PUBLIC LAW BOARD NUMBER 3932

Award Number: 6
Case Number: 6

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM

That, the provisions of the effective Agreement, in particular, Rule 18 and the Memorandum of Agreement dated August 16, 1983 (referencing Exhibit A, Letter No. 12 of the May 27, 1982 Agreement), were violated when the Carrier refused to let the grievant properly exercise his rights to bump a junior B and B Mechanic Foreman.

That, page 2 of Exhibit A-Letter No. 12 (section 4) clearly states that "New district seniority rosters will be established for B and B Mechanics..."

That, Section IV B of the August 16, 1983 Agreement provides for dovetailing of all Foremen into a "B and B Foreman Consolidated Roster for the Southern District."

That, the Agreement entered into between the Carrier and the Organization of August 16, 1983 specifically amended the Work Classification (Sec. 10, Rates of Pay (Sec. II), Employment (Sec. III), Seniority (Sec. IV) and the Bulletin and Assignment (Sec. V) provisions of the then effective Agreement (prior to Aug. 16, 1983).

That, the language of the above-stated Agreements cite no restrictions on the exercise of seniority other than those restrictions left intact under Rule 18 of the current Agreement.

That, following out the specific intent of the parties, and the spirit of the Agreements referenced herein, the grievant should have been allowed to displace junior B and B Mechanic Foreman C. Jack on February 11, 1985 (Newark, NJ)

That, because the Carrier refused to allow the grievant to properly exercise his rights, claim is now made for the difference in rate of pay between the grievant's

present Assistant Foreman's pay and junior B and B Mechanic Foreman C. Jack's rate of pay. This is a continuing claim.

FINDINGS

Claimant, at the time of the dispute in question, was employed as an Assistant Foreman at Penn Station, New York. By letter dated February 28, 1985, the Organization filed claim on his behalf seeking compensation on the basis that Carrier violated the Agreement by failing to allow Claimant to displace onto the Mechanic Foreman's position on February 11, 1985.

The issue to be decided in this dispute is whether Claimant was entitled under the Agreement to displace onto the position in question.

The position of the Organization is that Carrier violated the Agreement by failing to allow Claimant, a senior employee, to displace a junior employee.

Initially, the Organization contends that Carrier violated the August 16, 1983 Agreement between the parties concerning work classifications. The Organization contends that the seniority provisions of the Agreement clearly indicate that Senior B and B Mechanics and Foremen have full displacement rights on all positions within the seniority district. The Organization further contends that no language in that Agreement limits displacement by the class of Mechanic/Foreman, and that Carrier's attempt to justify rejection on that basis lacks any evidentiary support.

The Organization further argues that Rule 18 is controlling for purposes of determining displacement rights in this case, since the aforementioned Agreement does not specify such rights. The Organization maintains that Rule 18 clearly allows Claimant to displace by reason of his seniority rights.

Finally, the Organization maintains that the Claim is a continuing claim in accordance with Rule 64(e), and is therefore procedurally valid under the Agreement.

The position of the Carrier is that Claimant's request to displace was properly rejected under the Agreement.

Carrier contends that the August 16, 1983 Agreement, while creating a B and B Mechanic class (effective May 27, 1982), also allowed existing craft employees to retain prior rights to their positions on their prior crafts. Carrier alleges that those rights implicitly extended to seniority and displacement under Rule 18, and that both parties intended such a result. Carrier contends that the obvious nature of the extension negated any need for written language in the Agreement, and that therefore such lack of written documentation does not support the Organization's claim. Carrier further maintains that the general chairman involved in the August 16, 1983 Agreement negotiation understood and acknowledged the intent of the parties concerning displacement rights.

Carrier further argues that its interpretation of the August 16, 1983 Agreement is persuasive in a logical as well as in an evidentiary sense. Carrier maintains that since Claimant, as a senior B and B Mechanic Foreman (mason) had no prior rights as a B and B Mechanic Foreman (carpenter), it would be illogical to interpret the Agreement to allow Claimant to now displace through the use of seniority onto the position in question. Carrier argues that this is particularly evident since the Agreement was intended to protect the status of the B and B Mechanic Foreman (carpenter) position. Carrier maintains that any doubt concerning the meaning of the relevant Agreement should be resolved in favor of the more reasonable interpretation, and that its interpretation clearly meets that standard.

Finally, Carrier maintains that the Claim is invalid because it is excessive. Carrier alleges that the Claim factually cannot extend past March 11, 1985, since on that date the junior employee in question obtained another position for which Claimant had no eligibility. Carrier therefore contends that in the event the claim is sustained, it should nonetheless be reduced accordingly.

After review of the record, the Board finds that the Organization's claim must be denied.

The crux of this dispute involves the intent of the parties

regarding displacement rights. In the present case, it is the Board's finding that Carrier has adequately demonstrated that the parties intended to protect those employees with prior rights from displacement by newly protected employees.

The August 16, 1983 Agreement clearly, in Parts IV and V, protects the prior rights of those employees (i.e., carpenters) previously protected under the existing seniority roster. Part V of that Agreement specifically preserves those employees' rights concerning their status and present positions. Therefore, although no explicit language in the Agreement protects displacement rights for those employees, such protection may be implied in light of the overall intent of the Agreement. Additionally, reasonableness would dictate that such protection was intended, both because the other protections would be rendered largely meaningless without it, and because Claimant and similarly situated employees did not possess any such displacement rights prior to the Agreement. The Organization has failed to provide any evidence that its interpretation was intended by the parties other than the Agreement itself, which we find ambiguous regarding the issue at hand. Finally, the fact that no protest regarding displacement procedure was made by the Organization prior to this claim indicates that the intent of the parties was being carried out. In sum, the Board finds sufficient evidence of the parties' intent exists to conclude that the parties intended for those employees with prior rights to be protected both with regard to seniority and displacement.

Therefore, we find that Carrier properly rejected Claimant for the position in question.

AWARD

Claim denied.

Neutral Member

Carrier Member

- see dissent

Organization Member

DATE: _____

Employees' Dissent to Award No. 6, Case No. 6, Public Law Board No. 3932

The Board's decision is incorrect for two reasons. First, the Award goes beyond the scope of jurisdiction conveyed to the Board by the Agreement establishing it. Second, the Board has violated the cardinal principles of contract analysis by ignoring the clear, unambiguous language of the Agreement and substituting implied contract language based on the "intent" of the parties.

This decision violates Paragraph 3 of the Agreement establishing the Board. The Paragraph reads as follows:

> 3. The Board shall confine itself strictly to a decision in each of the disputes specifically set forth in paragraph 2 above, shall not have jurisdiction of disputes growing out of requests for change in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules and working conditions, and shall not have the right to write new rules. (emphasis added)

The Board's decision essentially adds a "Part VI" to the August 16, 1983 Memorandum of Agreement regarding the B&B Mechanic and Foreman classifications. This new "Part VI" explicitly states the procedures to be followed when B&B Foremen and Mechanics attempt to exercise seniority pursuant to Rule 18. As such, the Board's decision has written a new rule into the August 16, 1983 Memorandum of Agreement. Such a practice is forbidden by the Agreement establishing this Board; hence the Award of the Board can have no legal force or effect.

Without prejudice to the foregoing argument, the Employees also contend that the Board has misapplied the fundamental principles of contract analysis in making this Award.

The premise upon which the Board decided this claim was stated as follows:

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> The August 16, 1983 Agreement clearly, in Parts IV and V, protects the prior rights of those employees (i.e., carpenters) previously protected under the existing seniority roster. Part V of that Agreement specifically preserves those employees' rights concerning their status and present positions. Therefore, although no explicit language in the Agreement protects displacementrights for those employees, such protection may be implied in light of the overall intent of the Agreement.

The Employees contend that the "explicit language" regarding displacment rights is contained in Rule 18 which must be read in conjunction with the August 16, 1983 Agreement. Since the August 16, 1983 Agreement did not specifically amend the terms of Rule 18, the Rule must be applied with full force to any displacement involving B&B Foremen or Mechanics. Support for this position is found in NRAB Third Division Award No. 3825, Referee Swaim, which stated in relevant part:

> One expressed exception to a provision in a contract negatives the intention of the parties that there should be any other exceptions implied. This rule of construction was recognized by this Board in Award No. 2009.

The August 16, 1983 Memorandum of Agreement contains the one exception, prior rights for the award of advertised positions, there are no other exceptions mentioned. The Board cannot create new exceptions within the Agreement.

Finally, the Board has defended its decision as based on a reasonable interpretation of the Agreement based on the intent of the parties. Notwithstanding the Employees' contention that matters of intent are irrelevant to the analysis of a clear and unmbiguous document; the Board's reasoning in this particular area is faulty.

The Employees' argue that its interpretation of the Agreement is clearly reasonable in the light of the intent of the parties to the Agreement.

The Carrier's ex parte submission to this Board contained the following description of the historical situation leading up to the August 16, 1983 Agreement. The Carrier wrote in relevant part:

> The Organization's interest and agreement in this matter was to the Carrier's knowledge at least partially the result of their desire that the Carrier be stopped from allegedly being unfair to certain crafts while favoring other crafts during periods of reduction in forces. Seniority between the four (4) former crafts was in accordance with Rule 14 at that time not interchangeable. Therefore, for example, during winter months senior painters or masons would be furloughed while junior carpenters would remain employed. The Organization found this unfair given the Carrier's rights under the Interchangeability of Work Agreement. The agreed upon answer to this concern was the understanding and agreement to create a B&B Mechanic class effective May 27, 1982, and to handle furloughs and recalls according to that consolidated roster. However, the Organization demanded and the Carrier agreed to grant existing craft employees prior rights to positions of their former craft while they were in active service. Therefore, the parties in their August 16, 1983, final agreement included Section V. B. and C. granting such prior rights as clear and literal proof of that intent.

The August 16, 1983 Agreement, as written, and as interpreted by the Employees is a reasonable response to this historical background and "intent" of the parties. The prior craft rights were honored in the award of advertised positions. Such a provision makes sense in a time when forces are being increased via the bulletining of new positions. However, during a reduction of force levels, the continued application of prior craft rights would negative the intent ascribed to the Employees by the Carrier; namely that solely based on prior craft rights, junior employees would retain positions while senior employees were forced to furlough. The instant claim was filed when a similar situation occurred; a senior employee was required to displace into a lower rated class while a junior employee retained his position in the higher rated class. Clearly the exclusion of any mention of prior rights governing displacement rights of B&B Foremen and

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Mechanics was a conscious decision of the parties to the Agreement and reasonably expressed their respective intents in the matter.

For the reasons expressed above, the Employees must dissent from the Board's decision in Award No. 6, Case No. 6, Public Law Board No. 3932.

Respectfully submitted,

Jed Dodd - see dissent

Jed Dodd
Employee Member, Public Law Board No. 3932