



Award No. 6176
Docket No. 6051
2-N&W-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jesse Simons when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Carmen)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Norfolk and Western Railway Company violated the Agreement, when on September 11, 1968, they posted Bulletin Notice No. 23, improperly advertising for one carman first shift, in the Freight Car Shop at Roanoke, Virginia, and when they refused to accept bids on such job, or to advertise vacancy and new jobs in identifiable manner as requested.

2. That the Norfolk and Western Railway Company be ordered to comply with Agreement by bulletining the job formerly held by Carman A. J. Janney (deceased), and all other vacancies and newly created jobs in accordance with Rules of Current Agreement, so as to allow all Carmen to properly exercise their seniority in selecting the type and kind of work preferred.

EMPLOYES' STATEMENT OF FACTS: The Norfolk and Western Railway Company, hereinafter referred to as the carrier, maintains at Roanoke, Virginia, a point on its line, a Shop, with facilities and employes for the building and repairing of cars, commonly referred to as the East End Shop. Prior to September 4, 1968, Car Repairer A. J. Janney held a job as carman, first shift in said East End Shop. Due to the death of Carman A. J. Janney on September 4, 1968, a vacancy resulted on the position formerly held by him. During conference on September 13, 1968, Local Chairman Scruggs, requested of Carrier's Assistant General Foreman, C. R. Coleman, that said vacancy be advertised. Mr. Coleman stated that Bulletin No. 23, dated September 11, 1968, advertising for one carman, which Bulletin accompanies the file of this case herewith as Exhibit A, was said vacancy. However, when three bids were submitted on such vacancy, said bids were refused by Carrier's Officer, Mr. Coleman.

On October 3, 1968, the employes, through Local Chairman Scruggs, hereinafter referred to as claimants, filed written request that the job for-

in the Freight Car Shop. Upon appealing the claims the General Chairman apparently recognized the futility of explaining away a practice of approximately fifty (50) years, abandoned this tactic and endeavored to secure a new rule which clearly and definitely stated what was contended the present rule provided. If, as the Organization originally contended, the present rule provided for specific information on the bulletin, then the proposals of the General Chairman were meaningless and superfluous. Obviously, the requests for the rewritten rule are an admission that the present Rule 17 does not provide for those items contained in the requests.

In that the various Divisions of the Board have ruled that the act of both the carrier and the organization accepting a practice over a period of years as indicating the meaning and intent of a rule, which can be changed only through negotiations, carrier respectfully asks that this protest be declined.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

Two issues are before the Board, arising out of a grievance processed by the Organization on behalf of three employes of the Carrier. The first issue is whether or not the carrier properly identified and/or described a vacant position in Bulletin No. 23, dated September 11, 1968, pursuant to Rule 17 of the current working agreement; and the second issue is whether or not the Carrier's refusal to accept three bids submitted in response to above Bulletin No. 23 by three employes, whose names appear in Employee Exhibits B, C and D, was violative of Rule 17.

In this grievance, as in the many others submitted to and decided in the past by the Board, the fundamental issue in controversy, though expressed in terms of whether or not bulletining has been done pursuant to Rule 17 or some other rule, is the effort of the Organization to obtain greater specificity in Bulletins. Such effort is grounded on the belief that potential bidders have at their disposal what the Organization believes are the vital facts as to the job content, i.e., the duties which have been clustered together which in their totality make up the "job" advertised to the end that employes possess the requisite knowledge to determine the desirability of such vacancy, as compared with their existing assignment and thus bid, or refrain from bidding for it. Carrier(s) in the instant case (and in others) are convinced that the requirements of Rule 17 are fulfilled by providing shift, work week, shop, and some general phrase such as are contained in Carrier Exhibits as follows:

General Carmen's Work - Bulletin 23, September 11, 1968

Car Repairer - Carrier Exhibit B 9/23/43

Pipefitter (passenger car shop) - Carrier Exhibit B 3/10/41

Coach Repairer - Carrier Exhibit B 3/25/42

Helper Car Repairer - Carrier Exhibit B 9/26/39

Painter coach assignment - Carrier Exhibit B 12/5/40

Carrier further holds that such a method of bulletining is based on many decades of past practice and, therefore, has achieved the sanction of past practice, and finally Carrier(s) have declined to increase the amount of specific detail in vacancy bulletins so as to maintain maximum flexibility while simultaneously avoiding, as much as possible, the freezing of duties or tasks in particular jobs as they may be specified in a Bulletin, to the end that bulletining does not become a bar to the efficient and economic assignment and deployment of their Carmen employees.

The desires and objectives of each of the parties are well warranted, and, of course, are to some degree in conflict with each other. Out of collective bargaining has come the existing Rule, which is a compromise of the disparate goals of parties.

The processes of the Adjustment Board and its authority to interpret the Agreements, rules, et cetera, and to test the specific application of the agreements in particular fact-situations, is no substitute for the bargaining process, and the Board has properly resisted efforts, no matter from whence they emanate, to amend or modify the terms of the Agreements, Rules, et cetera, even though such agreements and rules, et cetera, possess, as they necessarily must, a vexing lack of precision and clarity reflecting the compromises reached in negotiation. The understandable desire of the Board for precise draftsmanship has not, and properly so, led it to, via interpretive decisions, perform the legislative functions reserved to the bargainers and not delegated to the Adjustment Board.

Similarly, it is believed, that the parties do themselves and the Board a great disservice to the extent that they, also vexed by the compromise language of some clauses or rules, attempt to use the Board procedures to obtain particular objectives not obtained in negotiations.

Submission to the Board of basically the same issue, over and over again, requiring the participation of numerous referees, is derogatory of Board procedures, and, if pursued indefinitely, can undermine the purposes and integrity of the Board and its procedures. In addition, such a course does not make good sense, if only for the fact that it is uneconomic. "Forum Shopping", or utilization of the board mechanism as if it were an oriental bazaar in which either party may continually re-adjudicate, in the hope of finally finding a referee to satisfy their tastes, is contrary to the spirit and intent of the National Railway Labor Act and third-party participation in resolution of labor-management disputes.

The parties to these agreements are aware that there does not exist, as perhaps there ought, any procedure or mechanism for maximizing conformity of Board decisions, one with the other (*res judicata* and *stare decisis*), or for minimizing the issuance of contradictory decisions.

The absence of such a procedure or mechanism is a temptation which needs to be, and is in the main, resisted by the parties to the end that repe-

titious adjudications constitute a small, but, unfortunately, a significant part of the deadlocked grievances submitted to the Board for final decision.

The reiteration of the above observations, while not binding on the parties, will serve a useful purpose if it results in stronger screening procedures with the result that the Board docket is not cluttered with disputes on which the Board has definitively ruled, thus avoiding needless expense and waste of time, while simultaneously permitting more expeditious processing of the current backlog of dockets.

As to the first issue posed in the claim before the Board, namely, did the Carrier provide sufficient descriptive data in Bulletin No. 23, dated September 11, 1968, the Board finds that said issue has been clearly and decisively disposed of in the Awards cited below in detail with the intention of clarifying this issue and thus minimizing future adjudication:

AWARD 5921 - Zumas - April 30, 1970

"The Organization contends that Rule 15 of the Agreement between the parties requires duty specification, and, further, that a past practice cannot be changed without agreement.

Rule 15 provides:

'When new jobs are created or vacancies occur in the respective crafts, the oldest employes in point of service shall, if sufficient ability is shown by trial, be given preference in filling such new jobs or any vacancies that may be desirable to them.'

There is no language under the rule which requires that duties be specified. The Classification of Work Rule of the Agreement lists all of the work assignable to electricians, and any of it may be assigned to electricians."

AWARD 6160 - McGovern - July 16, 1971

"RULE 17. FILLING VACANCIES

'When new jobs are created or vacancies occur in the respective crafts, the oldest employes in point of service shall * * * be given preference in filling such new jobs or any vacancies that may be desirable to them. All vacancies, or new jobs created will be bulletined.'

The Organization contends that since Carrier did not issue a bulletin for 19 days after the vacancy occurred, and since the bulletin when issued contained no information which would identify the position as the vacancy created by Carr, Carrier stands in violation of Rule 17.

Carrier contends that they have been issuing bulletins advertising jobs in the same manner for approximately 50 years, said bulletins containing the date, work area (shop), class of work to be

performed, hours of assignment and work days and have been accepted as having been in compliance with the bulletin rule.

As we view the record, we find no language expressed or implied in Rule 17, the standard bulletin rule, which places a burden on the Carrier to list precisely the duties of the position advertised. Indeed, we have examined sample bulletins contained in the record and agree with Carrier that they contain sufficient information to enable employes to exercise their seniority in an intelligent manner. Such were the facts in the instant case. Hence, we find that Carrier has complied with Rule 17. Furthermore, since there is neither an identifiable claimant nor a monetary claim involved, but simply a request that this Board order Carrier to comply with Rule 17 as interpreted by the Organization, we have no alternative other than to deny the claim."

AWARD 5866 - Coburn - April 9, 1971

"The record shows Carmen at Pine Bluff comprise a single subdivision for seniority purposes. Rule 20-1. Vacancies and new positions are bulletined to all carmen at that location and indicate the area where the position will be worked, i.e., the back shop or spot repair tracks. Where special qualifications are required or certain equipment is to be used, that information is set out in the bulletin — for example, qualified as a car inspector or a carman welder. Bulletins do not specify the particular duties of the position or the precise location within the area where the job will be worked.

The record further established that the carmen welders who were regularly assigned in the car shop worked in the tool room intermittently during the period covered by the claim although when they did perform the work, it was done on a shift basis. (Employes' Submission, page 2 and Exhibit 4.)

From the foregoing it appears to the Board that the work performed in the tool room by carmen welders was not of such duration and permanence so as to constitute each of the assignments as a 'new job' within the meaning and intent of Rule 12-1. Neither the rule nor the practice on this property requires the bulletining of assignments with specified duties or the designation of a particular job situs within the car shop area."

AWARD 6091 - Gilden - December 15, 1970

"Rule 17 of the N&W Shop Crafts Agreement obligates the Carrier to bulletin 'all vacancies or new jobs created.' There is no requirement in said rule to specify either what the preponderance of the job duties will be, or in what particular work area they will be performed. Thus, neither contractual compulsion nor practical operating considerations dictates that Notice No. 31 mention that one of said jobs would be in the plating and lacquer department, and the other would be on windows, doors and sides of passenger and baggage cars, particularly where, as here, there is an insufficient amount of those activities to warrant the assignment of full time employes thereto.

The reference in the bulletin to the applicable job titles in describing vacancies and newly created jobs, satisfies the posting requirements of Rule 17. If the parties were to desire that the bulletin set forth a more precise delineation of job duties and work areas than is presently called for under Rule 17, it is their responsibility to negotiate an appropriate revision of or amendment to Rule 17. Obviously, the parties have not authorized this Board to do that for them."

AWARD 6069 - McPherson - December 11, 1970

"The issue focuses on the concept of the scope of the job. We would feel, for example, that in many shops it would be inappropriate to bulletin a job simply as 'carman', since that craft is frequently in practice subdivided into various specialties such as car repairer, car inspector, welder, etc. To further subdivide the job concept by trying to identify each individual work assignment would tend to freeze each employe in a particular assignment and deprive management of the flexibility to which it is entitled unless it has already adopted a contrary policy by agreement, understanding, or past practice. We do not believe that Rule No. 17 requires such a narrow concept of 'job' or 'vacancy' as is here urged by the Organization.

We recognize that in some instances — though apparently not in this case — some of the individual work assignments of car repairers may be more attractive than others, but this does not require Carrier to consider them as separate and distinct jobs in the absence of special agreement or past practice. In such case individual preferences can be sought only informally by request."

The Board has carefully reviewed, at the suggestion of the Organization, Awards 490, 940, 962, 1090, 1140, 1574, 2039, 2148, 294, 2836, 2603, 3888, 4304, 4839, 5683, 5807, all cited by the organization as sustaining their basic position. For various reasons, which if specified in this award would lengthen it unduly, the Board finds such citations not pertinent to the issues raised in this grievance.

In the light of all of the above, the Board finds the instant grievance without merit for the reasons set forth above in the Awards cited.

As to the second issue, namely, the propriety of rejection by Carrier of the bids of the three grievants, the Board notes, first, that the three grievants inscribed on their respective bids the phrase, "Position formerly held by A. J. Janney, deceased." By doing this, the grievants sought to impose on the Carrier a definition, or rather a redefinition of the position advertised in Bulletin No. 23. Employes have no such right under any agreement or rule. Rather, it is the Carrier's right under these agreements to determine manpower needs, and the scope and definition of particular positions, the cluster of particular duties, if any, which constitute a particular vacated job.

Second, to sustain the organization's position would have the consequence of freezing in perpetuity assignments, or clusters of duties or tasks, performed by a particular employe who retires or who resigns or who dies.

The consequence of such action by the Board would ultimately have the gravest consequences on the enterprise, inimical to the basic interest of both parties.

It is well known that often, as employes advance in age, they gravitate towards less physically taxing tasks, and often management, when it can, permits such a reclustered of task assignments. This is usually done informally and is a mutual recognition of the humane need to "tailor" a man's particular set of tasks to his physically declining capabilities. To permit the freezing of such a clustering of duties, particularized for a particular employe because of advanced age, is not required by agreement nor is sanctioned by past practice nor could such freezing of a "job" have anything but negative consequences to all concerned. In the light of the above, the Board finds that Carrier did not violate the Rule when it did not accept the "bids of the three grievants" and this claim advanced by the Organization is not sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of October, 1971.