

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25052

Docket No. 44790

99-1-98-1-U-2058

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Union Pacific Railroad Company

PARTIES TO DISPUTE: (

(United Transportation Union

STATEMENT OF CLAIM:

"Claim of Train Dispatcher Howard G. Trask and other individuals similarly situated, that their seniority as Conductors/Trainmen was improperly terminated November 2, 1995 by D&RGW United Transportation Union General Committee (and said termination continued by the Union Pacific Eastern District General Committee after the UP/SP merger) without proper notice to the individuals after their positions as non-agreement dispatchers were involuntarily placed under representation of the ATDD (BLE). Said termination in violation of Article 37 of the DRGW/UTU Agreement."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier brings this claim asserting that certain train dispatchers in its employ have had their seniority as conductors and/or trainmen removed by the

Organization. This claim has its origin when the Denver and Rio Grande Western (DRGW) merged with the Southern Pacific (SP). Prior to the merger, these employees worked as train dispatchers for the DRGW. As such, they were not represented by an organization or covered by a collective bargaining agreement. The DRGW considered the position of train dispatcher to be an official position. Accordingly, the employees were permitted to retain and accumulate seniority as trainmen and/or conductors pursuant to Article 37(F) of the DRGW-UTU Agreement, which stated:

"An employee covered by this Agreement who accepts an official position in the service of this railroad or in the service of the United Transportation Union and assigned to service connected with this railroad or this organization, shall retain and accumulate seniority rights on his seniority district."

Train dispatchers on the SP, prior to the merger, were represented by the American Train Dispatchers Department of the Brotherhood of Locomotive Engineers (ATDD). Subsequent to the SP-DRGW merger, the National Mediation Board ruled that the ATDD represented the entire craft of train dispatchers on the merged property. The SP and the ATDD reached an agreement covering all of the dispatchers on March 2, 1995.

By at least May 5, 1995, the Carrier was on notice that there was an issue regarding the retention of UTU seniority by the former DRGW dispatchers. On that date, a memo was written by Labor Relations Manager D. A. Porter, stating:

"This refers to our previous discussions concerning ATDD/BLE-represented train dispatchers who hold seniority under other labor agreements.

We understand that certain units of the UTU are reluctant to protect UTU seniority of train dispatchers who were previously promoted in train dispatching and as a result of the March 2, 1995 ATDD/BLE Agreement became represented by the ATDD/BLE.

This will confirm the Company's commitment to take any steps necessary to protect the seniority held in another craft by ATDD/BLE-represented train dispatchers."

A copy of this memo, which was addressed to Mr. G. A. LaValley, was sent to the ATDD/BLE General Chairman. By memo dated May 16, 1995, Mr. LaValley advised the affected train dispatchers that the issue of retention of seniority had not been resolved "although no action has been taken against any of the existing train dispatchers who hold dual-seniority. Still hopeful that this can be worked out short of legal action."

On November 2, 1995, UTU General Chairman (DRGW Trainmen Committee) J. G. Pollard sent the following letter to Manager - Labor Relations M. L. Youngquist:

"This will acknowledge receipt of the 1995 System Seniority Roster(s), dated October 6, 1995, from your office. You advised the delay in receiving the roster(s) was the need for the carrier to make necessary corrections subsequent to publication. It would appear that more will be required after review by all of the locals and membership. We will advise further on this, as necessary.

Of immediate concern is the question that has been raised concerning the carrier leaving some employees on the roster(s) that are now employed in other contract positions. It is our information that dispatchers are now covered by a collective bargaining agreement represented by ATDA (BLE).

Article 37(F) allows employees to accept official positions with the carrier and retain and accumulate seniority rights while in such service. As such is no longer the case, please identify and advise of those dispatchers, or any other employees, involved in this category and arrange to have names deleted from the October 6, 1995 System Seniority Roster(s).

Your expedient attention and reply to this matter are appreciated."

Mr. Porter issued the following letter to Mr. Pollard and General Chairman J. K. Spear, who represented Switchmen, on November 6, 1995:

"As you know, employees holding UTU seniority on the Denver and Rio Grande Railroad were historically given leaves of absence to work exempt train dispatching positions. Subsequently, the National Mediation Board held the Southern Pacific and the Denver and Rio Grande Railroad to be

a single carrier and train dispatchers on the D&RGW were to be represented by the ATDD.

It is very important that these employees continue to work as train dispatchers in TSC. If they were to leave, it would create an untenable shortage of train dispatchers in the TSC in Denver. We are already short of train dispatchers and although we are training new dispatchers in order to get to minimum staffing levels, an exodus of train dispatchers at the present time would cripple the dispatching center. I do not believe any of us want that to happen.

While we would prefer that you continue to recognize their current leave of absence, since their exempt status changed as a result of circumstances beyond their control, we are proposing the attached agreement without prejudice to the position of either party regarding their continued seniority in the UTU.

We present this proposal with the hope that it addresses the concerns of your constituents, alleviates the uncertainty of the employees it covers, and avoids a potential untenable manning situation in TSC."

Thereafter, the Organization continued to demand the removal of the dispatchers from the seniority roster, and the Carrier refused. To resolve this matter, the Carrier submitted this dispute to the Board.

The Carrier argues it is improper to remove the employees from the seniority roster without first affording them due process. It contends this is a standard the Board generally imposes upon the Carrier when it has taken action to terminate an employee's seniority. It submits the Organization was obligated to notify the affected employees they would have a period of time during which they could either exercise their seniority or forfeit it. According to the Carrier, no communication ever went from the Organization directly to the employees. The only letter cited by the Carrier was General Chairman Pollard's letter of January 8, 1996, addressed to "Former DRGW Dispatchers" and sent to the Denver TSC. This letter states:

"This is to acknowledge receipt of your December 7, 1995, letter, received in this office above date.

The applicable rule of the UTU-C&T Agreement between the parties that applies to your letter is Article 37(F) which provides the following:

“An employee covered by this Agreement who accepts an official position in the service of this railroad or in the service of the United Transportation Union and assigned to service with this railroad or this organization, shall retain and accumulate seniority rights on his seniority district.”

This rule appropriately addresses the subject of your letter and the undersigned has been instructed by the members of this General Committee to enforce the provisions of this Agreement rule as it has been applied in the past on this property.”

The Carrier argues this letter does not explain to the employees that their continued employment under the ATDD contract would result in their losing their UTU seniority. It contends there is no rule in the Agreement prohibiting an employee from continuing on a leave of absence to work in another represented craft. Absent such a rule, the Carrier says the employees have never been told that they may not simultaneously work under any other labor organization's agreement, and that they would have a reasonable amount of time to either return to the UTU craft or forfeit their seniority therein. Finally, the Carrier asks why these employees were singled out while hundreds of other trainmen who hold seniority under the BLE Agreement are allowed to maintain their UTU seniority. The Carrier cites several Awards of Public Law Boards, as well as the Second and Third Divisions of the Adjustment Board, holding that employees must be given adequate notice before their seniority rights may be taken away.

The Organization objects to the Board's jurisdiction of this matter, asserting that the Carrier is not a “representative” under Section 1 Sixth of the Railway Labor Act, and is not empowered to act for or on behalf of employees. In the alternative, the Organization argues the dispatchers are “officials” and are not within the definition of “employees” as contained in Section 1 Fifth of the Act. This Board, says the Organization, only has jurisdiction over the claims of employees, not officials.

The Organization also contends the gravamen of the claim is a breach of the duty of fair representation, which is not within the jurisdiction of this Board. On this point, the Organization cites *Czosek v. O'Mara*, 397 U.S. 25 (1970). As an aside, the

Organization notes that any claim for breach of the duty of fair representation would be barred by the statute of limitations.

The Organization further argues the claim is procedurally defective in that there is no record of any grievance timely filed in the usual and customary manner under the former DRGW-UTU Agreement. Therefore, concludes the Organization, it is not appropriate for a merits decision by the Board.

Finally, the Organization denies the Carrier's claim has merit. It says the Carrier is attempting to enforce an Agreement provision that has not been in effect since implementation of the Denver and Salt Lake City Hub Implementing Agreements of July 1, 1997. Furthermore, the Organization submits the dispatchers were not officials at the time the Agreement provision did apply, and were, therefore, not entitled to the application of Article 37(F).

The Board finds that it has jurisdiction over this matter in that it is a dispute between a Carrier and a group of employees, namely the United Transportation Union. Access to this Board is not unilateral. While virtually all of the disputes heard by this Board have had their beginning as a claim filed by an employee, and then progressed through the grievance process, a Carrier is entitled to present disputes when it disagrees with the Organization regarding the interpretation of an Agreement. In some cases, the Carrier acts upon its interpretation, thereby generating a claim, or, in some cases, a strike. In this case, the Carrier has been told by the Organization that certain employees must be stricken from the seniority roster. The Carrier disagrees, and therein lies the dispute. It is privileged under the Act to present that dispute to this Board for adjudication.

While it is unusual, but certainly not unheard of, for a Carrier to bring a dispute in this manner, we find that the path this case has taken is quite usual for a dispute of this nature. When the General Chairman presents an issue such as this to the highest Carrier official designated to handle disputes, and there is then disagreement, either party may then progress that dispute to this Board. The requirements of Section 3 First(i) have been satisfied.

Furthermore, we do not agree that the Carrier is acting as a representative of the dispatchers. While they may be affected by this matter, they are not parties. This dispute is simply between the Carrier and the Organization.

The fact that the DRGW-UTU Agreement may have been abrogated does not change the nature of this dispute. The dispute arose over an interpretation of that Agreement, and the Organization is insisting that such Agreement required the dispatchers' forfeiture of seniority once they became part of the ATDD bargaining unit. In a sense, the Board is looking at a snapshot in time. What has happened subsequently has no bearing on this dispute. To be sure, the Board notes that since the Southern Pacific merged with the Union Pacific, the dispatchers in question are no longer subject to a collective bargaining agreement. That, however, has no effect on whether they lost their seniority at an earlier time. If their seniority was forfeited then, the SP-UP merger would not have reinstated it.

Turning to the merits of the dispute, we do not agree the dispatchers are, or were, on a leave of absence. There is no mention in Rule 37(F) of a leave of absence, unlike Rule 37(E), which grants a leave of absence for trainmen who enter military service. Similarly, Rule 37(G) grants a leave of absence to trainmen elected or appointed to government positions. It is beyond the power of this Board to insert language into the Rule that was not placed there by the parties. Even if the Carrier had placed the dispatchers on a leave of absence apart from Rule 37(F), Rule 37(B), which generally governs leaves of absence, limits such leaves to six months in duration during any calendar year.

Rule 37(F) must be strictly construed. It is clear and unambiguous. The dispatchers were permitted to retain their seniority as trainmen under this Rule only so long as they were in official positions. Once they became members of the ATDD bargaining unit, they lost the protection of the Rule. This Rule is the only Rule, other than those cited above relating to leaves of absence, that permits an employee to retain trainman seniority while not working in the craft. General rules of contract construction require us to conclude that absent such a specific provision, employees may not retain and accumulate seniority when not working in the craft. Otherwise, there would be no need for Rule 37(F). We note that trainmen promoted to engine service retain their seniority under separate Agreements.

This being the case, the Carrier argues due process requires notification to the affected dispatchers so that they could take the necessary action to protect their seniority, should they so choose. Due process, however, does not arise out of a vacuum. It is a creation of the Agreement. For instance, discipline rules establish certain due process requirements, such as a precise statement of charge. In other cases, certain

notices are contained in the Agreement itself. When an employee is recalled from furlough, the Agreement may require an automatic forfeiture of seniority if the employee does not respond. The Agreement will generally, however, specify the form of notice to be given to the employee. He may be required, though, to know that the Agreement contains the consequences of not returning to work. It need not be specifically stated in the recall notice unless the Agreement requires such a statement. This Board has ruled on many occasions that an employee's failure to return to work upon the expiration of a leave of absence results in an automatic forfeiture of seniority, without the Carrier being required to conduct an Investigation. The employee on leave is held to know these consequences.

Likewise, we find that the dispatchers should have been aware that their retention and accumulation of seniority was conditional upon their holding official positions. It is common knowledge that positions covered by a collective bargaining agreement are not official positions. Once they found themselves in that situation, they had the option of returning to the trainman craft with their seniority intact, or remaining as dispatchers and forfeiting their trainman seniority. As we noted above, there is no Rule in evidence that would have allowed them to retain seniority while working in another covered craft.

It is evident that the dispatchers, at some point, may have relied upon the Carrier's efforts to reach an Agreement with the UTU that would allow them to continue to retain and accumulate their seniority. That reliance was at their peril. Their failure to exercise their seniority once they were no longer covered by Rule 37(F) resulted in the forfeiture of their seniority. The Agreement requires that they be removed from the roster, as requested by the Organization.

The Board is cognizant that this decision may present a hardship to the dispatchers. The role of this Board, however, is to interpret the Agreement. We do not mete out equity. That is the function of the negotiators at the bargaining table.

AWARD

Claim denied.