

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES)
TO THE) BROTHERHOOD OF RAILWAY SIGNALMEN
DISPUTE) and
) SOUTHERN PACIFIC TRANSPORTATION COMPANY
 (WESTERN LINES)

QUESTION AT ISSUE

- A. Did the Southern Pacific Transportation Company (Western Lines) violate and does it continue to violate the February 7, 1965 Mediation Agreement when the SPTC(WL) abolished the Brooklyn Signal Shop and Leading Signal Maintainer, H. A. Hanson, was deprived of work opportunity beginning June 1, 1982?
- B. Should the Southern Pacific Transportation Company be required to pay Mr. H. A. Hanson eight hours at his applicable rate for each day commencing on June 1, 1982 and continuing as long as the violation exists?
- C. Should the Southern Pacific Transportation Company afford Mr. H. A. Hanson a separation allowance?
Carrier file SIG 130-45. BRS-SBA 3725 SP(WL).

OPINION OF BOARD

Claimant entered Carrier's service in December 1955 and worked for many years in the Signalman classification. In 1976, Claimant went on a medical leave of absence due to varicose veins and thrombophlebitis. In April 1977, Claimant was allowed to return to service with certain restrictions placed on him by the Carrier's Chief Medical Officer; i.e., Claimant could not stand in one place for prolonged periods and he was restricted from climbing poles or walking long distances. Despite these restrictions, which precluded Claimant's assignment to any positions in the field, Claimant filled a vacancy in the Brooklyn Signal Shop in May 1977, repairing and refurbishing failed relays for reintroduction into field service.

As a result of a systemwide decline in business, the Carrier gave notice in May 1982 that the positions in the Brooklyn Signal Shop would be abolished effective June 1, 1982. Claimant then sought to exercise his seniority in one position and bid on another position. However, the Carrier would not allow him to fill either position because each would have required Claimant to engage in one or more of the physical activities from which he was medically restricted.

The Organization challenged the abolishment of the positions at Brooklyn Signal Shop as a violation of the Memorandum of Understanding between the Organization and the Carrier dated November 30, 1960, which constituted Appendix K of the collective bargaining agreement. Award Number 9 of Public Law Board No. 3402 (Neutral Eischen) sustained the claim and the Carrier was ordered to reopen the Brooklyn Signal Shop, which it did.

The Organization also filed a claim in Claimant's behalf requesting that he be allowed to exercise his seniority rights. In Award Number 10 of Public Law Board No. 3402, Neutral Eischen ruled that the Carrier was "obligated...to extend reasonable effort to find 'light work' in the Signal Department which Claimant could handle within the medical restrictions imposed upon him." That Board also noted that, "...direction of an appropriate remedy in this case at this time has been obviated by our decision in Award No. 9."

Claimant applied for and was granted a disability annuity by the

Railroad Retirement Board effective September 23, 1983. He has received payments thereunder ever since. This case, was, however, filed and came before this Board before Claimant went on disability.

The position of the Organization is that the Carrier arbitrarily closed the Brooklyn facility and violated Claimant's rights under the agreement of February 7, 1965 by denying him either a separation allowance or another position. The Organization maintains that Claimant was adversely affected by the abolishment of the Brooklyn facility, and but for that closing, Claimant would still be working. The Organization also contends that since Award No. 9 of Public Law Board No. 3402 caused the Carrier to reestablish the Brooklyn Signal Shop and since Claimant was adversely affected by the abolishment of the facility, the Carrier is required to either compensate Claimant or pay him a separation allowance.

The position of the Carrier is that procedurally, the claims cannot be maintained. The Carrier maintains that Questions A and C have already been disposed of by Public Law Board No. 3402. The decision in Award No. 10 is final and binding despite the fact that Public Law Board No. 3402 refused to determine the merits of the Washington Job Protection Agreement claims or those under the February 7, 1965 Agreement. These issues are not open for decision in another forum and the Carrier cites various Third Division Awards for the propositions that a party must choose the proper forum in the first event and that a claim should be dismissed when it is identical to one already decided in another award. Further, the pending dispute arose under a local agreement and the Carrier argues that many awards deny jurisdiction

to the Disputes Committee to decide in such circumstances. As to Question B, the Carrier argues that the Organization did not raise it on the property and therefore is barred from raising it for the first time before this Board. Finally, the Carrier argues that the claims in this matter are barred by laches noting that the Organization did not present the claim for more than two years.

On the merits, the Carrier maintains that it was justified in not allowing Claimant to fill the two positions he attempted to fill in 1982 because he could not perform all the duties of the assignments. The Carrier argues that it has the right to restrict an employee who cannot perform all the duties of a given assignment even if they are unusual or occasional. The Carrier maintains that it is proper for it to prevent Claimant from displacing or bidding on positions that include tasks or duties he is restricted from performing. The Carrier notes that Claimant has not altered his status as an annuitant with the Railroad Retirement Board and, thus, is not fit to resume his job, and, citing various arbitration awards, is not entitled to benefits under any agreement.

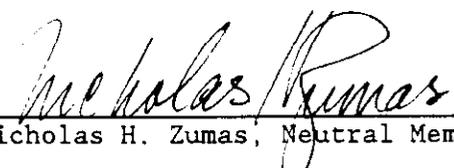
Finally, the Carrier cites Article IV, Section 5 of the February 7, 1965 Agreement, "A protected employe[e] shall not be entitled to the benefits of this Article during any period in which he fails to work due to disability..." and argues that this eliminates any entitlement Claimant might have to a "separation allowance or another position" because the medical restriction on his work has not been lifted.

After consideration of the entire record, the Board finds that Questions A and C have been disposed of by Public Law Board No. 3402 and that this Board cannot reopen those inquiries. The Brooklyn Signal Shop was ordered reopened and that obviated the need to provide Claimant with a separation allowance. Claimant was properly denied the option of filling the position into which he sought to displace and the one on which he bid because he could not function in those positions in light of his medical restrictions. Claimant has not attempted to fill the positions in the Brooklyn facility which leaves the Board puzzled as to what further relief he seeks. Claimant continues to fail to work due to a disability and therefore is not entitled to a separation allowance according to Article IV, Section 5.

Finally, Question B was not raised on the property and it is well settled that a question cannot be presented to the Board which was not first raised below. The Board therefore will not consider it. However, the Board notes that having resolved whatever violation might have existed by the reopening of the Brooklyn facility, it can find no ongoing injury of which Claimant complains.

AWARD

The answer to each of the questions posed is "no."



Nicholas H. Zumas, Neutral Member

Date: 1-4-89