PUBLIC LAW BOARD NO. 5927

Case No. 1
Award No. 1

Transportation-Communication Union )
vs ) PARTIES TO THE DISPUTE
Burlington Northern Santa Fe )
Railroad )

STATEMENT OF CLAIM

(a) Carrier violated the Mediation Agreement and the working rules of the current Clerk's Agreement at Barstow, California when it improperly removed H.P. Schumacher from protected status and improperly removed his name from the Purchases and Materials Management (P&MM) Coast Lines Seniority Roster effective January 1, 1995: and

(b) H.P. Schumacher shall now be restored to the status of a protected employee and shall have his name replaced on the P&MM Coast Lines Seniority Roster and shall be compensated for any monetary loss deriving from the Mediation Agreement and/or the working rules Agreement, commencing January 1, 1995 and continuing until such violations are corrected, in addition to any other compensation he may have received.

FINDINGS

This Board finds the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the dispute involved herein. The parties to said dispute were given due and proper notice of hearing thereon.

Claimant had a seniority date of April 28, 1977. As such claimant was a protected employee under the terms and conditions of the February 7, 1965 National Agreement as amended effective January 1, 1980.

On December 27, 1990 Claimant last worked a clerical position due to a force reduction, and began receiving the benefits of the protective agreement. It is noted that when the claimant was furloughed there were not any clerical positions left on the seniority district.

On February 25, 1991 Claimant was offered comparable employment as a shop craft laborer under the provisions of Article II Section 4 of the protective agreement. Claimant accepted the offer and was paid a supplemental allowance (the difference between the laborer's rate and the protected clerical rate).

On January 1, 1995, under the provisions of Rule 17A of the Schedule Agreement the Carrier removed the claimant from the clerical seniority roster and ceased paying the difference in rates.

The Organization has progressed the claim alleging the Carrier has violated both the Schedule Agreement as well as the February 7, 1965 Agreement, as amended.

The Carrier takes the position that it properly removed the claimant from the clerical seniority roster under Rule 17A, and that the February 7, 1965 Agreement, as amended, does not supersede the Schedule Agreement. It argues that once the claimant had lost the clerical seniority he was no longer entitled to any benefits of the clerical craft.

The Carrier also argues that when the February 7, 1965 Agreement was amended in 1980 it no longer had to retain clerical employees in service. Therefore, it was proper to furlough the claimant. After the claimant had not worked in the clerical craft for 4 years it was within their right to terminate the "life time" protection of the February 7, 1965 Agreement, as amended.

Article I Section 1 of the February 7, 1965 Agreement reads:

> All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this Agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964, and had fifteen or more days of compensated service during 1964, <u>will be retained in service subject to compensation</u> as hereinafter provided unless or until retired, discharged for cause, or otherwise removed by natural attrition. Any such employees who are on furlough as of the date of this Agreement will be returned to active service before March 1, 1965, in accordance with the normal procedures provided for in existing agreements, and will thereafter be retained in compensated service as set out above, provided that no back pay will be due to such employees by reason of this Agreement. For the purpose of this Agreement, the term "active service" is defined to include all employees working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not October 1, 1964 was a work day), all extra employees on extra lists pursuant to agreements or practice who are working or are available for calls to service and are expected to respond when called, and where extra boards are not maintained, furloughed employees who respond to extra work when called, and have averaged at least 7 days

work for each month furloughed during the year 1964. (Emphasis added)

Article I as amended reads:

Section 1-

(a) Employees assigned to a regular position on January 1, 1980, having three (3) or more years of continuous employment relationship in the clerical craft as of January 1, 1980, will become protected employees on January 1, 1980.

(b) Employees assigned to a regular position on January 1, 1980, having less than three (3) years of continuous employment relationship in the clerical craft on January 1, 1980, will become protected employees on the first of the month immediately following the month in which they acquire three (3) years continuous employment relationship in the clerical craft, unless they are not regularly assigned on the date they are eligible to become protected employees, in which event they will become protected employees on the first of the month immediately following the month when recalled to service and assigned to a regular position in accordance with existing rules of the Clerks' Agreement.

(c) Employees not regularly assigned as of January 1, 1980, having three (3) or more years of continuous employment relationship in the clerical craft as of January 1, 1980, will become protected employees on the first of the month immediately following the month when recalled to service and assigned to a regular position in accordance with existing rules of the Clerks' Agreement.

(d) Employees not regularly assigned as of January 1, 1980, having less than three (3) years of continuous employment relationship in the clerical craft as of January 1, 1980, will become protected employees on the first of the month immediately following the month in which they acquire three (3) years of continuous employment relationship in the clerical craft, unless they are not regularly assigned on the date they are eligible to become protected employees, in which event they will become protected employees on the first of the month immediately following the month when recalled to service and assigned to a regular position in accordance with existing rules of the Clerk's Agreement.

(e) Employees hired on or after January 1, 1980, who acquire five (5) years continuous employment relationship in the clerical craft will become protected employees on the first of the month immediately following the month in which they acquire five (5) years continuous employment relationship in the clerical craft, unless they are not regularly assigned on the date they are eligible to become protected employees, in which event they will become protected employees on the first of the month immediately following the month when recalled to service and assigned to a regular position in accordance with existing rules of the Clerks' Agreement.

(f) For the purpose of this Agreement, the term "regular position" does not include as advertised temporary vacancy or a short vacancy.

The apparent reason for the change is that the amendments to the February 7, 1965 Agreement require furloughed employees to apply for Railroad Retirement Board Unemployment Benefits, with the Carrier making up the difference between the protected rate of pay and the unemployment rate. However, both versions limit the number of protected employees that may be reduced to a decline-in-business formula.

Article II Section 1, which reads:

An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated o service, he will be restored to the status of a protected employee as of the date of his reinstatement. (Emphasis added)

was amended to read:

An employee shall cease to be a protected employee in case of resignation, death, retirement, dismissal for cause in accordance with existing agreements, or he becomes eligible for an annuity at age 65 under the Railroad Retirement Act. The protected status of an employee who fails to obtain or retain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements,

> or fails to accept employment as provided in the Agreement, or fails to respond to extra work when called, will be suspended until such time as he obtains a regular position. As of the date he occupies such position he will be restored to the status of a protected employee and protected at the rate of the regular position occupied on the date his protected status is restored. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement. (Emphasis added)

The Carrier argues that the removal of the Claimant's name from the seniority roster under Rule 17A was in essence a resignation. It avers that seniority is a key to the treasures of the protective agreement, and when the key was lost the treasure chest was forever locked.

This Board must decide whether the Carrier had the right to terminate the Claimant's seniority under Rule 17, and if so did it have the right to terminate the benefits of the February 7, 1965 Agreement, as amended.

Rule 17A of the Schedule Agreement reads:

> Employees who do not assert their displacement rights within the time limits provided in these rules, or who waive displacement rights in writing, or who do not possess sufficient seniority to displace a junior employee will be considered laid off-in-force reduction. Except as otherwise provided in Rule 13, Rule 14B and Rule 17, such off-in-force-reduction employees shall retain their seniority rights so long as they do not fail to perform service under this Agreement during any period of 48 consecutive calendar months.

The record is void of any evidence that the Claimant; (1) did not assert his displacement rights within the time limits provided in the Schedule Agreement; (2) waived his displacement rights in writing; or, (3) did not possess sufficient seniority to displace a junior employee.

While the Carrier argues it has terminated numerous employees under Rule 17A, the record is void of any evidence of history of terminating employees who were receiving the benefits of the February 7, 1965 Agreement, as amended. It is clear the claimant is not covered by Rule 17A. Also there is no evidence that the Carrier terminates the seniority of clerical employees who have been promoted to management positions, and who have not worked in the craft for 48 months.

However, even if the claimant were covered by Rule 17A, the Carrier would have had no basis under the protective agreement to terminate the benefits. Claimant had accepted comparable employment in another craft under the provisions of Article II Section 4, which reads:

> Off-in-force-reduction employees who are entitled to protective benefits under National Mediation Agreement Case No. A-7128 dated February 7, 1965, as amended, may be offered, in reverse order of seniority, reasonably comparable employment in another class or craft or other employment with the Carrier signatory hereto or a Carrier fully or partially owned by the Carrier signatory hereto which does not require a change in residence for which he is physically qualified, if such employment does not infringe upon the employment or transfer rights of the employees in such other craft or class, and the filling of the vacancy in the other craft or class would require the Carrier to hire a new employee. (Emphasis added)

Article IV describes the benefits due regular assigned protected employees and supplemental allowance due unassigned protected employees. Section 5 of the article describes when an employee will not be entitled to the supplemental benefits. It reads as follows:

> A protected employee shall not be entitled to the benefits of this Article during any period in which he fails to work due to disability, discipline, leave of absence, military service, or other absence from the Carrier's service, or during any period in which he occupies a position not subject to the working agreement (except as provided for in Article II) or his protected status is suspended; nor shall a protected employee be entitled to the benefits of this Article IV during any period when furloughed because of reduction in force resulting from seasonal requirements (including lay-offs during Miners' Holiday and the Christmas Season) or because of reductions made pursuant to Article I, Sections 3 or 4. (Emphasis added)

This section clearly excepts those employees accepting comparable employment from suspension of benefits.

Finally, in a similar case before Special Board of Adjustment No. 605, in Award No. 318, Referee Zumas held:

> Essentially Carrier asserts that its action under Rule 8(c) comes within the definition of "discharged for cause or otherwise removed by natural attrition."

The Board does not agree. The purpose and policy of the February 7, 1965 Agreement was to afford job protection, under certain conditions, to certain employees because of economic crises in the railroad industry.

It is assumed from the record that Claimants herein did not work the required 60 days solely because Carrier had no need for their services, and not because of any willful or voluntary act on their part. This was what the February 7, 1965 Agreement attempted to obviate.

Since there has been no showing that Claimants were discharged for cause, they did not lose their protected status under the provisions of the February 7, 1965 Agreement.

None of the changes in 1980 changed the purpose of the February 7, 1965 Agreement.

The Carrier by its actions has attempted to reduce the "life time" protection benefits of the February 7, 1965 Agreement, as amended, to a four-year benefit. While its arguments may show ingenuity they are sophomoric.

The Carrier has violated the Schedule Agreement when it improperly removed the Claimant from the seniority roster and the February 7, 1965 Agreement, as amended, when it ceased paying the Claimant his supplemental benefit.

AWARD

Claim sustained. Carrier is ordered to restore Claimant's clerical seniority and reimburse the claimant for all monies withheld within 30 days of this Award.

Robert Richter, Neutral Member

L.L. Broxterman
Carrier Member
I dissent

William R. Miller
Employee Member

Dated 2-6-1997