Award No. 5884

Docket No. CLX-5596

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

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

(a) The agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes effective September 1, 1949 was violated at Seattle, Washington when on or about May 1, 1950 the work of the Seattle District Accounting Bureau was arbitrarily transferred to the San Francisco, California District Accounting Bureau without prior conference and agreement;

(b) The Seattle District Accounting Bureau, including the seniority roster governing employes covered thereby shall be restored status quo ante;

(c) All employes adversely affected shall be restored to the positions they held at the time the transfer of work was made to the San Francisco District Accounting Bureau;

(d) That any and all employes of the Seattle District Accounting Bureau who have suffered loss of earnings through the arbitrary transfer of the work here involved shall be compensated in full for such loss;

(e) That all travel time resulting from the transfer of employes from Seattle to San Francisco shall be paid for at the basic monthly rate of the position held at the time the transfer was made;

(f) That all expenses incurred by employes transferring from Seattle to San Francisco of crating, packing, cartage, transportation charges, travel expense, meals and hotel expense shall be paid by the carrier; and

(g) That any loss incurred by employes transferring from Seattle to San Francisco by reason of forced sale of property or by depreciation of property value as the result of such transfer shall be paid to the employe by the carrier.

EMPLOYES' STATEMENT OF FACTS: Prior to May 1, 1950, Railway Express Agency, Inc. maintained and operated a District Accounting Bureau in the City of Seattle. This Bureau handled the accounting r

general provisions. Any other construction would make Rule 23 meaningless. It would be contrary to the intent of the parties as evidenced by the practice that has been accepted and followed by the parties with respect to the consolidations since the first Agreement became effective February 15, 1920. The very reading of the rule indicates that it is a specific exception to the general provisions of the Agreement for after it prescribes the manner in which employes affected may follow their positions to the consolidated office or department it provides the following "after such rights have been exercised, these rules will govern." Such language can lead to no other conclusion that the rule is designed to accomplish a specific purpose, namely, to afford a vehicle by which employes' rights would be protected in effecting consolidations that after the rights set forth in the rule had been exercised the general rules of the Agreement come into operation thereafter. It is clear, therefore that Rule 23 governs consolidations in their entirety and that Rule 22 is inapplicable.

CONCLUSION

The Carrier has established that the claims of the Employes are vague, indefinite and undefined and should be dismissed.

Notwithstanding and without prejudiced to its position in that respect, the Carrier has established that no violation of the Agreement occurred by reason of the consolidation of the Seattle District Accounting Bureau with the San Francisco District Accounting Bureau at San Francisco.

The Carrier submits that the Third Division, National Railroad Adjustment Board, should dismiss the claims herein.

All evidence and data set forth have been considered by the parties in correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: About May 1, 1950 the District Accounting Bureau of the Carrier at Seattle, Washington was consolidated with and transferred to the Bureau at San Francisco, California. This was without Agreement with the Organization. Notice of intention to do so was given to the representative of the Organization but no consent thereto was obtained. The Organization in its claim describes this as an arbitrary transfer of work. It says that this could not properly be done without prior conference and agreement.

In consequence of this alleged violation the Organization asks (1) restoration of the roster at Seattle, (2) restoration of employes adversely affected to the positions held at the time of consolidation, (3) that all employes of the Seattle District Bureau who suffered loss of earnings be compensated for the loss, (4) that all travel consumed by employes making transfer be compensated at straight time rate, (5) that the transferred employes be reimbursed for expenses incidental to transfer and removal to San Francisco, and (6) that those who because of transfer to San Francisco lost money on account of forced sale of or depreciation to property be reimbursed therefor by the Carrier.

Rule 5, the first paragraph of Rule 22, and Rule 23, as follows are of major importance in the determination of this controversy:

> "Rule 5. Seniority districts of defined limits shall be established by mutual agreement between the Management and duly accredited representative of the employes, and, pending the establishment of such districts, the districts as now established by Supplement Nineteen (19) to General Order Twenty-Seven (27), shall remain in effect.

Rule 22. Positions or work involving a position may be transferred from one seniority district to another after conference and agreement between the management and the duly accredited repsentatives of the employes. Employes may follow their positions or work when same is transferred from one seniority district to another. The incumbents will have prior rights to the positions to be transferred, if they elect to accompany same. Those electing not to follow their positions and work may exercise their seniority rights as per Rule 24 and their positions will be bulletined first in the seniority district from which they are to be transferred, and if necessary, second in the seniority district to which they are to be transferred. Seniority of employes transferring under such circumstances shall be transferred to the district to which they are transferred.

Rule 23. When, for any reason, two or more offices or departments are consolidated, employes affected shall have prior rights to corresponding positions in the consolidated office or department. After such rights have been exercised, these rules will govern."

Prior to the consolidations there was a seniority district for the Bureau employes involved at Seattle. As such under Rule 5 it was required that it remain in effect unless a change was made by mutual agreement. There is no information that in a technical sense it was ever abolished. For all practical purposes, however, it was. In any event after the consolidation there was no work to which any employe could assert a right at Seattle. The work disappeared.

With the disappearance of this work it appears proper to say that the employes involved here had no rights which they could assert under Rule 5. If they have any rights they must flow from an interpretation and application of Rules 22 and 23.

The Organization says that Rule 22 is a limitation upon Rule 23 and that the consolidation could not properly take place without conference and agreement between Management and the accredited representatives of the employes. The Carrier on the other hand says that the two in this respect are unrelated and that the question of consolidation is one solely for determination by Management and that the rights of employes are only such as flow to them from Rule 23 itself.

That the two rules together contain ambiguities there can be little doubt. It can with justification, as the Carrier substantially urges, be said that Rule 22 is applicable only where **positions or work involving a position** are transferred from one **existing** seniority district to another **existing** district and that it has no application where the **office or department with all of its work as** distinguished from **positions or work involving positions** is transferred.

The Organization contends substantially that when there is a consolidation under Rule 23 there is in consequence a **transfer of positions or work involving positions** within the meaning of Rule 22 and that the conference and agreement provisions of Rule 22 became applicable. This contention cannot be said to lack justification.

This cleavage of interpretation cannot be resolved by reference to these or other provisions of the Agreement. A proper interpretation appears to depend largely upon ascertainment of the intent of the parties when the provisions were placed in the Agreement. This intent cannot be ascertained directly for reasons which are obvious. It must be ascertained indirectly from the evidence of the attitude taken toward the provisions in the years since they have appeared therein.

They have appeared without change at least since 1922. They have remained continuously without change and without any evidence of negotiation looking to change.

The record discloses 5 such consolidations as this prior to 1922 and 37 from 1922 to 1937 inclusive. There is no evidence that the representatives of the employes or the employes themselves ever protested any of these consolidations. The 37 were all in metropolitan areas and it is to be reasonably presumed that the number of employes affected in each instance was sufficient to challenge attention to the rights of such employes under the Rules.

This evidence of past attitude appears to be sufficient upon which to base a conclusion that the parties up to 1937 assumed that the intent was that the Carrier had the right under Rule 23 to consolidate its Accounting Departments without regard or recourse to Rule 22.

The Organization contends that it is not bound by the attitude taken from 1922 to 1937 since it did not assume full representation of the employes until 1937 and after the 37 consolidations.

The record does disclose that it did not take over full representation until 1937 although it had some representation as far back as 1922 or before. When it did take over in 1937 it took over the Agreement which contained Rules 22 and 23, which Rules have been carried without change into each succeeding Agreement. At the time it took over and since except by claims in 1950 the Organization has not protested the accepted interpretation of intent or sought a modification or change in these Rules. The record also discloses that no consolidation took place between 1937 and 1950 and that the consolidations effected in 1950 were protested.

Under the decisions of this Division and the facts it appears that the present Organization is bound by the interpretation as to the intent which had attached before it assumed representation.

In Award 1609 it is pointed out that the Organization is chargeable with knowledge of the content of Rules and existing practices at the time of assumption of negotiation of an Agreement and that abolition or change thereof may be effected only by negotiation and agreement.

In Award 5404 it is pointed out that lack of knowledge of a practice which existed at the time of negotiations will not furnish the basis for a valid claim.

In Award 5416 it was said:

> "The fact, if it is a fact, as the Organization charges, that it did not know of the custom and practice in question affords no sound ground for a contrary conclusion. As stated in Award No. 5404 and Awards 1609 and 4208, the Organization is chargeable with knowledge of the warking conditions in operation on the property and we must assume it had knowledge thereof, at least from the time it took over the Telegraph Department employes' Agreement of October 20, 1933, long prior to its negotiation of the current Agreement."

These cited Awards bear only an analogy in point of fact to the matter involved here but it appears that the same principles are involved. If accepted they must be allowed to control in this instance. It appears after due consideration that they should be accepted.

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 claim has not been sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 24th day of July, 1952.