NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6399

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 1
and	)
	) Award No. 1
NORFOLK SOUTHERN RAILWAY COMPANY	)

Martin H. Malin, Chairman & Neutral Member
J. Dodd, Employee Member
D. L. Kerby, Carrier Member

Hearing Date: May 14, 2001

STATEMENT OF CLAIM:

Claim on behalf of D. E. Siegenthaler for 87.5 hours at the overtime rate for various dates between August 14 to 26, 2000, while held on former position until his August 28 release to fill a new position awarded him by an August 7, 2000 bulletin.

FINDINGS:

Public Law Board No. 6399, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On July 14, 2000, Carrier issued Bulletin No. 3051, advertising ten trackman/watchman positions. Claimant bid on these positions and, on August 7, 2000, Carrier issued Bulletin No. 3108, announcing that Claimant and eight other employees had been awarded the positions. (One position went no bid.) However, Claimant was not released from his prior assignment until August 25, 2000, and did not begin working the trackman/watchman position until August 28, 2000.

The Organization contends that Carrier violated Rule 8(a), by not allowing Claimant to work the trackman/watchman position within twenty days of the posting of Bulletin No. 3051, i.e. by August 3, 2000. Rule 8(a) provides:

> Permanent vacancies and permanent new positions (except positions covered by Rule 20) will be bulletined for a period of fifteen days within fifteen days previous to or ten days following the date the vacancies occur or new positions are established. The name of the employee applying for and awarded the position will be announced by bulletin within

twenty days from the date of the advertisement bulletin. Bulletins advertising positions and announcements under such bulletins will be posted at the headquarters of each gang or at places accessible to employees not in gangs, and copy furnished to General Chairman.

The Organization contends that Carrier violated the plain language of Rule 8(a) when it waited until August 7, 2000, to announce the award of the positions and when it held Claimant in his former position until August 28, 2000. Carrier admits that it violated Rule 8(a) by waiting until August 7, 2000, to announce the award.[1] Carrier contends, however, that a long-standing practice on the property allows Carrier to hold an employee in his former position for up to thirty days without payment of additional compensation. Therefore, because Claimant began working his new assignment within thirty days of August 3, 2000, in Carrier's view, no compensation is due.

The initial inquiry is whether the relevant language of Rule 8(a) is clear and unambiguous. The critical language of the Rule is, "The name of the employee applying for and awarded the position will be announced by bulletin within twenty days from the date of the advertisement bulletin." Carrier argues that the only thing the Rule requires to be accomplished within twenty days of the advertising bulletin is the announcement of the award. In Carrier's view, the Rule is silent concerning when Carrier must release the employee from his former position and allow him to begin working the awarded position.

We do not find Carrier's argument persuasive. Rule 8(a) requires that Carrier announce "[t]he name of the employee . . . awarded the position," within twenty days of the advertising bulletin. It would be impossible for Carrier to announce the name of the employee awarded the position if it had not already awarded the position. Thus, Rule 8(a) clearly and unambiguously requires Carrier to award the position within twenty days of the advertising bulletin. Once the position is awarded, it becomes the assignment of the employee to whom it was awarded. Rule 8(d) indicates how Carrier is to determine which of the employees from among those bidding is entitled to be awarded the position. Carrier's interpretation that it may retain the successful bidder in his former position in the absence of a Rule expressly setting a time that it must allow him to begin working the awarded position is inconsistent with the successful bidder's right under Rule 8(d) to be awarded the position and his right under Rule 8(a) to be awarded the position within twenty days of the advertising bulletin. Under the clear and unambiguous language of Rule 8(a), absent some express provision to the contrary, the award of the position and the right to begin working it go hand-in-hand.

Our interpretation of Rule 8(a) is supported by a series of awards interpreting a similar rule in the Organization's agreement with ConRail. Rule 3(d) of the ConRail agreement provided:

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[1]During handling on the property, Carrier denied that the delay in announcing the award violated the Agreement. In its submission, Carrier concede the violation.

Award will be made and bulletin announcing the name of the successful applicant will be posted within seven (7) days after the close of the advertisement.

This Rule shall not be construed so as to require the placing of employees on their awarded positions when properly qualified employees are not available at the time to fill their places, but physical transfers must be made within ten (10) days.

Boards interpreting Rule 3(d) have consistently held that "the first paragraph in Rule 3(d) means that job assignments resulting from awards will start not later than 'seven (7) days after the close of the advertisement.'" Public Law Board 3781, Award No. 24. *Accord*: Third Division Award No. 29578; Third Division Award No. 31265; Special Board of Adjustment No. 1016, Award 58.

Carrier argues, however, that these awards are not applicable to the instant claim because Rule 3(d)'s language is significantly different from Rule 8(a). Carrier urges that its interpretation of Rule8(a) is supported by Third Division Award 19380 and Third Division Award 20070. We do not agree.

The first sentence of Rule 3(d) and the relevant sentence of Rule 8(a) do differ, but their differences are not material to the issue in dispute. Rule 3(d) runs the time for awarding the position and announcing the award from the close of the bid period, whereas Rule 8(a) runs the time from the date of the advertising bulletin. This difference is immaterial to the question at issue, whether the award of the position necessarily includes commencement of the assignment by the successful bidder.

Nothing comparable to the second sentence of Rule 3(d) is found in Rule 8(a). Carrier suggests that it is the second sentence of Rule 3(d) that accounts for the interpretation of the first sentence made in the cited ConRail awards. We do not agree. The cited awards treat the claims as straight forward applications of the clear and unambiguous language of the first sentence of Rule 3(d). They do not find the first sentence ambiguous and imply a meaning from the second sentence. On the contrary, they treat the second sentence as an express exception to the mandate of the first sentence that "job assignments resulting from awards will start not later than seven (7) days after the close of the advertisement."

The awards cited by Carrier do not lead us to a different conclusion. There is no indication in Third Division Awards Nos. 19380 and 20070 that either case involved a rule setting an express time limit for the award of a position. Because the awards do not appear to interpret a rule mandating the award of a position within a specified period of time, we do not find them helpful in interpreting Rule 8(a).

Carrier maintains, however, that the Section 6 notice served by the Organization on November 1, 1999, recognized that Rule 8(a) did not obligate Carrier to place the successful bidder in the position within the time limit specified for awarding it. The notice proposed, among other things, to "provide that employes will not be held in positions when they are entitled

by virtue of their seniority to move to different positions." However, Section 6 notices identical in their entirety were served by the Organization simultaneously on the Burlington Northern and ConRail. The Organization observes that such uniform Section 6 notices were required by the decision in *Alton & Southern Railway Co. v. Brotherhood of Maintenance of Way Employes*, Civ. No. 94-2365(TFH) (D.D.C. May 28, 1996), which enjoined the Organization to engage in national bargaining with the National Carriers' Conference Committee. Furthermore, the Section 6 notice on its face declares. "Any request for changes herein is not an admission, expressed and/or implied, directly and/or indirectly, that those changes requested are not already contained within the terms and conditions in any existing collective bargaining agreement between Brotherhood of Maintenance of Way Employes and the carrier." Accordingly, we cannot agree with Carrier that the Organization's Section 6 notice recognized that Carrier was not obligated to commence the successful bidder's assignment within the twenty day period specified for its award.

Carrier also contends that the parties have had a long standing past practice of allowing Carrier to keep the successful bidder in his former assignment for up to thirty days without additional compensation. The Organization contends that Carrier has not established such a past practice and, in any event, a past practice cannot contradict the clear and unambiguous language of the Agreement. The Organization cites several awards for the proposition that a party retains the right to insist on enforcement of the Agreement even though it may have acquiesced to violations of the Agreement in the past.

Carrier's evidence of past practice consists of two letters, one dated January 4, 1990, and one dated November 26, 1991, protesting in specific instances Carrier's failure to allow successful bidders to occupy their positions within thirty days. Although the Organization argues that these two letters appear to be parts of two series of correspondence and cannot be evaluated without seeing the contexts in which they were written, it is apparent from the face of the letters that the two Organization officials who had responsibility for enforcing the Agreement protested not that the employees at issue weren't allowed to assume their new positions within twenty days of the bulletin advertising them, but that they were not allowed to assume their new positions within thirty days of the awards. This is very strong evidence that the Organization acquiesced in a practice whereby Carrier retained successful bidders in their former positions for up to thirty days. This evidence stands unrebutted in the record.

It is important to recognize that Carrier's evidence does not establish a past practice interpreting and applying an ambiguous contract Rule. Rather, it establishes the Organization's acquiescence in a practice contrary to the plain and unambiguous language of Rule 8(a). The doctrine of acquiescence has long been recognized in grievance arbitration. Under the doctrine of acquiescence, a party who acquiesces in a practice in violation of the clear language of the contract may withdraw its acquiescence at any time and insist on observance of the contract. However, the other party may not incur monetary liability until it has been given notice that the previously acquiescing party insists on strict contract compliance. *See* Elkouri & Elkouri, *How Arbitration Works* 576-77(5th ed. 1997).

AWARD NO. 1

Third Division Award No. 25930 appears to have applied the arbitral doctrine of acquiescence. The organization claimed that the carrier had violated the applicable agreement when it used outside forces to mow grass and weeds along its right-of-way. Carrier argued that it had been using outside contractors to perform the work for twelve years. The Board held that the agreement reserved the work to organization-represented employees and that the organization's acquiescence to carrier's use of outside contractors did not bar it from insisting on compliance with the agreement. However, the Board continued, "In view of the Organization's apparent acquiescence to the use of outside forces and Carrier's reliance upon this acceptance, it would be unfair to hold Carrier liable for the compensatory portion of the claim."

We find Award No. 25930 directly applicable to the instant dispute. For a substantial period of time, the Organization acquiesced in a practice allowing Carrier to retain successful bidders at their former assignments for up to thirty days, even though that practice was contrary to the plain language of Rule 8(a). The Organization may now insist on compliance with the Agreement. However, it is apparent that Carrier relied on the practice and the Organization's acquiescence in retaining the Claimant in his former assignment until August 28, 2000. Accordingly, we will sustain the claim but only to the extent of finding that Carrier violated the Agreement. We will not award any monetary compensation. Therefore, we have no occasion to consider what type of monetary compensation is appropriate for a breach of Rule 8(a). Carrier is now on notice that it must comply with Rule 8(a) or face future monetary liability.

AWARD

Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

Martin H. Malin, Chairman

D. L. Kerby,
Carrier Member

J. Dodd
Employee Member

Dated at Chicago, Illinois, August 31, 2001.

Concurrence attached

AWARD NO. 1

PLB NO. 6399

Carrier's Concurrence
To Award No. 1 of PLB No. 6399

Referee Malin

Carrier concurs with the Board's finding that there is a long standing practice of Carrier holding the successful bidder in his former assignment for up to thirty days from the award date without additional compensation; and, that no monetary compensation may be awarded in this case where the claimant was released prior to the expiration of the thirty days. However, to give full effect to the award, we are compelled to memorialize the context of the decision with respect to the finding that "under the clear and unambiguous language of Rule 8(a), absent some express provision to the contrary, the award of the position and the right to begin working go hand-in-hand."

The on-property handling in the case at bar consisted only of a complaint that other employees, whose awards were announced on the same bulletin, were released and began obtaining overtime work prior to Claimant's release; and, a response by Carrier that such employees may be held on their former positions for up to thirty days at no additional cost pursuant to a long standing past practice. Rule 8 is silent concerning the physical transfer of the successful bidder to the awarded position. Accordingly, this decision effectively found that, absent something more, an employee was entitled to commence working the new position upon being awarded such position; and, under the appropriate circumstances, there could be monetary liability as a result of Carrier not timely releasing the employee from his former position.

The parties arguments to the Board, including discussion in executive session, touched on a gamut of issues surrounding application of Rule 8 that were not a part of the handling of this particular dispute on the property and, therefore, could not be a basis for a decision in this case. The Carrier understood that the findings in this case do not consider the propriety of the practice in place, agreed to or otherwise, concerning the release of employees and appropriate compensation for the period between the announcement bulletin and the release.

Here, the Board only considered the language of the rule and Carrier's assertion that it incurred no additional cost for holding a successful bidder on his former position until thirty days past the award date. Moreover, the Carrier understood that the propriety of any remedy arrangement in connection with the time from an award until such employee is released to the awarded position would be a different dispute not addressed in the handling of this case. Carrier's understanding is affirmed in these findings in the statement "therefore, we have no occasion to consider what type of monetary compensation is appropriate for a breach of Rule 8(a)." Accordingly, these findings do not purport to disturb any existing mutually agreed to arrangements concerning application of Rule 8.

D. L. Kerby
Carrier Member
PLB 6399

AWARD NO. 1 PLB NO. 6399

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
AWARD NO. 1 OF PUBLIC LAW BOARD NO. 6399
(Referee Malin)

In a transparent attempt to undermine the well-reasoned and clearly stated Findings of the Neutral Member, the Carrier Member has mischaracterized not only the record of the case, but the plain findings of the award itself. The Carrier Member begins his misdirection by titling his writing a "Concurrence" in order to cloak it with the appearance of reasonableness. However, the truth is that the Carrier Member concurs with virtually nothing in the award and is actually attempting to eviscerate it. Indeed, the Carrier Member has verbally stated that the Carrier does not intend to comply with the award and his so-called "Concurrence" is obviously nothing but an attempt to set the stage for an end run. Fortunately for the Organization, none of the Carrier Member's bobbing, weaving and hedging can change the fact that the Neutral Member determined that the language of Rule 8(a) was clear and unambiguous and decided the case on that basis. The Neutral first determined that the language of Rule 8(a) was clear and unambiguous as follows:

> "*** Carrier's interpretation that it may retain the successful bidder in his former position in the absence of a Rule expressly setting a time that it must allow him to begin working the awarded position is inconsistent with the successful bidder's right under Rule 8(d) to be awarded the position and his right under Rule 8(a) to be awarded the position within twenty days of the advertising bulletin. **Under the clear and unambiguous language of Rule 8(a), absent some express provision to the contrary, the award of the position and the right to begin working it go hand-in-hand.**" (Emphasis in bold added)

After determining that Rule 8(a) was clear and unambiguous, the Neutral Member then determined that a contrary practice had no force or effect and the Organization could insist on compliance with the Agreement:

> "*** For a substantial period of time, the Organization acquiesced in a practice allowing Carrier to retain successful bidders at their former assignments for up to thirty days, even though that practice was contrary to the plain language of Rule 8(a). **The Organization may now insist on compliance with the Agreement.** ***" (Emphasis in bold added) (Award at P.8)

When the Carrier Member's so-called "Concurrence" is read in the light of the above-quoted findings, which are not only well reasoned but also supported by ample precedent, it is clear that the Concurrence is much ado about nothing.

After disingenuously entitling his response a "Concurrence", the Carrier Member sets that stage for his campaign of misdirection with his very first sentence where he purportedly concurs with, "... the Board's finding that there is a long standing practice of Carrier holding the successful bidder in his former assignment for up to thirty days from the award date without additional compensation; and, that no monetary compensation may be awarded in this case where the claimant was released prior to the expiration of the thirty days. ***" Of course, the Carrier Member conveniently fails to mention that the "long standing practice" to which he refers is the practice which has no force or effect in the face of the clear language of Rule 8(a). Likewise, he

also fails to mention that the only reason no monetary award was made in this particular case was because the Organization had not put the carrier on notice that it intended to enforce the plain language of Rule 8(a) and would no longer acquiesce to the contrary practice. However, the Neutral Member plainly concluded the award by stating:

> "*** **Carrier is now on notice that it must comply with Rule 8(a) or face future monetary liability.**" (Emphasis in bold added) (Award at P.5)

The Carrier Member continues his campaign of misdirection by next asserting that the Carrier, "*** understood that the findings in this case do not consider the propriety of the practice in place, agreed to or otherwise, concerning the release of employees and appropriate compensation for the period between the announcement bulletin and release." Given the plain language of the award, there is no basis for the carrier to have such an understanding concerning the "practice in place". The primary thrust of the award is that the practice has no continuing force or effect in the face of the plain language of Rule 8(a) and that the Organization may now insist on compliance with that language. With respect to "appropriate compensation" for a future violation of Rule 8(a), the carrier is correct that this Board has not determined what that compensation should be other than to state that the carrier would "*** face future monetary liability." Obviously, this Board could not know what that liability would be in any given case because the loss suffered by an employe could include rate differences, loss of overtime and various compensation and expenses associated with working away from home or assigned headquarters depending on the circumstances of the case. In other words, the fundamental make whole remedy will be determined by the facts of any given case.

In addition to mischaracterizing the award itself, the Carrier Member attempts to undermine the award by implying that the case was decided on the basis of a poorly developed on-property record. What the Carrier Member fails to mention is that both parties developed substantial records in their presentations to the Board and that at the hearing the parties agreed that all evidence and argument should be considered by the Neutral Member so as to definitively resolve this issue. This included substantial "new" past practice evidence submitted by the Carrier which the Organization agreed to let in the record. This point can not be overemphasized. The parties explicitly agreed to let all evidence in because they specifically agreed they wanted the issue definitively settled and did not want to find themselves rearbitrating the issue six months down the road. Now that the issue has been settled, the Carrier Member is attempting to lay the ground work for undermining the definitive settlement which the parties mutually agreed to seek. Where we come from this is called welching on a deal and it's not tolerated.

In conclusion, Award No. 1 of PLB 6399 could hardly have been reasoned or written more clearly. Hence, it stands as sound authority that under the clear and unambiguous language of Rule 8(a), the award of the position and the right to begin working it go hand-in-hand and the carrier must now comply with Rule 8(a) or face make whole monetary liability.

Respectfully submitted,

Jed Dodd
Labor Member