Award No. 354
Case No. H&RE-22-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO DISPUTE) Hotel and Restaurant Employees and Bartenders International Union

and

Texas and Pacific Railway Company

QUESTIONS AT ISSUE:

1. Whether the carrier is required by the February 7, 1965 Agreement to restore to protected status employees whom it deprived of protected status by the application of a pre-1965 schedule rule reading as follows:

> "Employes who, account reduction in force, have performed no service for a period of six months (6) will be dropped from the seniority roster."

2. Whether the carrier is required now to pay to employees heretofore deprived of protected status, i.e., M. E. Collings, S. Durkee, L. E. Trezevant, J. E. Banks, Jr., B. Gardner, C. Young, Jr., L. A. Bryant, H. W. Robinson, J. M. Crabbe, Jr., E. C. Pierce, N. Powell, Jr., W. H. Caldwell, P. Alexander, W. H. Roberts, and all others similarly situated, compensation to which they heretofore have been entitled under a proper interpretation of the February 7, 1965 Agreement as protected employees.

3. Whether the carrier is required to furnish Health & Welfare protection (or reimbursement for failure to provide such protection in the past) to the above-identified employees, and all others similarly situated, as a part of their protected compensation.

OPINION OF BOARD: There is no dispute as to the essential facts in this case. Claimants herein were dining car employes and were protected under the terms of the February 7, 1965 Agreement. On May 31, 1969 Carrier discontinued its passenger service, and Claimants were furloughed (and continued to retain seniority as provided in the schedule agreement between the parties herein.)

On November 30, 1969 Claimants were dropped by Carrier from its seniority roster pursuant to Rule 9 of the schedule agreement that reads in pertinent part as follows:

"*** Employes who, account reduction in force, have performed no service for a period of six months (6) will be dropped from the seniority roster."

Carrier determined that since it had ended the employment relationship and Claimants ceased to be employes by reason of the operation of Rule 9, they (Claimants) also lost their protected status. As a consequence, Carrier discontinued paying the protected rate effective December 1, 1969.

On March 30, 1970 the Organization filed claims "for payment of delinquent present and future payments for protective compensation under the terms of [the February 7, 1965 Agreement.]" The claims were denied by Carrier by letter dated April 14, 1970 asserting Rule 9 of the schedule agreement as well as the fact that the claims were not filed within 60 days from November 30, 1969.

An additional "claim" was filed by the Organization's General Chairman (by letter dated December 22, 1969 and sent to Carrier's Director of Personnel) for "payment of delinquent present and future payments of premiums [for health and welfare protection] to cover employees of your railroad who are also protected under the provisions of the February 7, 1965 Agreement."

Carrier declined this claim not only on the merits but also for the reason that the claim was not timely presented.

On April 22, 1970 the Organization's General Chairman informed Carrier that both claims were being referred to the Organization's Vice President for further handling. Thereafter on August 11, 1972 (over two years later), the General Chairman wrote a letter to Carrier stating that he is "renewing and filing claims on the property * * * for payment of delinquent retroactive present and future payments for protective compensation * * *." Our Award No. 318 was referred to as the basis for the "renewing and filing" of the claims.

On August 18, 1972 a notice was served on the joint committees advising of the Organization's intent to file submissions with this Board.

As to Question No. One

The issue of whether Carrier, by the application of a schedule agreement rule, can deprive a protected employe of his protected status has been determined by this Board in Award No. 318. In that award we held that the

provision[1/] in the schedule agreement did not, in and of itself, deprive an employe of protected status where the employe failed to work through no fault of his own. This conclusion was affirmed by our Award No. 326. The Board in the latter award was careful to point out that while the schedule agreement provision did not deprive the employe of his protected status, his obligation to perform service under the February 7, 1965 Agreement must still be fulfilled.

In its submission Carrier takes strong issue with the findings in Award No. 318, submits that is in error, and urges in this dispute that it be reversed. Carrier states, in part:

> " ... We believe your Board erred in its Award 318 in construing the provision 'otherwise removed by natural attrition' by limiting the meaning of that phrase in such a way as to exclude loss of seniority and employment relationship in the application of a schedule rule where employes who were laid off by reason of a decline in business did not perform service and were dropped from the seniority roster. This is the application of an existing Agreement which was not amended or modified by the February 7, 1965 Agreement under which employes in the usual and customary application of that rule ceased to be employes in the same way that employes cease to be employes in the case of retirement, resignation or death.
>
> "Your Board concluded that 'since there has been no showing that claimants were discharged for cause, they did not lose their protected status under the provision of the February 7, 1965 Agreement,' but makes no finding as to the term 'otherwise removed by natural attrition.' This term must necessarily be broadly interpreted since it includes not only such things as death and disability, but also resignations. This term is broad enough and should be interpreted to in-

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1/ The provision referred to in Award No. 318 read: "An employe who, on account of reduction in force, has not performed sixty (60) days' service during a period of twelve (12) consecutive months will be dropped from the seniority roster."

clude forfeiture of seniority under the application of an existing Agreement where such attrition of the force flows from the natural or normal application of an existing rule in the schedule agreement. For these reasons, the Carrier submits Award 318 is erroneous.

"As we have previously pointed out, the Carrier's defense in this dispute is based on an argument which either was not advanced in the docket leading to Award 318 or was not discussed by your Board in the opinion. This defense is the fact that the February 7, 1965 Agreement must necessarily apply only to 'employes'. It is beyond imagination that either the Carriers or the Labor Organizations contemplated affording any kind of benefits to a person who was not an 'employe'. Further, the February 7, 1965 Agreement did not amend or modify the basic schedule agreement but simply added protective benefits under the circumstances described in the Agreement."

Carrier's suggestion that the term "otherwise removed by natural attrition" is sufficiently broad to include being "laid off by reason of a decline in business" not only belies awareness of the plain meaning of the words, but more importantly, it is inconsistent with the application of the terms of the February 7, 1965 Agreement.

Under the provisions of Sections 3 and 4 of Article I of the February 7, 1965 Agreement there may be a reduction in force of protected employes only under certain conditions and within certain limitations. There has been no showing in this dispute that Section 3 of Article I (decline in Carrier's business) was applicable.

Carrier further argues that the Board in Award No. 318 did not consider or discuss the basis for Carrier's defense, namely, that the February 7, 1965 Agreement must necessarily apply only to "employes." As the Carrier states: "It is beyond imagination that either the Carriers or the Labor Organizations contemplated affording any kind of benefits to a person who was not an 'employe'."

There is, as this Board views it, no intention by the parties to protect persons who are not employes. This begs the question. At issue is whether a Carrier can summarily and unilaterally deprive an employe of his vested benefits by applying a rule in the schedule agreement that has nothing whatever to do with "resignation, death, retirement, dismissal for cause * * *." (Article II, Section 1.) The Board thinks not.

As to Question No. Two

Notwithstanding the Board's conclusions as to Question One above, it finds that the Organization failed to process the claims in compliance with the required time limits with respect to compensation, and they are therefore barred. This specific Question deals only with the question of compensation and the Time Limit rules apply. (See Interpretations, Page 18.)

As to Question No. Three

Article IV of the February 7, 1965 Agreement provides in relevant part that: "protected employes * * * shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position on October 1, 1964; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent general wage increases."

The Board re-affirms its findings in Awards No. 99 and No. 342 holding that its jurisdiction does not include "paid vacations, holiday pay, health and welfare and any and all other similar benefits." (Award No. 99).

AWARD

1. The answer to Question No. One is answered in the affirmative.

2. The answer to Question No. Two is answered in the negative.

3. The answer to Question No. Three is answered in the negative.

Nicholas H. Zumas
Neutral Member

Dated: Washington, D. C.
April 18, 1973