SPECIAL BOARD OF ADJUSTMENT NO. 605

AWARD NO. 428

CASE NO. CE-115-W

PARTIES TO THE DISPUTE:

WESTERN PACIFIC RAILROAD COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

QUESTION AT ISSUE:

(1) Did the Carrier violate Article II Section 1 of the February 7, 1965 Mediation Agreement when it failed to fully restore Mr. Herbert Rupprecht to the status of a protected employe on October 29, 1979, the date of his reinstatement?

(2) If the answer to Question No. 1 is affirmative, should Mr. Herbert Rupprecht be made whole for the differential loss suffered as a result of the Carrier's refusal to reinstate his proper protected rate from October 29, 1979 to the present?

OPINION OF BOARD:

Under the terms of the February 7, 1965 Mediation Agreement, as updated between the Western Pacific Railroad Company and BRAC by a Memorandum Agreement of August 18, 1978, Mr. H. Rupprecht became a "protected employe" with a protected rate as Quality Control Inspector at Milpitas, California. On February 28, 1979 an incident arose out of which Rupprecht was charged by Carrier with certain misconduct. Following an investigation into the charge, he was found guilty and dismissed from service on March 21, 1979. A claim for his reinstatement with full back pay and benefits was filed and handled to resolution on the property short of arbitration by an understanding referenced in a letter of October 12, 1979, as follows:

October 12, 1979

GM Case No. 11772-1979-BRAC
Local Case No. 5558
Freight Claims

Mr. William R. Miller
General Chairman, BRAC
4053 Farmer Way
North Highlands, CA 95660

Dear Mr. Miller:

This will confirm understanding reached in conference October 11, 1979 in connection with the claim on behalf of H. Rupprecht, GM Case No. 11772, your Case No. 2328.

Mr. Rupprecht will be restored to service with his original seniority date as soon as he has passed the re-entry physical examination. His restoration to service will be on a leniency basis without compensation for time held out of service and upon the condition that he transfer to Seniority District 18 and exercise his seniority to the Oakland Extra Board.

The above understanding constitutes full and final settelement of GM Case No. 11772, your Case No. 2328.

Very truly yours,

R. W. Bridges

R. W. Bridges

cc: Mr. L. F. Battaglia

In consequence of the foregoing settlement, Rupprecht exercised his seniority in Seniority District No. 18 and obtained a position on the Guaranteed Extra Board (GEB). It appears that his first payday thereafter occurred on or about October 29, 1979, at which time he was compensated at the prevailing rate for a Clerk off the GEB. The present claim was filed promptly alleging that Carrier's failure to compensate Rupprecht at the higher rate of his former Quality Control Inspector position on and after

October 29, 1979 was a violation of his rights under the February 7, 1965 Mediation Agreement. The matter remained unresolved in handling on the property whereupon the Organization submitted the Question at Issue supra for determination by this Board.

As a primary position, the BRAC maintains that since the reinstatement of Claimant to service was silent regarding the protected rate, the express language of Article II, Section 1 of the February 7, 1965 Agreement requires that Rupprecht be "made whole" for the difference between his GEB compensation and the protected rate of his former Quality Control Inspector position. In support of this view, the Organization cites Special Board of Adjustment No. 605, Award No. 108 (Nicholas Zumas). Carrier rejoins that neither expressly nor by implication does the reinstatement agreement or the February 7, 1965 Mediation Agreement require compensation of Rupprecht at the rate of the position from which he was disqualified as a condition of returning to service. Carrier urges that Rupprecht's voluntary acceptance of the leniency reinstatement with restricted services constituted an implicit waiver of the rate of the Quality Control Inspector position; albeit a retention of "protected status" pursuant to Article II, Section 1. In support of this view Carrier cites Special Board of Adjustment No. 605, Award No. 259 (Milton Friedman).

We are faced in this case with a set of facts which fall somewhat between those which produced directly countervailing conclusions by two well-respected neutral arbitrator colleagues serving as Neutral Members on this Board. In Award No. 108, Referee Zumas held that acceptance by a dismissed employe of a leniency reinstatement conditioned only upon a temporary limitation of bidding rights had "no relevance to his protection under the February 7 Agreement." In Award No. 259, Referee Friedman emphasized differences between the conditions of the reinstatement agreement in Award No. 108 and those in his case

wherein a dismissed Train Director accepted leniency reinstatement to a Leverman position and permanent disbarment from a Train Director job. He also imputed to the parties an implicit intent to treat the acceptance of conditional reinstatement to the lesser rated position as the equivalent of a bid for purposes of Article II, Section 1 of the February 7, 1965 Agreement. We find compelling the similarities between the facts in the present case and those which produced the rationale developed by Referee Friedman in Award No. 259, as follows:

> The Train Director's position was relinquished by Claimant as part of the understanding restoring him to work. Certainly the intent of that understanding was not that he would be compelled to occupy lower-rated position and receive a guarantee of compensation at a higher rate. This would constitute a reward rather than the punishment which was manifestly intended both by his period of suspension without pay as well as by the restriction on the exercise of his future seniority.
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> * * *
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> The Organization and Claimant need not have acquiesced in the settlement, but could have sought an adjudication which either would have sustained the Company's action or would have restored him to his full rights. Instead, a mutually agreeable compromise was found to be more desirable. Claimant must take the bad with the good. He cannot be rewarded as he seeks, since the parties agreed otherwise, as they had a right to do.
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> Not only the evident intent of the settlement but Question No. 1 on Page 14 of the Interpretations of November 24, 1965, demonstrates that Claimant's guaranteed compensation should not be that of Train Director. The Question is:
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> > If a "protected employee" for one reason or another considers another job more desirable than the one he is holding, and he therefore bids in that job even though it may carry a lower rate of pay than the job he is holding, what is the rate of his guaranteed compensation thereafter?

The answer is given as "the rate of the job he voluntarily bids into." For his own reasons Claimant Loop considered a move into the Leverman's job more desirable than efforts to retain the Train Director's job by successful litigation. He chose the voluntary downgrading, which could not have been imposed unilaterally by Carrier, and he cannot be held entitled, therefore, to retention of a guarantee at the Train Director's rate.

While Claimant Loop's protected status and other rights remained unimpaired as a result of the settlement, he obtained no greater rights than are generally available to employees covered by the February 7 Agreement. What was in effect a voluntary bid into a lower-rated job does not permit retention of the guaranteed compensation of a higher-rated position.

Faced with a choice between the two approaches to such cases, we find Award No. 259 much more analogous to our own case on the present record. Based upon all of the foregoing, we find that the Question must be answered in the negative.

AWARD

1) The answer to Question 1 is No.

2) The answer to Question 1 obviates Question 2.

Dana E. Eischen, Neutral Member

Date: January 10, 1983