Award No. 381
Case No. CL-98-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

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

QUESTIONS AT ISSUE:

(a) Does Carrier violate the provisions of the February 7, 1965 Agreement when it fails and refuses to recognize M. D. Hartman as a protected employe?

(b) Shall Carrier compensate M. D. Hartman beginning May 26, 1970, for the difference between his guaranteed rate as a protected employe and that of Janitor position and/or other positions held subsequent thereto, as provided in the February 7, 1965 Agreement?

OPINION OF BOARD: Claimant was hired on December 28, 1961, as a clerk in the Station Department at Arkansas City; and worked until November 22, 1962, when he was furloughed. Thereafter, on November 29, 1962, he was hired as a clerk in the Mechanical Department at Arkansas City--a separate and distinct seniority district from the Station Department. Both positions--in the Station and Mechanical Departments--are included within the Organization's jurisdiction. Consequently, Claimant retained and continued to accumulate seniority in the Station Department; as well as accumulating seniority in the Mechanical Department.

On May 29, 1963, Claimant was recalled from furlough to a position in the Station Department seniority district at Ponca City. At this juncture, as alleged by the Organization, Claimant had the option of "forfeiting his seniority in the Mechanical Department and returning to the Station Department or forfeiting his seniority in the Station Department and continuing to work and accumulate seniority in the Mechanical Department." He opted to "forfeit his Station Department seniority and retain his position and seniority in the Mechanical Department."

Thereafter, Claimant continued to work in the Mechanical Department until May 25, 1970, when a number of positions were abolished. In due course, Claimant exercised his seniority rights in the Mechanical Department and displaced on a Janitor position, at a lower rate of pay. Therefore, the Organization filed the instant claim for the difference in rates of pay from May 26, 1970. Subsequently, on January 28, 1972, Claimant was furloughed again and when he declined recall to the Mechanical Department on February 25, 1972, it resulted in a forfeiture of his seniority rights.

Hence, the primary issue is whether Claimant was a protected employee pursuant to the provisions of Article I, Section 1 of the February 7, 1965 Agreement. The pertinent portion of Section 1, applicable herein, provides as follows, to wit:

> "All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and had fifteen or more days of compensated service during 1964, will be retained in service subject to compensation as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition."

Unquestionably, Claimant was in active service as of October 1, 1964; as well as having had two or more years of an employment relationship with the Carrier; as well as having had fifteen or more days of compensated service during 1964.

Thus, presumably, Claimant has met every condition detailed in Article I, Section 1 of the February 7, 1965 Agreement. Hence, the query--why does Carrier insist that Claimant was not a protected employee? Furthermore, the Organization argues that we have decided this issue previously, in Award Nos. 34, 161 and 246. Specifically, in Award No. 34, we stated as follows, viz:

> "Seniority, normally, flows from the Agreement of the parties as evidenced by the collective bargaining contract. Conversely, the employment relationship arises when an employee is first hired--whether in a bargaining unit or excepted position. Hence, the employment relationship need not be coincidental with seniority."

Moreover, the Organization buttresses the aforesaid, by reference to Question and Answer No. 5 under Article I, Section 1 of the November 24, 1965 Interpretations, viz:

> "Question No. 5: Is the term 'employment relationship' synonymous with 'seniority'?
>
> Answer to Question No. 5: The term 'employment relationship used in this Section should not be confused with the term 'seniority,' since it was used in the agreement to provide protection to employes who had at least a 2-year employment relationship with a carrier on October 1, 1964, but who may not have had at least 2 years' seniority."

Undoubtedly, were we to ignore the balance of the Carrier's argument, we would be compelled to agree with the Organization's position that Claimant was a protected employee. It is at this juncture, however, that we

are constrained to pause and reassess the problem. What is the basis for Carrier's denial of protection to Claimant? It is premised on Question and Answer No. 10, Article I, Section 1 of the November 24, 1965 Interpretations, to wit:

> "Question No. 10: Can employment in more than one seniority district in the same craft on the same carrier be counted in determining protected status?
>
> Answer to Question No. 10: Yes, provided the employee acquired and retained seniority on each seniority district or roster or was transferred to another seniority district or roster at the request of management for temporary services. Otherwise, no."

In essence, it is the position of the Carrier that when Claimant relinquished his seniority in the Station Department on November 29, 1962, he had not fulfilled the requirement contained in Article I, Section 1 of the February 7, 1965 Agreement. Namely, as provided by Answer No. 10--"acquired and retained seniority on each seniority district." Thus, having failed to retain his seniority in the Station Department for the two year period prior to October 1, 1964, Claimant never obtained protection; despite the fact that he had an employment relationship.

Admittedly, we are reluctant to accept this argument. Nonetheless, we are impelled to the conclusion that we cannot be oblivious to its portent. We have stated, previously, that the negotiators to the February 7, 1965 Agreement, as well as the November 24, 1965 Interpretations, were experts in this field. Having propounded Q. & A. No. 5, why did they see fit to add Q. & A. No. 10 under Article I, Section 1? Evidently, they were still in disagreement as to the scope of protection accorded employees under Article I, Section 1. Hence, they sought to clarify and narrow their differences. In effect, Q. & A. No. 10, in our view, covers the instant situation.

As we understand the thrust of the Carrier's argument, an employee who acquired seniority in two separate seniority districts, was required to retain his seniority in at least one seniority district for the two year period prior to October 1, 1964. This requirement is mandated by Q. & A. No. 10, otherwise, there could not be a tacking-on of seniority. On the other hand, where there existed an employment relationship only, absent any involvement of seniority, or solely in one seniority district , for the two year period prior to October 1, 1964, then Q. & A. No. 5 would control. Conversely, where an employee acquired seniority in two separate seniority districts prior to October 1, 1964, he was required to retain his seniority in at least one seniority district for the two years prior to October 1, 1964, in order to acquire protection.

Thus, it is our considered judgment that under the circumstances prevalent herein, Claimant was required to retain his seniority in the Station Department for the two year period prior to October 1, 1964, in order to be considered a protected employee. In passing, we would note that equity favors Claimant, however, we are required to construe the Agreement and Interpretations as written by the parties. In that regard, we acknowledge our ineluctability to the Carrier's arguments.

Award:

The answer to questions (a) and (b) is in the negative.

Murray M. Rohman
Neutral Member

Dated: Washington, D. C.
July 26, 1974