

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) Brotherhood of Railway, Airline and Steamship Clerks,
TO) Freight Handlers, Express & Station Employees
DISPUTE) and
Missouri Pacific Railroad Company

QUESTIONS 1. Did Carrier violate the provisions of the February 7, 1965
AT ISSUE: National Agreement, as amended, when it refused and failed to
establish the protective rate of pay for Mrs. Kathryn Jo Woods
as being that of Mobile Agent, Kingsville, Texas, her regular
assigned position on January 1, 1981; which was also the date
she attained protective pay status under the Agreement, as
amended? (Carrier's File 279-1342).

2. Shall Carrier now be required to establish Mrs. Woods'
protective rate of pay to be that of Mobile Agent, Kingsville
and compensate her for all protective pay benefits due beginning
February 5, 1981.

OPINION OF THE BOARD: The parties hereto amended the February 7, 1965, agreement by an
agreement signed November 7, 1978, which provided in pertinent
part as follows:

"B All employees who do not become protected employees on
January 1, 1979, will acquire a protected status on the
January 1 immediately following their fifth anniversary date
of employment....

E Employees who attain a protected status pursuant to
Paragraph B above will be protected at the rate of the
assignment held on January 1 of the year they acquired
protected status; if not regularly assigned on that date,
their protected rate will be the rate of their monthly
average earnings in the preceding calendar year or the
preceding twelve (12) months in which they performed
service."

The facts herein are not in dispute. Claimant herein, with a
seniority date of November 5, 1975, became a protected employee effective
January 1, 1981, pursuant to Paragraph B of the November 7, 1978 agreement.
Due to the dismissal of an incumbent, Carrier bulletined the position of
Mobile Agent on August 25, 1980 (Position Mobile Agent No. 152) at
Kingsville, Texas. The bulletin indicated that this was a permanent
position. The claimant bid for and was assigned to the position effective
September 5, 1980. She held that position until February 6, 1981, when she
was displaced by the former incumbent under conditions which were indicated
below.

Following an investigation, Mobile Agent V. R. Lay (who had occupied the position of Mobile Agent No. 152 at Kingsville) was dismissed from service effective August 25, 1980. Thereafter the Organization processed a claim on behalf of Ms. Lay and at the same time Carrier advertised the position of Mobile Agent as a permanent vacancy in accordance with the agreement. It should be noted that all vacancies in excess of thirty days are advertised as permanent vacancies. Following protracted negotiations, a determination was made by Carrier that Ms. Lay should be returned to service and that her record be cleared of the discipline and pay for lost time accorded her. She was returned to her former assignment at Mobile Agent No. 152 effective February 6, 1981. At the time that Ms. Lay was reinstated to her former Mobile Agent position, her protected rate as Mobile Agent was also restored. In the interim, Mrs. Woods, the claimant herein, had been accorded the protected rate of Mobile Position No. 152, which position she had occupied as the regular incumbent on January 1, 1981. Upon her displacement, Mrs. Woods then displaced junior employee J. E. Hicks in the position of Swing Clerk at Kingsville, which was a lower rated job. Subsequently, Carrier changed Mrs. Woods protected rate to the rate of the position to which she exercised her seniority following the reinstatement of Ms. Lay to service. It was this sequence of events which triggered the dispute herein.

The Organization argues that Mrs. Woods established her protected rate of pay as the permanent Mobile Agent in the position in question pursuant to the provisions of Paragraph B of the November 7, 1978, amended agreement. She had been awarded a bulletin permanent position which she held continuously from September 17, 1980, until February 6, 1981. Furthermore, in accordance with Paragraph E of the amended agreement, her rate of pay was determined by the position that she was in on January 1 of 1981 in this instance. The Organization notes that she continued to hold the assignment which she had bid for until she was displaced in an exercise of seniority by a more senior employee, the former incumbent Ms. Lay. The Organization notes further that Carrier arbitrarily changed the established protected rate for Mrs. Woods when it indicated that her rate would be the rate she acquired after leaving the agency position at Kingsville. The Organization insists that this method of determining the protected rate was totally contrary to the revisions of Paragraph B and E of the agreement indicated above. The Organization finally concludes that Carrier wishes to change the clear and unambiguous language of the amended agreement through the medium of this dispute without negotiations. There is no basis for such action, according to the Organization.

As an initial position, Carrier insists that the dismissal of Ms. Lay under Rule 18 of the Organization's agreement cannot be considered to be permanent until all levels of appeal are exhausted, and that the rule in question (Rule 18(h)) provides, among other things, that if the final decision decrees that charges are not sustained, the employees shall be reinstated and compensated for wage loss. In this instance, the Carrier insists that claimant's occupancy of the Mobile Agent position was tentative pending the final decision regarding Ms. Lay's dismissal. Thus, when the final decision was made and Ms. Lay was reinstated to her position, that

action was automatic in the absence of any other agreement between the parties. For that reason, the Carrier's major position is that two employees cannot be protected at the rate of one position. According to Carrier, that position it maintains is supported by Award No. 38 of this Board. In that decision, the Board held that the claimant, who was the proper incumbent of the position, was the only one who was entitled to the protection. Thus, the Organization is incorrect in its claim, according to Carrier. Carrier states further that claimant was only entitled to the Mobile Agent rate as a protected rate during that period of time she occupied the position prior to the return of the incumbent.

Carrier argues further that the facts in this dispute indicate that the former incumbent, Ms. Lay, was the rightful owner of her former position at all times and that the claimant herein, Mrs. Woods, was only an interim occupant. For that reason, Mrs. Woods' protected rate should be the rate of the position her seniority entitled her to hold other than the Mobile Agent position, according to carrier. Thus, Mrs. Woods' rights to the Mobile Operator's position were nullified by the return of Ms. Lay. For this reason, Carrier insists that claimant enjoyed the protected rate only while she occupied the job beginning January 1, 1981. That protected rate was not properly hers when Ms. Lay was reinstated and her protected rate restored.

The Board does not agree with a number of the conclusions reached by Carrier. First, it is apparent that the job in question was, indeed, a permanent job as indicated by the bulletin. To characterize the job as temporary by virtue of the discharge being appealed by the Organization would be inconsistent and erroneous. For example, it might well have taken anywhere from six months to three years to resolve the discharge issue. Would then the position be still conceded to be temporary as argued by Carrier? The answer is clearly in the negative. By contract, in fact, it was agreed that all positions of thirty days or more in duration are to be advertised as permanent. That contractual language brooks no interpretation.

Carrier relies in part on Award 38 of this Board. In that case, however, the claimant was improperly placed in the higher position and the Board ruled that only the proper incumbent was entitled to the higher protected rate. Clearly those facts are distinguishable from those herein since Mrs. Woods was the proper permanent incumbent on January 1, 1981. It also must be noted that the Board's view in this matter is supported by a number of prior awards, including Awards 207, 323 and 343.

The Board can find no basis for agreeing with the protected rate mechanism used by Carrier in determining the rate for claimant following her being bumped. There is no provision in any agreement which provides for that method of determining the protected rate. Rather it is apparent that Paragraph E of the 1978 amendments is controlling with respect to claimant's protected rate. That language is clear and unambiguous and provides that the protected rate would be that of the assignment held on January 1 of the year the employee acquired protected status. In the case of claimant, that

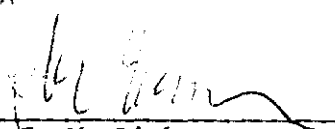
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date was January 1, 1981. The fact that she was bumped subsequently due to the improper discharge of the prior incumbent of the position has no bearing on her protected rate. In fact it is apparent that in many situations an employee may, subsequent to the achievement of her protected rate under any of the provisions of either the 1965 agreement or the 1978 amendments, be bumped. Such after-the-fact bumping has no bearing on the rate which is achieved in accordance with the contract. For example, it is apparent that in a force reduction, employees may be bumped from their original positions in which they achieved protected rates, or in the event of the return of an employee from protracted sick leave, an employee might indeed be bumped from the position in which he or she had achieved a protected rate. Thus, in this instance, the fact that the former incumbent was returned to her position due to the processing of a claim under the agreement, has no bearing on the actual achievement of the protected rate in accordance with the understandings reached by the parties. The Board cannot change the agreement reached by the parties and the exception requested by Carrier, in this instance, would clearly effectuate a change in the language which had been agreed to.

AWARD

The Questions are answered in the affirmative.



I. M. Lieberman
Neutral Member

Dated: 3-2-81