

> An employee shall cease to be a protected employee in the event of his failure to accept employment in his craft offered to him by the carrier in any seniority district or on any seniority roster throughout the carrier's railroad system as provided in implementing agreements made pursuant to Article III hereof,---."

Under Section 3 of the Implementing Agreement, three options were granted the affected employees. Option No. 1, transfer to Kansas City (Argentine), Kansas or Amarillo, Texas respectively; Option No. 2, exercise seniority to a position held by a junior employee in their respective station seniority district; Option No. 3, resign and accept a separation allowance, if qualified. Thus, we need to examine the Organization's argument, whether an affected employee who was specifically requested to transfer under the Implementing Agreement, could then be penalized if Option No. 2 was elected, rather then transfer.

Unquestionably, the Implementing Agreement granted three options to the affected employees. Thus, the choice was the employees'. However, were these options in the Implementing Agreement negotiated in a vacuum or within the context of the February 7, 1965 National Agreement? Article III, Section 1, of the February 7, 1965 Agreement, mandates the Organization to enter into an Implementing Agreement for transfer of employees throughout the system. Further, Article II, Section 2, of the February 7, 1965 Agreement, provides that a protected employee shall lose

such protection,"---failure to accept employment--offered to him by the Carrier--on any seniority roster throughout the carrier's railroad system as provided in implementing agreements made pursuant to Article III---." We are cognizant of the Organization's contention that the Implementing Agreement offered three options and omitted any mention of a specific penalty. It also argues that the affected employees fully complied with the provisions of the Implementing Agreement by selecting a choice which was proffered.

In addition, concurrent with the execution of the Implementing Agreement on July 25, 1969, a Letter of Understanding was signed, which provided that in the event positions remained unfilled, such vacant positions would be offered to qualified employees on the respective Division Station Employees' seniority districts to which the unfilled positions were allocated.

At the outset, we frankly admit that the instant dispute has caused us great concern. We are requested to interpret an Implementing Agreement which at the time of execution, the parties knew they disagreed as to certain aspects. This invites disputes and makes a mockery of collective bargaining. Nonetheless, we shall apply ourselves to the task.

In this posture, was it the intent of this Implementing Agreement merely to grant the affected employees a choice of options? Or, was it the intent of the Implementing Agreement to protect the affected employees from the penalty contained in Article II, Section 2, of the February 7, 1965 National Agreement? In order to overcome this apparent loophole, the Carrier persisted by contacting each affected employee and alerting them to the consequences. Again, we ask, does this cure the problem? Admittedly, without the Implementing Agreement granting the affected employees a choice of options, Article II, Section 2, of the February 7, 1965 Agreement, would be the controlling document. Thereafter, having granted the options to the employees, without including any penalty proviso or reference to Article II, Section 2 therein, can it truly be said that the Carrier is justified in revoking the protection to the nine employees who elected option No. 2?

Although it may not be evident, we have sought to resolve the instant dispute in a judicious manner. However, no matter how hard we strive, we cannot escape the fact that the Implementing Agreement granted the affected employees a choice of options. Nowhere within that document is there contained a penalty in the event option No. 2 was elected. It is, therefore, our view that these nine employees having made their election under the Implementing Agreement, are entitled to have their protection continued.

AWARD:

The answer to the Question At Issue is in the negative.

Murray M. Rohman
Neutral Member

Dated: Washington, D.C.
July 24, 1970