Award No. 5070

Docket No. CL-5073

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

1. Carrier violated Rule 17 of current Agreement effective April 1, 1945 when it did not issue bulletin three (3) days in advance of September 19, 1949, on which date it abolished position of Miscellaneous Accounting Clerk in the Agent and Freight Auditor's Office, Seniority District 19.

2. (a) Mr. Jack Bernard, senior minimum-rated Clerk in the Agent and Freight Auditor's Office, Seniority District 19, be paid for wage loss sustained representing the difference between what he was paid for services as Clerk at rate $11.17 per day and the rate attached to the Miscellaneous Accounting Clerk's position, namely $12.70.

(b) R. L. Vollmar, furloughed employe, but then employed as Messenger, be paid wage loss sustained representing the difference in his earnings as a Messenger, rate $9.30 per day and rate of $11.17 per day attached to Bernard's position, and

(c) Robert Whelan, furloughed Messenger, be paid wage loss sustained representing time lost from September 19, 1949 to October 6, 1949 inclusive.

3. That claim for wage loss set forth in Section 2 hereof be effective from September 19, 1949 to October 6, 1949, inclusive.

EMPLOYES' STATEMENT OF FACTS: Absence due to illness of Mr. A. F. Lenz, occupant of position of Accounting Clerk, rate $12.70 per day, in the Agent and Freight Auditor's Office, St. Louis, prompted management on September 14, 1949 to bulletin as a vacancy, his position. (Employes' Exhibit 1)

Mr. L. H. Becker, regular assignee to position of Miscellaneous Accountant, was awarded and assigned to the position of Accounting Clerk, temporarily vacated by Mr. Lenz, effective 8:00 A.M., September 16, 1949.

the deficiency by writing to the General Chairman on September 21 and advising him that it was actually posted on September 16 and that the word "temporarily" was simply for the purpose of letting the employes know that he intended to reestablish the abolished position when business conditions, which were being affected by the Missouri Pacific strike, improved. However, a corrected bulletin was posted reading as follows:

"CORRECTED BULLETIN

September 16, 1949
Bulletin No. 516
District No. 19
Group No. 1

"TO EMPLOYES CONCERNED:

Effective as of 8:00 A.M. (DST) September 21, 1949, the position of Miscellaneous Accountant, incumbent Mr. Louis H. Becker, is abolished."

The Miscellaneous Accounting Clerk position was reestablished by Bulletin 518, dated October 24, 1949, and Mr. L. H. Becker, the former incumbent, was the successful bidder.

That portion of Rule 17 covering the abolishing of positions and reductions in force reads as follows:

"When reducing forces seniority rights shall govern. Any reduction in force shall be bulletined at least three (3) days in advance of the effective date reduction is to be made and employes affected will be paid up to the end of that period. Bulletin will show the position or positions to be abolished and the names of the occupants thereof. 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 a regular position, shall assert such rights within ten (10) days. Employes who do not possess sufficient seniority to displace a junior employe will be considered as furloughed. Copies of all bulletins issued under this rule and a list of the employes furloughed will be furnished the General Chairman."

POSITION OF CARRIER: The employes contend in Section 1 of their claim that the carrier violated Rule 17 of the agreement of April 1, 1945 when it did not post a notice of position abolishment three days in advance of the effective date. Such contention is without basis because it will be noted that the advance notice provision of Rule 17, quoted in our Statement of Facts, is applicable only to **reductions in force.** There is no requirement that notice of position abolishments must be posted three days in advance and unless the abolishment of a position necessitates a reduction in force, no such advance notice is required. No reduction in force was made in this case because Mr. Lenz was in the hospital unable to work and Mr. Becker had been assigned by bulletin to work in Mr. Lenz's place until he returned. No one had been assigned to work Mr. Becker's regular position at the time it was abolished, consequently, it was not necessary for us to reduce the force and no employe was furloughed.

From the foregoing, it is quickly apparent that there is no merit in the employes' contention and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Because of sick leave granted A. F. Lenz, the regularly assigned occupant of the position of Accounting Clerk in its Agent and Freight Auditor's office at St. Louis the Carrier bulletined his position as a temporary vacancy. L. H. Becker, regular assignee to the position of Miscellaneous Accountant, a non-continuous service position in the same office, was the successful bidder and was awarded and assigned to the temporary

position, effective 8:00 A.M., September 16, 1949. The position vacated by Becker was not declared vacant and bulletined. Instead the Carrier issued an undated bulletin in which it declared such position temporarily abolished, effective 8:00 A.M., September 19, 1949. On all dates in question there was a contract between the parties, and a supplementary letter of Agreement, interpreting Rule 17 of that instrument.

Rule 17, to which we have just referred and on which the Brotherhood predicates the instant claim, relates to force reductions. Provisions thereof pertinent to the issues here involved read:

> "When reducing forces seniority rights shall govern. Any reduction in force shall be bulletined at least three (3) days in advance of the effective date reduction is to be made and employes affected will be paid up to the end of that period. Bulletin will show the position or positions to be abolished and the names of the occupants thereof. Employes whose positions are abolished may exercise their seniority rights over junior employes;"

The letter of Agreement has reference to the advance notice required by the contractual provision just quoted and simply provides that its language is to be construed "as referring to 'working' days so far as the advance notice is concerned, with the understanding that every day is a 'working' day so far as continuous service positions are concerned."

While, as we have heretofore indicated, the bulletin declaring Becker's position temporarily abolished was not dated, it is clear from the record that it was posted on the bulletin board by the Carrier on Friday, September 16, 1949. It is also clear that the very next day the Brotherhood, taking the position the attempted action called for a reduction in force, called the Carrier's attention to the fact that the bulletin attempting to abolish the position did not meet the requirements of Rule 17 and the Supplemental Agreement interpreting it, in that since Becker's was a non-continuous service position the bulletin should have allowed three full work days' notice in advance of the date fixed for its abolishment whereas it allowed only two inasmuch as the third day included therein was Sunday.

The Carrier does not deny this first notice was insufficient if its action in abolishing Becker's position is to be regarded as a reduction in force. In fact throughout its submissions it repeatedly concedes that it was not sufficient for that purpose. Its claim now is, and from the very start has been, there was no actual reduction in force, therefore no advance notice was necessary and Rule 17 was not violated. Significantly enough even though that has been its claim from the beginning the evidence is that on October 3, 1949, in an attempt to correct the original notice it posted another notice on its bulletin board, bearing the date September 16, 1949, and entitled "Corrected Bulletin" in which it stated that effective September 21, 1949 Becker's position was abolished.

It is also interesting to note there is evidence disclosing that Becker's position was reestablished on October 24, 1949, and he was again assigned thereto.

We are not disposed to labor arguments advanced by the Carrier in support of its contention the failure to bulletin the Miscellaneous Accountant position did not result in a violation of the Agreement. Boiled down, the gist of its position is there was no force reduction when such position was abolished because it had been blanked and no one was occupying it on that date. We fail to see that affords any sound ground for rejection of the claim. Indeed to adopt the Carrier's theory would simply mean it could circumvent the provisions of the involved rule at will by simply blanking positions when it desired to effect a force reduction and then abolish them without paying any attention to the advance notice and pay features of such rule on the ground the positions were not occupied at the time of its action. We refuse to give the rule any such construction. Regardless of whether the position was unoccupied the fact remains that when Becker was elevated to the tem-

porary position of Accounting Clerk and the Carrier failed to fill the position he had vacated there was one less position filled in the Carrier's Agent and Freight Auditor's office than there had been before. By the same token there was one less employe occupying a position in that office than there had been before. The actual result was a reduction in force which deprived some junior employe down the seniority line of a position and precluded others from moving up into higher positions, including the one Becker had vacated. It follows the Carrier should have given three days' advance notice of the date the reduction in force was to become effective by bulletin showing the position to be abolished, as required by the provisions of Rule 17, and that its failure to do so resulted in a violation of its terms.

The question of the penalty to be assessed for infraction of the Agreement presents no easy question. We doubt if a proper notice was ever given in compliance with the rule. Of a certainty the first one was not because it was not posted three working days in advance of the effective date named therein. The same vice inheres in the second. According to the evidence it was posted on the bulletin board October 3, long after instead of in advance of the effective date fixed by its terms, namely September 21. But we do not need to labor the point. The Brotherhood concedes this last notice, if it be treated as giving notice the force reduction was to be effective as of October 6, three days after it was posted, is sufficient to constitute conformance with the rule. The Carrier suggests the first notice could be given like import by adding a sufficient number of working days to the effective date therein named. The trouble is neither notice was sufficient and the Brotherhood refuses to make the concession respecting it. Therefore, since the rule requires any reduction in force to be bulletined, we are forced, for our purposes, to take the bulletin which all of the parties concede may be treated and considered as posted in compliance with its terms. Once that conclusion is reached the penalty to be assessed is ascertainable from the terms of the rule itself which provide "the employes affected will be paid up to the end of that period." That, under the facts, circumstances and conditions existing in this case, means the employes affected are entitled to be paid up to October 6, 1949, for the difference between what they did earn and what they would have earned had the Carrier filled Becker's position up until that date.

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 violated the Agreement.

AWARD

Claims 1 and 3 sustained; Claims 2(a) and 2(b) sustained; Claim 2(c) sustained, the Carrier to receive credit for whatever claimant Whelan earned during the period of time therein described; as per the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1950.