

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31575
Docket No. CL-32132
96-3-94-3-539

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Transportation Communications International
(Union

PARTIES TO DISPUTE: (

(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the
Organization (GL-11102) that:

(1) Carrier violated the rules of the current Clerks' Agreement at Schaumburg, Illinois, when it waived the entry rate provisions of the National Agreement for select employees and not for other employees covered by the same National Agreement; and

(2) Karen Willey shall now be compensated at the full (100%) rate for any and all compensation, commencing retroactively 60 days prior to the date of this claim, in addition to any other compensation received for these days."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

Article III, Section 1 of the Agreement establishes a progression rate for employees in the first 60 months of service starting at 75% of the applicable rate of pay and increasing by 5% every 12 months until the full rate is achieved. The relevant language in that provision states:

"Employees entering service on and after the effective date of this Article on positions covered by an agreement with BRAC shall be paid as follows for all service performed with the first sixty (60) calendar months of service:

... For the first ... months of employment, new employees shall be paid ... % of the applicable rates of pay (including COLA)."

The Carrier states that because it was unable to fill Rate Clerk positions from within it hired R. J. Skarda and T. C. Bye from the outside and "waived the entry rate" paying the new hires the full rate for the position. This claim followed on behalf of Claimant, a Communication Specialist paid in accord with the progression rate, seeking to raise her rate to the full rate of her position. The parties advise us that there are other similar claims being held in abeyance pending the outcome of this dispute.

A similar dispute (with the same neutral Board member) was addressed in Public Law Board No. 5022, Award 2 [emphasis added]:

"Clearly, the Carrier violated the Agreement by failing to adhere to the entry rate progression set forth in the Agreement when it paid the full rate to the newly hired Secretary I in Los Angeles instead of 75% of that rate. The Carrier's argument that it is free to hire employees at a rate above the entry rate progression is not persuasive. The language is clear. The entry level progression rates are not minimum rates. For newly hired employees (as well as others in the various steps of the progression) the Agreement requires that "such employees shall be paid" at the specified rate corresponding to length of service."

Therefore, like Public Law Board No. 5022, Award 2, here the Carrier violated the progression schedule agreed to by the parties when it "waived the entry rate" for the

new hires. The progression rate is mandatory ("shall be paid"). This Board has no authority to change that language.

The difficult question is how to remedy the demonstrated violation. The claim seeks payment to Claimant at the full rate, notwithstanding the fact that she is properly in the progression schedule. To award that type of relief would also violate the agreed upon progression schedule. Again, see Public Law Board No. 5022, Award 2:

"As a remedy, in this case we shall not require the Carrier to raise the entry rates to the full rate for those employees hired after the effective date of the Agreement as requested by the Organization. It does not follow that violation of a provision of a collective bargaining agreement by one party dictates that the language of that provision be declared null and void. The remedy in a case such as this is to require compliance with the terms of the Agreement, and, where possible, to structure a monetary remedy commensurate with the violation."

The Organization's request to raise Claimant to the 100% rate is therefore denied.

But still, the Carrier violated the Agreement when it "waived the entry rate" for the new hires. As in Public Law Board No. 5022, Award 2, to remedy that violation:

"... [T]he appropriate remedy is to require the Carrier to abide by the terms of the Agreement"

Therefore, as a remedy, the Carrier is directed to henceforth pay the new hires in this case and in all subsequent hirings in strict compliance with the progression schedule. It may be that in certain situations the Carrier will have difficulty filling vacant positions. However, that difficulty flows from the clear language of the negotiated Agreement and this Board cannot change the parties' mutual commitments.

But, there was monetary relief fashioned in Public Law Board No. 5022, Award 2. In that case, the remedy included a distributed portion of a sum of money to the employees kept in the progression schedule equal to the difference between what the employee whose rate was waived earned and the appropriate progression rate for that employee. While such an award falls within the remedial discretion of this Board, in this

case that type of award is not an appropriate exercise of our discretion. Here, there is sufficient evidence that the Carrier has "waived the entry rate" in certain situations for a substantial period of time in the past without protest by the Organization. Under these circumstances, it would be manifestly unfair to now impose affirmative monetary relief against the Carrier.

Fourth Division Awards 4768 and 4770 relied upon by the Carrier are not inconsistent with Public Law Board No. 5022, Award 2. The Fourth Division Awards (which were individually filed) did not specifically protest, as here and as in Public Law Board No. 5022, Award 2, the failure of the Carrier therein to pay the appropriate progression rate. The Fourth Division Awards only sought the raising of the employees in the progression schedule to the full rate of pay—an act that Public Law Board No. 5022, Award 2 also found inappropriate. Here, and in Public Law Board No. 5022, Award 2, the waiver of the progression rate was specifically protested as an independent violation of the Agreement.

The Carrier's argument that the claim was untimely filed under Rule 47's requirement that claims are be filed within 60 days is without merit. The Carrier focuses upon the hiring of Skarda and Bye in March and November, 1991 respectively and Claimant's hiring in May, 1991 and argues that because the claim was filed on April 6, 1992, the 60 day time limit was not met. The correspondence on the property, however, shows that the Organization did not become aware until the week of February 17, 1992 of the fact that Skarda and Bye were not being paid at the appropriate progression rate. The April 6, 1992 claim was therefore filed within the 60 day requirement.

In sum then, by failing to pay the agreed upon progression rate, the Carrier violated the progression schedule in Article III, Section 1 of the Agreement. The Carrier is directed to strictly comply with the terms of the progression schedule for present and future employees.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of August 1996.