

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) Transportation•Communications International Union
TO THE)
DISPUTE) and
)
) The Atchison, Topeka and Santa Fe Railway Company

QUESTIONS AT ISSUE:

1. Did the Carrier violate the provisions of the February 7, 1965 Mediation Agreement as amended, effective January 1, 1980, when it failed to pay protective make-up benefits to R. R. McCoy for the month of June, 1989, and each month thereafter?
2. Shall the Carrier now be required to compensate Claimant McCoy a monthly make-up allowance of the difference between the daily rate (\$102.42) of a Zoned Extra Board Position and the daily rate (\$116.65) of a PAD Traffic Controller Position commencing with the month of June, 1989 to and including May, 1992 and restore her protected rate to \$116.65 per day?

**OPINION OF
THE BOARD:**

Claimant, whose seniority date is August 25, 1978 on the Kansas City Division Station Department Seniority District, is a protected employee under the February 7, 1965 Job Stabilization Agreement, as amended and effective January 1, 1980. Claimant established her protected rate on the job of Traffic Controller, a position not subject to the promotion, assignment and displacement (PAD) rules of the applicable clerical agreement.

In February, 1987, the Carrier dismissed Claimant from service. On her behalf, the Organization progressed a claim appealing Claimant's discharge to the Third Division of the National Railroad Adjustment Board (NRAB). *In Award No. 27865 (Carter)*, the NRAB Third Division determined that the discipline that the Carrier imposed on Claimant was excessive.

Therefore, the NRAB reinstated Claimant to service without back pay but with ". . . seniority and all other rights unimpaired" While the NRAB reinstated Claimant to service, it specifically declined to place her back on the Traffic Controller position because the Carrier had the right of appointment and concomitantly, ". . . the prerogative to remove an employee from such a position at its discretion."

The Carrier implemented Award No. 27965 on June 1, 1989 by restoring Claimant to service but it declined to assign Claimant to her former PAD Traffic Controller position. Instead, Claimant was permitted to exercise her Rule 15 displacement rights. However, she lacked sufficient seniority to displace to a position. Claimant went into off-in-force reduction status.

On June 16, 1989, the Carrier recalled Claimant and assigned her to Zoned Extra Board Position No. 6446 having a daily pay rate of \$102.42. A short while later, a senior employee displaced Claimant and she was again relegated to off-in-force-reduction status.

Beginning in June, 1989 and for each month thereafter, Claimant filed an application for protective benefits under the February 7, 1965 Job Stabilization Agreement, as amended. The Carrier paid Claimant protective benefits based on the rate of pay of Zoned Extra Board Position No. 6446. Contending that her protected rate continued to be the rate of pay of her former PAD Traffic Controller position, which was then \$116.65 per day, Claimant sought the difference between the daily pay rate for the Zoned Extra Board Position No. 6446 and the Traffic Controller position for each day that she was entitled to protective benefits.

Besides appealing her discharge to the NRAB Third Division, Claimant filed a charge with Equal Employment Commission (EEOC) alleging that the Carrier failed to reinstate her to her PAD Traffic Controller position due to her gender. Sometime after suit was instituted in Federal

Court, the Carrier and the EEOC entered into a Consent Decree fully and finally ending the litigation. *Equal Employment Opportunity Commission v. The Atchison, Topeka and Santa Fe*, Civil Action No. 91-2014-L (DC KS 1991). Pursuant to the March 31, 1992 Consent Decree, the Carrier paid Claimant \$20,000 and afforded her training and assistance to qualify for a PAD Communication Coordinator position, a position having a pay rate comparable to her prior PAD Traffic Controller position. After extensive training, Claimant began filling short vacancies on Communication Coordinator positions. On September 9, 1992, the Carrier assigned Claimant to a permanent PAD Communication Coordinator assignment.

The issue in this case is what was Claimant's protected rate during the period she filed for protective benefits. The Organization avers that her protected rate is the rate of the PAD Traffic Controller position while the Carrier argues that Claimant's protected rate is the rate of Zoned Extra Board Position No. 6446.

In support of its position, the Organization cites Article II, Section 1 of the amended Job Stabilization Agreement. The pertinent section of Article II, Section 1 reads:

" . . . If an employe dismissed for cause is reinstated to service, he will be restored to the status of a protected employe as of the date of his reinstatement."

The Organization further argues since the NRAB Third Division reinstated Claimant with all rights unimpaired, *Award No. 27865* coupled with Article II, Section 1, served to perpetuate Claimant's protected rate which she first acquired on the PAD Traffic Controller position.

On the other hand, the Carrier contends that Claimant's ultimate exercise of seniority to Zoned Extra Board Position No. 6446 was a voluntary action as contemplated by Article IV, Section 3 of the amended Job Stabilization Agreement which provides:

"Any protected employe who in the normal exercise of his seniority bids in a job or is bumped as a result of such an employe exercising his seniority in the normal way by reason of a voluntary action, will not be entitled to have his daily rate preserved as provided in Sections 1 and 2 hereof, but will be protected at the rate of pay and conditions of the job he bids in; provided, however, if he is required to make a move or bid in a position under the terms of an implementing agreement made pursuant to Article III hereof, he will continue to be protected in accordance with Sections 1 and 2 of this Article IV."

The Carrier concludes that Claimant acquired a new protected rate on June 16, 1989, when the Carrier recalled her, in the normal exercise of her seniority, to Zoned Extra Board Position No. 6446.

In Award Nos. 13 and 26, this Board ruled that an employee, who is disqualified from a higher rated position and then exercises seniority (pursuant to applicable rules) to a lower rated position, the employee engages in a voluntary exercise of seniority. In Award No. 13, this Board specifically ruled that when the employee is disqualified from a position and then voluntarily exercises seniority to a lower rated position, the employee is no longer entitled to the level of protection applicable to the former position.

In this case, we are bound to follow our well-entrenched precedent. When the Carrier declined to reinstate Grievant to her former PAD Traffic Controller position, the Carrier was in essence, disqualifying her from the assignment. When Claimant eventually exercised her seniority rights to the Zoned Extra Board position, she was no longer entitled to receive the level of protection she held as a PAD Traffic Controller. She acquired a new protected rate equivalent to the rate of the Zoned Extra Board position.

Article II, Section 1, on which the Organization relies, only provides that Claimant will not lose her rights as a protected employee. This is not in dispute. Claimant, prior to her dismissal and after her reinstatement, was a protected employee under the amended Job Stabilization Agreement. Article II, Section 1 does not necessarily maintain protected rates. It preserves protective status so that Claimant need not satisfy the eligibility requirements for becoming a protected employee.

Moreover, the NRAB Third Division reinstated Claimant with all rights unimpaired with one very glaring exception, that is, she had no right to resume working on the PAD Traffic Controller position. In essence, *Award No. 27865* implicitly provided that Claimant must absorb the consequences of the Carrier's right to remove her from the PAD Traffic Controller position. One of those consequences is an adjustment in her protected rate because a disqualification from the position is tantamount to a voluntary exercise of seniority.

The Consent Decree terminating Claimant's sex discrimination lawsuit does not alter our analysis for several reasons. First, the Consent Decree did not expressly address either Claimant's status as a protected employee under the amended Job Stabilization Agreement or her protected rate. Second, the Carrier compensated Claimant \$20,000 for not reinstating her to the PAD Traffic Controller position. Implicit in this payment is the intent that the lump sum compensated Claimant for all her losses stemming from the Carrier's failure to reinstate her to the PAD Traffic Controller position. Third, even if the matter was not impliedly put to rest as part of the \$20,000 settlement, Item 13 of the EEOC Consent Decree announces that Claimant shall acquire no greater rights than any similarly situated employee. A protected employee in a situation similar

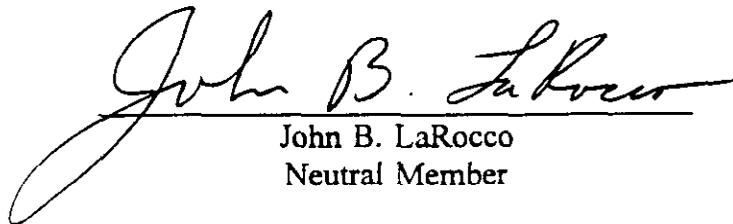
to Claimant would be governed by the precedential principles laid down by our Award Nos. 13 and 26. Claimant must be treated the same as any other protected employee.

In sum, Article IV, Section 3 of the amended Job Stabilization Agreement governs the disposition of this claim.

AWARD

1. The Answer to Question No. 1 at Issue is No.
2. Question No. 2 at Issue is moot.

Dated: July 24, 1995


John B. LaRocco
Neutral Member