Award No. 825
Docket No. CL-806

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

FLORIDA EAST COAST RAILWAY

W. R. Kenan, Jr., and S. M. Loftin, Receivers

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that—

"Mr. H. F. Ortagus be compensated for wage losses sustained May 15, 1938, account violation of seniority rights as hereinafter stipulated."

EMPLOYES' STATEMENT OF FACTS: "Mr. H. F. Ortagus holds seniority under the clerks' agreement in the New Smyrna Beach Store Room. He was cut off in reduction of forces April 15, 1938, at which time he filed his name and address in compliance with Rule 19, paragraph (b).

"On May 15th, 1938, Laborer E. F. Byers reported sick and unable to work, was absent on that date and his position was not filled.

"On March 8, 1938, General Storekeeper A. R. Dale issued bulletin No. 258, reading as follows:

> 'For the benefit of all concerned and to avoid misunderstanding, this is to advise that all positions in Stores Department at New Smyrna Beach are seven day assignments and the hour of duty for each is hereinafter definitely stated:
>
> **'Laborers**
>
> '1st trick, daily 7:30 A. M. to 4:00 P. M.—present incumbent E. F. Byers
>
> 7:00 A. M. to 3:30 P. M.—present incumbents H. F. Ortagus— W. D. Dresser
>
> 'Lunch period for the above three laborers to be governed by Rule 40—that is limited to 30 minutes.
>
> 6 A. M. to 2 P. M.—present incumbent O. E. Jones.
> 'Lunch period to be governed by Rule 41.
>
> 'The change in starting time, (if any) as above outlined shall be subject to provisions of Rule 21.'"

POSITION OF EMPLOYES: "There is in evidence an agreement between the parties, bearing effective date of Jan. 1, 1938, and the following rules thereof are cited:

ever work there was available to do, and Mr. Ortagus would not have worked. The fact that Mr. Byers was absent one day and his position was not filled did not cause Mr. Ortagus any loss, and did not affect his status in any degree. If Byers had actually reported for work the morning of May 15th, had become ill after working five hours, and had been relieved without the carrier calling the senior furloughed laborer to fill the remaining three hours of the day's assignment, it might be assumed from the argument advanced by the Brotherhood that the carrier would be expected to pay the senior furloughed laborer a day's pay for failing to call him to fill the remaining three hours of Byers' assignment, notwithstanding the fact that an hour or more might be consumed in contacting the furloughed man and waiting for him to get to the job. It is quite obvious, of course, that if such an illogical theory is to be seriously considered, the carrier could protect itself against unfair penalties of this nature by abolishing a position when it is made vacant for a day, or even a few hours, through the absence of the regular incumbent, then reestablish and readvertise the position, as necessity might require. Such a procedure, of course, would be no more desirable than the effort which is being made by the Brotherhood to establish through the medium of an award by the Third Division of the National Railroad Adjustment Board, a work guarantee that was not written into the agreement between the Brotherhood and the Railway. At the time the Jan. 1, 1938 agreement was negotiated, the Brotherhood endeavored to prevail upon the carrier to write a guarantee rule into the agreement, and the carrier declined to do so.

"The Florida East Coast Railway reserves the right to introduce and examine witnesses in support of its position in connection with all issues in this case, and to cross-examine witnesses who may be introduced by petitioners, as well as to answer any further or other matters advanced by such petitioners in relation to such issues, whether oral or written. All of the matters cited and relied upon by the carrier, have been discussed with the employes."

OPINION OF BOARD: The position involved in this dispute was created by Bulletin No. 258, issued March 8, 1938. This bulletin, in addition to specifying the hours of the positions therein created, stated:

> "For the benefit of all concerned and to avoid misunderstanding, this is to advise that all positions in Stores Department at New Symrna Beach are seven day assignments and the hour of duty for each is hereinafter definitely stated."

This bulletin, in the opinion of the Division, created a seven-day assignment or position which the carrier could not change without compliance with Rule 19 (a). This provides in substance that the carrier will give as much advance notice as possible when making a reduction in force or in abolishing a position. The carrier makes no claim that in the action complained of in this dispute that it acted under the provisions of this rule. This assignment, in the opinion of the Division, obligated the carrier to fill any temporary vacancy occurring in it.

The carrier, being under an obligation to fill this temporary vacancy, should have called the senior available qualified employe in accordance with the requirement of Rule 3 (e). This provides that "seniority rights of employes to vacancies or new positions, or to perform work covered by this agreement, will be governed by these rules." The record clearly indicates that the claimant herein was the senior available qualified employe.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier in failing to call the claimant for the temporary vacancy involved in this dispute violated Rule 3 (e) of the Agreement.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of March, 1939.

DISSENT ON AWARD 825, DOCKET CL-806

The author of this Award is authority for the statement, in a treatise on the National Railroad Adjustment Board, that the only function of this Board is to interpret existing rules and apply them in the settlement of disputes. He has also stated that it frequently happens that a Division, in its attempt to arrive at a **proper decision,** renders an award having the effect of making a new rule or modifying an existing one. *1.

Since its only function is to interpret and apply the rules of agreements as it finds them, it is scarcely necessary to comment that an award having the effect of supplying a new rule or modifying an existing one exceeds the authority of this Board. Such assertion of extra jurisdictional authority by referees, of whom the Act creating this Board requires that they shall be wholly disinterested and impartial and without bias as between the parties to the dispute, is a challenge of their qualifications.

What does the author mean by "proper decision"? Manifestly, unless the terms of the agreement are ambiguous or contradictory, a decision can be rendered in consonance with its express terms. If the terms of the agreement are ambiguous or contradictory, it is neither an addition to the terms nor a modification of them to place a logical interpretation upon such ambiguous or contradictory terms. The very context in which we find the expression challenges it: the **only** function is to interpret and apply existing rules; to modify existing ones, or supply where it may be conceived that one would be useful, is, then, to make not a **proper** but an **improper** decision. But, following the thought, how, in the absence of a governing rule, can it be determined what is a "proper" decision? One should consider the facts with relation to the rule and reach a decision as to its proper application. But here we have no rule. It must be in such cases that we start with a conclusion (paradoxical as that seems)—a "proper decision"—and then supply the modification of existing rules or additional ones as the exigencies demand.

Zeal to serve a cause may account for, but it does not excuse or justify, the seizure of such extra jurisdictional authority. A shocking example of the practice is this Award 825.

The Opinion of Board in this Award opens with the statement that the position involved in this dispute was created by Bulletin No. 258 of March 8,

*1. A monograph entitled "The National Railroad Adjustment Board." by William H. Spencer, Professor of Business Law and Dean of the School of Business, University of Chicago, University of Chicago Press, 1938—pp. 61, 62.

1938. A perusal of the bulletin does not support the conclusion, nor does the record disclose that the position as referred to in the bulletin had not theretofore been worked seven days per week. The bulletin states that it was issued to avoid misunderstanding.

The next assertion is that having created a seven-day assignment by bulletin No. 258, the carrier could not change it without compliance with Rule 19-(a). This rule is not quoted in the Award and it is necessary to reproduce it here in order that we may explore the possibility of reaching such a conclusion as here stated by any process of logical reasoning. Rule 19-(a) reads:

> "When reducing forces seniority rights shall govern. As much advance notice as possible will be given employes affected in reduction of forces or in abolishing positions. Employes whose positions are abolished may exercise their seniority rights over junior employes; other employes affected may exercise their seniority rights in the same manner. Employes displaced, whose seniority rights entitle them to regular position, shall assert such rights within ten (10) days. Employes who do not possess sufficient seniority to displace a junior employe or who do not assert their displacement rights within the prescribed time limit will be considered as furloughed. A copy of the notices given furloughed employes under this rule will be furnished by the Railway to the Local Chairman of the district where the reduction occurs."

This rule was not invoked by the employes, as will be noted by reading the statement of their position. They make only one reference to it in the record of this case, stating that had the carrier abolished Byers' position for the day, Sunday, May 15, as it asserted it might have done had this proceeding been anticipated, they would have regarded it as sharp practice in discordance with the intent of Rule 19-(a).

In the presentation of this claim to the General Storekeeper, by letter of July 1, 1938, the General Chairman invoked Rule 19-(c) and 3-(e). On appeal to the General Superintendent, by letter of July 25, 1938, he referred also to Rule 21.

The Opinion declares that the carrier could not change the seven-day assignment without compliance with Rule 19-(a). Rule 19 bears the caption "Reducing Force." Its first provision is that seniority rights shall govern in reducing forces. It next provides that when forces are reduced or positions abolished as much advance notice as possible will be given employes affected. Other provisions of this paragraph cover the exercise of seniority to other positions by employes whose positions are abolished or who are displaced by assertion of seniority rights and places a time limit of ten days within which such seniority rights shall be exercised. It also requires that a copy of the notices given furloughed employes under the rule shall be furnished to the local chairman.

It must be clear, therefore, that their is no prohibition contained in Rule 19-(a) against the change of an assignment, nor is there any method prescribed in 19-(a) for a change of assignment. It deals entirely with the reduction of forces and abolishment of positions.

The Opinion states that the substance of the rule is that the carrier will give as much advance notice as possible when making a reduction in force or when abolishing a position, and it says that the carrier does not claim to have been acting under the provisions of Rule 19-(a) in the matter complained of in this dispute. Certainly it did not make that defense. The claim was not brought under Rule 19-(a) and the carrier did not invoke it in its defense of the claim. The claim does not charge that the position was abolished or that if it were the action was improper. The responsible officer in charge of the storehouse expected Byers to report for duty at the assigned

hour of 7:30 A. M. this Sunday morning. Byers failed to report and the responsible officer says he was not informed of the fact until one hour later. Certainly the carrier does not claim that it then and there abolished the position.

There are three postulates in the second paragraph of the Opinion: First, that Bulletin 258 created a seven-day assignment which the carrier could not change without compliance with Rule 19-(a). As we have shown, this is a force reduction rule. Second, that the rule requires that the carrier give as much advance notice as possible when making a reduction in force or abolishing a position. Third, that the carrier does not claim in the instant dispute to have acted under the provisions of Rule 19-(a). From these postulates we jump immediately to the conclusion, expressed as the opinion of the Division, that this assignment (by Bulletin 258) obligated the carrier to fill any *temporary vacancy occurring in it.*

Just what in the three postulates suggests such a conclusion? The requirement of notice in Rule 19-(a) is that it shall be given to the employes affected by a reduction in force or abolition of position. The claimant in this case, Ortagus, would not have been affected by the abolition of Byers' position and would not have been entitled to notice of such action under Rule 19-(a). Certainly it cannot be argued from that proposition that the carrier is obligated to fill a temporary vacancy occurring in Byers' job.

Rule 19-(a) imposes only one other duty on the carrier: that it shall furnish a copy of the notices given furloughed employes to the Local Chairman of the district. The remainder of this paragraph of Rule 19 prescribes the manner in which employes may exercise their seniority rights.

But perhaps we err in assuming that the conclusion reached in the last sentence of the second paragraph of the Opinion of Board rests upon the three postulates preceding it. The last sentence states that the assignment obligated the carrier to fill the temporary vacancy. It is previously stated that Bulletin 258 created the seven-day assignment of Byers' position. If it is Bulletin 258 and not Rule 19-(a) that is the source of the carrier's obligation to fill any temporary vacancy occurring in Byers' job, then we must look to the language of Bulletin 258 to find such an obligation.

Bulletin 258 announces that it is issued for the benefit of all concerned to avoid misunderstanding. It states that all positions in the Stores Department at New Smyrna Beach are seven-day assignments, and follows, the assignment of hours for certain named laborers in four positions. The concluding sentence of the Bulletin is that any change in starting time shall be subject to Rule 21. There is not in this language anything to suggest an obligation on the part of the carrier to fill any temporary vacancy in any of these jobs, nor can the language used be tortured into imposing any such obligation. It can only be done by adding words not even suggested by the context.

The first postulate in the second paragraph of the Opinion illustrates well the expedient frequently adopted in order to make a "proper decision." Here we have a declaration that, having established a seven-day assignment, the carrier cannot change it without abolishing the position. Since the referee, in an effort to sustain the employes' position in this claim, explored the agreement for Rule 19-(a), he would have done well to have explored further. Had he looked only at the next but one he would have found Rule 21, reading:

> "Regular assignments shall have a fixed starting time and a designated point for the beginning and ending of tour of duty and the regular starting time shall not be changed without at least 36 hours notice to the employes affected. When the established starting time of a regular position is changed one hour or more for more than six (6) consecutive days, or changed in the aggregate in excess of one (1)

hour during a period of one year, or changed from a six (6) to a seven (7) day assignment or vice-versa for a period of more than four (4) weeks, the employes affected may, within ten (10) days thereafter, upon 36 hours' advance notice, exercise their seniority rights to any position held by a junior employe. Other employes affected may exercise their seniority in the same manner."

From Rule 21 it will be noted that the carrier was not even under obligation to afford seven days' work on this position as long as it existed. The assignment could have been changed from seven to six days and not until it had existed for more than four weeks as a six-day position could the regularly assigned incumbent have exercised his seniority in claiming another position.

It is well to point out that the agreement between the parties to this dispute contains the usual so-called six-day guarantee rule for "regularly assigned Groups 1 and 2 employes," and paragraph (b) of that rule (69) provides that nothing in the same shall prevent the abolition of a position at any time. There is no provision in the agreement guaranteeing employment for any period to Group 3 employes, nor does the petitioner in this case claim that there is. But even if there were, in the language of Rule 69, which applies only to Group 1 and 2 employes, it would apply only to regularly assigned employes and not to furloughed employes (See Award No. 792 and Dissents on Awards 414, 415, and 546).

The third paragraph of the Opinion lays down the postulate that the carrier, being under obligation to fill this temporary vacancy, should have called the senior, available, qualified employe in accordance with the requirement of Rule 3-(e), and it next states the provision of this rule to be that seniority rights of employes will be governed by the rules of the agreement, which clearly shows the falsity of the postulate. Rule 3-(e) does not establish any rights nor does it purport to do so, but the rights that exist, whatever they are, shall be governed by the rules. This rule was violated only if the claimant was denied the exercise of a seniority right conferred upon him by some other rule of the agreement. It does not require or imply the duty stated in the postulate.

No finding is made that any rule of the agreement entitled the claimant to be called for this temporary vacancy. Hence there was no violation of Rule 3-(e).

The Opinion proceeds from a declaration that the carrier was obligated to fill the temporary vacancy, which is not supported by any rule of the agreement, and certainly not by the language of the bulletin, to an equally unfounded and unwarranted declaration that Rule 3-(e) required that the senior, available, qualified employe should have been called—a thought not remotely suggested by its language—to the final finding that Rule 3-(e) was violated, heaping error upon error.

/s/ Geo. H. Dugan

The undersigned concur in the above Dissent:

/s/ A. H. JONES
/s/ R. H. ALLISON
/s/ J. G. TORIAN
/s/ C. C. COOK