Award No. 5855

Docket No. CL-5794

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

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

(a) The Carrier violated its Agreement with the Brotherhood governing hours of service and working conditions of employes covered thereby when it suspended certain positions in the office of Car Accountant at Nashville, Tenn., and refused to permit the employes regularly assigned to such positions to perform their assigned work and duties on July 7, 8 and 9, 1949; and

(b) That the Carrier shall be required to compensate the affected employes for loss of wages for the three days at the pro rata rates of the positions to which they were assigned.

EMPLOYES' STATEMENT OF FACTS: On or about June 30, 1949, General Chairman Bryson and Division Chairman Freeman met with the Carrier's Superintendent of Transportation, Mr. F. Whittemore, for the purpose of discussing a rumor that all positions in the Car Accountant's Office were to be abolished immediately. Mr. Whittemore advised that due to decline in business and revenue and in the interest of economy the operating department of the railway was reducing forces either for a temporary time or on a permanent basis. His part of the program would be handled on the plan of abolishing all positions in the Car Accountant's Office, with the Exception of the Chief Clerk, for a period of three days on July 7, 8, and 9, 1949. (See Employes' Exhibit No. 1)

On July 1, 1949, the General and Division Chairman, in conference with Car Accountant P. J. Climer, were advised by the latter that all positions in his office, except the position of Chief Clerk, would be abolished with the close of business on July 6, 1949, for three days.

On or about June 30, 1949, Mr. W. K. Tate, Vice President-Traffic, called Division Chairman Williams into his office and advised that the Railway would have to cut expenses and that Mr. Tate had been instructed by the President to substantially reduce forces. He suggested that Williams canvass the department and ascertain whether the employes would rather take three days off without pay and every one share alike, or abolish a job or a sufficient number of jobs to accomplish the equivalent. The employes were in favor of taking three days off without pay in preference to the other alternative;

4—The petition of the Employes should be dismissed and the claim denied.

* * * *

All matters referred to herein have been presented, in substance, by the Carrier, to the General Chairman of the organization representing the employes, either in conference or correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: The main facts bearing significantly on this dispute appear to be as follows: (1) Faced with a decline in operating revenues in June, 1949, and anticipating further declines, the Carrier declared on the 30th of that month its intention to abolish 24 positions in the Nashville, Tennessee, Office of Car Accountant, effective July 6, 1949. (2) Of the 24 abolished positions, by bulletin of July 8, 1949, 22 were re-established as of July 11. One new position was also created, leaving net one position permanently abolished. Before her position was abolished (July 6) the stenographer was required by the Carrier to prepare the necessary forms for bulletining the positions to be re-created; but the dates of issue and bidding were left blank, to be filled in later. (3) The same employes as before filled the re-created jobs, and at the same rates of pay. (4) The work that had piled up during the three-day period when the positions were non-existent (July 7, 8, and 9) was disposed of, in addition to the regular work, by the end of the first week after employes returned to the re-established positions, without overtime. (5) Before the above-mentioned action was taken, a conference was held between the Carrier's Superintendent of Transportation and the appropriate General Chairman and Division Chairman. Here two alternative methods of adjusting to the decline in revenue were discussed—permanent abolition of certain positions in the Car Accountant's Office versus temporary abolition of all. And the affected employes were canvassed in respect to their preferences between these alternatives. Both the General Chairman and the Superintendent of Transportation talked separately to the employes. The employes preferred temporary general abolition.

The differences between the disputants in this case include questions of fact as well as of interpretation of the effective Agreement. One outstanding factual issue is this: At the pre-abolition conference, did the General Chairman, as well as the Division Chairman and claimant employes, acquiesce in and approve the method and procedure used by the Carrier? The Carrier strongly states "yes", with supporting affidavits. The Organization says "no" with equal emphasis and similar documentary support.

Another question of fact is this: At the conference with representatives and employes, did the Carrier state that the abolition period would be three days or not? Here again there is sharp division. The Carrier contends that it did not set any time limit because it did not then know how long the period would be. The Organization states that such a limitation was definitely enunciated.

The main interpretative issue is this: On the assumption that there was no such meeting of minds as the one mentioned just above, did the Carrier's action violate the parties' Agreement?

In respect to the issue of fact, the evidence in the record of this case does not establish beyond reasonable doubt that the employes' representatives agreed to a waiver of the applicable provisions of the Agreement. True, the Carrier did confer with the employes and their representatives; its actions could not be interpreted as having been unilateral from the start. Further, there can be no question that these representatives could probably have approved a suspension of applicable rules in order to facilitate the handling of the problem described above. If they had done so in writing, the Carrier would clearly have been relieved of liability under the Agreement. The case, if it ever had arisen at all, would doubtless never have reached us for

decision. But there is no written memorandum of understanding or other document to establish the Carrier's allegation of the fact of waiver.

The Carrier contends that two facts indirectly support its allegation: The claim was not pressed until March, 1950, nine months after the alleged violation. And the representative who pressed the claim was a new Division Chairman, not the one who attended the June, 1949, conference. We do not think these facts are compelling or controlling.

In the absence of definitive evidence, we think we must rule that there was no clear agreement to waive the application of the relevant terms of the parties' collective bargaining agreement.

On the other question, we think the issue is moot. There is no clear-cut basis for ruling one way or the other on this question.

In respect to the interpretative issues, the Organization contends violation of Rules 27 (a) and 35 of the Agreement. Rule 27 (a) guaranteed 6 days of work per week for regularly assigned employes; nothing except holidays was to permit the reduction of the work week below 6 days for regular employes during the month involved in this case. Rule 35 contained the usual prohibition against abolishing established positions and creating new, similar ones that have the effect of reducing rates of pay or evading the application of the rules.

The Carrier contends that neither of these rules is applicable to the circumstances of the instant case. Rule 27 (a) is held inapplicable because the positions were abolished; the employes were not "regularly assigned". That is, no relationship of employment existed for them. The Carrier denies the Organization's allegation that its actions in this case were not in good faith and constituted a purposeful effort to evade the provisions of Rule 27 (a). Rule 35 is said to be irrelevant because the re-established positions bore the same rates of pay as the abolished ones.

The Carrier contends further that the positions were abolished, re-created, and filled in entire accord with the provisions of Rules 6 (a), 12 (e), and 51 covering such matters. Moreover, the Carrier states that Rule 13 (a), dealing with the rights of employes in respect to bulletined positions that have been abolished and subsequently re-established within 90 days, not only was obeyed by the Carrier but also sanctions its acts in the instant case. As stated above, the Carrier denies that its acts constituted a bad-faith subterfuge.

Having declared ourselves on the two main questions of fact, our final task is to rule on the interpretative issues. Was the abolition of the 24 positions of the sort contemplated under Rule 13 (a) and is this Rule therefore controlling? Or did the Carrier's action constitute an evasion of its responsibilities under Rule 27 (a)? Certain facts—e.g., the Carrier's effort to give effect to the employes' preferences, its effort to obtain bilateral agreement, and the ability of the re-assigned employes to catch up within a week on the three missed days of work—suggest an affirmative answer to the first question and negative answer to the second. Other facts, such as the shortness of the period of abolition and the fact that in the end only one position was permanently discontinued, point to opposite answers. On balance we think that the Organization's position must be upheld here. We do not hold that the Carrier acted in bad faith. But we do believe that (1) the effect of its actions were to avoid and violate the intent of Rule 27 (a); and (2) its actions were not of the sort contemplated by Rule 13 (a).

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 failed to adhere to the intent of the applicable provisions of the Agreement.

AWARD

Claim (a and b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of July, 1952.