PUBLIC LAW BOARD NO. 1844

AWARD NO. 84

CASE NO. 103

PARTIES TO DISPUTE:

Brotherhood of Maintenance
of Way Employes

and

Chicago and North Western
Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated Article VIII - Entry Rates - of the October 30, 1978 National Agreement when Trackman Marvin Simonis was not compensated at the regular trackman's rate following completion of his first twelve months of employment. (Organization File No. 7CT-1370; Carrier's File No. 81-19-233)

(2) Claimant Marvin Simonis shall be compensated for the difference in pay between the entry rate of $7.76 per hour and the regular trackman's rate of $8.52 per hour for all service rendered subsequent to June 27, 1980 and continuing until such time as the rate of pay is corrected.

OPINION OF BOARD:

Claimant entered service of Carrier on June 27, 1979 as a Trackman in Zone H of the Twin Cities Division, Seniority District No. 7. On his entry to service as a new employe Claimant was compensated at 90 percent of the applicable rate of pay, in accordance with Article VIII of the October 30, 1978 National Agreement, reading in pertinent part as follows:

ARTICLE VIII - ENTRY RATES

Section 1 - Service First 12-Months

Except as otherwise provided in this Article VIII, employees entering service on and after the effective date of this Article shall be paid as follows for all service performed within the first twelve (12) calendar months of service:

(a) For the first twelve (12) calendar months of employment, new employees shall be paid 90% of the applicable rates of pay (including COLA) for the class and craft in which service is rendered. However, an employee promoted to a higher class shall not be paid at a rate of pay lower than the rate he would have been paid had he remained in the lower class.

(b) When an employee has completed a total of twelve (12) calendar months of employment in any maintenance of way position (or combination thereof) the provisions of sub-paragraph (a) above will no longer be applicable. Employees who have had a maintenance of way employment relationship with the carrier and are rehired in a maintenance of way position will be paid at the full applicable rate after completion of a total of twelve (12) calendar months combined employment.

(c) Any calendar month in which an employee does not render compensated service due to voluntary absence, suspension, or dismissal shall not count toward completion of the twelve (12) month period.

(d) The reduced rates provided by this Article are applicable to trackmen; extra gangmen; sectionmen; all laborers, gardeners, farmers and helpers; firemen; upgraded mechanics; flagmen, gatemen and watchmen; and roadway equipment and machine operators who have not established seniority as such.

After less than one month of service Claimant's position was abolished by Carrier in July 1979. Rule 5 - Seniority Districts of the controlling Schedule Agreement granted Claimant certain displacement rights and privileges as follows:

"Except for the Chicago Division, each Seniority District will be divided into Zones to be known as Zone A, Zone B, etc. An employe whose position is abolished or who is displaced through the exercise of seniority will not be required to displace to another zone of his seniority district, but will be priviledged to do so. An employe desiring to stay within the zone encompassing the railroad territory of the job previously held by him will not suffer loss of seniority in higher classification under Rule 13 by displacing an employe in a lower classification within the zone; i.e., he will continue to hold all seniority theretofore attained within the entire seniority district. Seniority Districts are identified as follows:....."

The uncontroverted record shows that there were no employes junior to Claimant in Zone H of the Twin Cities Division Seniority District No. 7 against whom he could have exercised displacement rights. Similarly, it is not contested that there were junior employes outside Zone H in Seniority District No. 7 whom Claimant could have but did not displace. When his position was abolished and he did not displace employes outside his Zone, Claimant was placed in furlough status in July 1979. He remained on furlough until sometime in January 1980 and worked thereafter at least until October 7, 1980 when the present claim was filed in his behalf.

The claim alleges that Carrier violated the above-quoted language of Article VIII, Section (b) when it continued to pay Claimant after June 27, 1980 at the 90 percent rate. The Organization maintains that the plain and unambiguous language of Article VIII, Section (b) required Carrier to pay Claimant at the full applicable rate of pay on and after June 27, 1980, the anniversary date of his entrance to service. Carrier responds that it considered Claimant's failure to displace on a position outside his Zone to be tantamount to a "voluntary absence" under the language of Article VIII, Section 1(c), supra.

We conclude that the express language of Rule 5 governs the disposition of this matter: "An employe whose position is abolished or who is displaced through the exercise of seniority will not be required to displace to another zone of his seniority district, but will be privileged to do so." Under this provision Claimant is under no obligation to try and displace outside his Zone. Carrier is not free to penalize, either directly or indirectly, the employe who fails to exercise his privilege to make such displacement. We do not concur that Claimant's furlough was a voluntary absence and find

that Carrier violated his rights under Article VIII, Section 1(b) by not paying him the full applicable rate effective June 27, 1980.

AWARD

Claim sustained. Carrier shall comply with this Award within thirty (30) days of issuance.

Employe Member

Carrier Member
Idissent

Dana E. Eischen, Chairman

Date: March 30, 1983

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CARRIER MEMBER'S DISSENT

At the time this case was argued on March 31, 1982, the parties had not received the Oregon Short Line Arbitration Committee decision of September 27, 1982, Chairman Richard R. Kasher, involving the same parties as the present dispute. In that dispute, the employees likewise chose not to exercise seniority under Rule 5, and contended their failure to work did not disqualify them from receiving displacement or furlough allowances under the OSL Conditions. The Arbitration Committee properly denied the claims on the basis that the "privilege" granted in Rule 5 "...doesn't specify entitlement to protective benefits."

In this award, as in Award No. 83, the Chairman has chosen to appropriate the functions of the parties to the collective bargaining agreement, in issuing an award which holds that a voluntary absence should not be considered a voluntary absence under circumstances in which he considers that the Organization did not exercise sufficient foresight at the time of negotiating the National Agreement.

Rule 5 clearly gave the employee the option of working or not working. He chose not to work. There is no question that this was an absence within the meaning of the applicable rule, and there is no question concerning the fact that it was voluntary on his part. The Referee's conclusion that a voluntary absence is not a voluntary absence under these circumstances is so erroneous on its face that this award should not serve as a precedent in any future dispute involving this Carrier or any other Carrier, or any other parties to the entry rate rules.

J. D. Crawford
J. D. Crawford
Carrier Member

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