Award No. 6022
Docket No. CLX-6011

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

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, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective October 1, 1940, was violated at Cleveland, Ohio on August 28, 1945 when positions titled "Transportation Clerk," Postions 6 and 7, Group 57-X, were discontinued and the work assigned to other occupants of positions titled "Transportation Clerk" in the same group, at a lower rate of pay;

(b) Employes O. D. McKinley, B. R. Crannell, et al, shall now be compensated for the difference between what they received subsequent to August 29, 1945 and what they would have received had the rate not been decreased; and

(c) Carrier shall be required to make a joint check of the payrolls with employe representatives in order that wage losses sustained by claimants may be properly and accurately ascertained.

EMPLOYES' STATEMENT OF FACTS: O. D. McKinley and B. R. Crannell are the regular occupants of positions titled "Transportation Clerk" in the Agency office at Cleveland, Ohio. Both have established seniority rights, McKinley as of September 1, 1915, and Crannell as of August 2, 1918.

April 12, 1943 Carrier created two positions titled "Special Representative" in the Transportation Department excepted from agreement coverage, rated at $253.36 and $243.36 basic per month. McKinley and Crannell were appointed to these positions in the absence of bulletin and award.

A protest was registered and claim filed by the employes contending that the work performed by employes McKinley and Crannell, under the title of "Special Representative" was work which belonged to and had heretofore been brought under the scope and operation of the agreement.

Being unable to progress the claim to a satisfactory conclusion on the property it was advanced to Express Board of Adjustment No. 1, identified

The claim now before the Board amounts to a demand that Messrs. McKinley and Crannell from August 29, 1945, without limitation, be compensated at $253.36 and $243.36 respectively in whatever capacity they may have been employed in the interim. The claim is fantastic, to say the least, and Carrier ventures the opinion that no such claim has ever been presented to any Board. Not only is the claim fantastic but it is wholly unsupported by evidence of any rule violation, the holding of any decision, or otherwise, and entirely devoid of reason.

When forces were reduced effective August 28, 1945, and the number of Transportation Clerks reduced from seven to five, employe McKinley, incumbent of Position 6 abolished at that time, exercised his seniority over a junior Transportation Clerk in the same Group, and employe Crannell, incumbent of Position 7 abolished at the same time, elected to exercise seniority over a junior employe holding position of Foreman at the 26th Street Terminal. Nowhere in the Agreement may be found a requirement on the part of the Carrier to maintain positions not needed, and nowhere in the Agreement or under the decision of Referee Lewis for that matter may be found authority for paying employes McKinley and Crannell rates of $253.36 and $243.36 on non-existent positions or on other positions of their choice after their former positions of Transportation Clerks were abolished. Whatever the effect of Decision E-1506, with respect to the payment to be made these employes from the time they were brought under the Agreement in accordance with Decision E-1425 until they were abolished, that effect disappeared with the abolishment of the positions on August 28, 1945.

An award now fixing a rate of pay under circumstances such as we have here to non-existent positions, or to employes McKinley and Crannell simply because they were the claimants in the cases covered by Decisions E-1425 and E-1506, would amount to an unwarranted abuse of the functions of the Board inhibiting it from making rates of pay.

The claim is based entirely on false reasoning. Carrier is confident that this Board will not lend itself to any conclusion based on the fantastic claim here presented other than to deny it in its entirety.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The record in this case is so complicated it will be difficult for those interested in the Opinion to glean the facts essential to a disposition of the issues involved by merely reading it. For that reason we feel impelled to state our version of what we regard as the more important and decisive facts. Highly summarised those susceptible of being characterized as undisputed can be related as follows:

On April 12, 1942, the Carrier, ostensibly for the purpose of expediting the movement of war materials, created what it regarded as two excepted positions, titled Special Representative, in its transportation department at Cleveland, Ohio, rated at $253.36 and $243.36, to which it appointed, without bulletin and award, Claimants, McKinley and Crannell, respectively, former occupants of Transportation Clerk positions in Group 57-X. Prior to that time Carrier had maintained, and thereafter continued to maintain, five Transportation Clerk positions in such group, rated at $208.61 per month.

The Organization protested the foregoing action and sought to have the newly created positions brought under the Agreement. This claim was progressed to Express Board of Adjustment No. 1 and ultimately sustained in Decision E-1425 on the ground the bulk of the duties asigned to the occupants of such positions were the same as those they had performed while assigned as Transportation Clerks.

In applying Decision E-1425 the Carrier discontinued the two Special Representative positions and on December 1, 1944, increased the number of classified positions in Group 57-X from five to seven by bulletining two additional positions of Transportation Clerk, positions 6 and 7 in the same group and classification, at the Transportation Clerk basic rate of $208.61 per month. These two positions were bid in and awarded to Claimants, McKinley and Crannell, who, thereafter, performed the identical duties they had been performing prior to the date of the rendition of such decision.

The foregoing action resulted in further protest by the Employes and, when the dispute could not be resolved on the property, it was taken to Express Board of Adjustment No. 1 on a claim based on the premise the Carrier's action in abolishing the two Special Representative positions, rated as aforesaid, and rebulletining them with title of Transportation Clerk at the rate of $208.61 per month was in violation of the Agreement, hence the rate of those two positions should be restored and all employes adversely affected compensated for the difference in salary loss sustained since December 1, 1944. In Decision E-1506, rendered December 6, 1946, the Express Board sustained this claim, holding, as the Organization had contended in presenting it, that the employes bidding in positions 6 and 7 had been and were performing the identical duties they had performed while classified as Special Representatives.

Positions 6 and 7, as created, were continued in effect by the Carrier until August 28, 1945. On that date, allegedly due to disappearance of wartime traffic necessitating a reduction in force, it discontinued such positions, thereby reducing the number of Transportation Clerks in Group 57-X from seven to five. Thereupon, Claimants, who had been the occupants of positions 6 and 7, exercised their seniority rights over junior employes in the same seniority district and whatever work remained on such positions was absorbed by the five remaining Transportation Clerk positions and has since been performed by the occupants thereof.

In applying Decision E-1506, Carrier paid the employes involved the difference between $253.36 and $243.36, respectively, and what they were actually paid for the period December 1, 1944, to August 28, 1945, inclusive, the date on which it permanently discontinued such positions.

On April 24, 1947, the Employes' General Chairman inquired of Carrier as to the amounts of reparation paid under Decision E-1506. Thereafter, he was informed that payment had been made as indicated in the preceding paragraph and that it was Carrier's position the amount so paid was all that it was obligated to pay under such decision because of the fact the positions therein involved had been discontinued on August 28, 1945. In response to this reply the General Chairman requested restoration of the rates in dispute. When this request was denied the General Chairman indicated he contemplated returning the matter to Express Board of Adjustment No. 1. Thereafter, the parties negotiated back and forth until November 9, 1947, when a formal hearing was requested. After several postponements this hearing was held on June 11, 1948, resumed on July 15, 1948, and concluded on that date. Twelve days later the Carrier's acting Terminal Agent, the official before whom the hearing was held, advised the Employes that Management's position it had paid all it was obligated to pay under Decision E-1506 had not been changed as a result of the testimony adduced at the hearing. The dispute was then docketed with Express Board of Adjustment No. 1. Later, and on November 14, 1949, that body by Decision E-1631 remanded the case for possible adjustment in the field without prejudice to the rights of the parties. There on divers dates it was discussed in conference until September 5, 1951, when it was finally denied. Some three months later the instant claim, charging the Agreement was violated on August 28, 1945, when the Carrier discontinued positions 6 and 7 and assigned the work thereof to occupants of other Transportation Clerk positions in the same group at a lower rate of pay and claiming reparation for the difference in rates of pay from August 28, 1945, was filed with this Division of the Board.

In a preliminary way it should be said this is an exceptional case from many standpoints. Indeed it is so exceptional the parties have failed to cite, and we have been unable to find, any decision which can be considered as either a persuasive or governing precedent. The length of time the claim has been pending is unusual. Many of the facts pertinent thereto must be determined from the records of other cases and much that is there said and held must be given force and effect in deciding it. In addition, because of the manner in which it was handled on the property and the contentions advanced by the parties in support of their positions, the claim must be regarded as a composite hydra-headed claim involving matters which must be treated, considered, and decided as separate and distinct issues.

At the outset Carrier points out that this claim has been pending for a long time and suggests it should be dismissed because of dilatory action on the part of the Organization in progressing it to this Division for decision. We have reviewed the record and are far from convinced it discloses a situation warranting a conclusion the claim is barred or should be dismissed on grounds of laches or estoppel. Therefore, we have concluded it must be disposed of on its merits.

Heretofore, we have indicated that in part this case, although based on improper discontinuance of the positions in question, was presented, argued, and denied on the property, and for that matter is so presented here, on the theory Decision E-1506 is decisive of the rights of the parties, the Employes contending in substance that Carrier had not complied with such decision because of language in the last paragraph thereof relating to changes in rates of pay, which they construe as precluding it from ever abolishing such positions without negotiation. On the other hand the Carrier insists that such decision cannot be construed as denying it the right to abolish the positions, that all it holds is that it was required to pay the rate of pay originally established for them so long as they were maintained and that hence, having paid that rate to the date on which they were discontinued, it has fully complied with its requirements.

There can be no doubt that decisions rendered by the Express Board of Adjustment and Boards of like character are binding upon this Division of the Board (see e. g., Awards 897, 3628, 4388 and 4616). Therefore, it is our duty to give force and effect to what is held in Decision E-1506. Turning to the record in that case it appears the claim was based on the premise Rule 79-A of the Agreement had been violated because the Carrier abolished two theretofore established Special Representative positions and created two new positions under the title of Transportation Clerk with similar duties at reduced rates of pay; that the reparation sought was restoration of the higher rate and compensation for difference in salary loss from December 1, 1944; that the Carrier defended the claim on the ground its action in abolishing the positions and establishing new ones in lieu thereof was permitted by the Agreement, not on the basis it had discontinued the positions on August 28, 1945, and that therefore reparation should be limited to that date; that on December 6, 1946, the Express Board had jurisdiction over the parties and the subject of the action and full power and authority to render a decision which would be binding upon them; and that on such date it rendered a decision, which has never been modified or set aside, allowing the claim and directing the Carrier to make reparation as sought therein.

Under the foregoing conditions and circumstances, we are convinced Decision E-1506 must be construed as requiring Carrier to pay compensation to the date on which the Express Board rendered its decision. In our opinion any other construction would read something into it that is not there. Regardless of its purpose a suggestion by Carrier pointing out such decision was not rendered until some 15 months after it had abolished the positions merely serves to add weight to our conclusion it must be construed as heretofore indicated. We know of no rule permitting a party to an action to impeach or modify the clear and unequivocal terms of a money judgment long after it has become final and binding on the basis that

facts known to him before rendition of the decree but not presented to the tribunal rendering it would have resulted in a different judgment. Indeed, once such a judgment has become final it cannot be modified or impeached even on grounds of newly discovered evidence. Based on the foregoing conclusion and what has been said with respect thereto we are constrained to conclude there is no merit to Carrier's position it fully complied with the requirements of Decision E-1506, by making payments under its terms to August 28, 1945, and therefore hold that paragraph (b) of the instant claim must be sustained to the extent heretofore indicated.

We have little difficulty in concluding the Organization's contention respecting the force and effect to be given Decision E-1506 cannot be upheld. Careful analysis of the record in that case makes it clear the Express Board's decision was limited to the basic premise on which the claim was founded and that nothing said therein has any application to or bearing on the right of the Carrier to permanently discontinue the positions in question.

From the foregoing conclusions it becomes apparent the next question to be determined is whether the Carrier violated the Agreement in permanently discontinuing the Transportation Clerk positions described in paragraph (a) of the claim. Decision of this question necessarily depends upon the facts here presented and the application of well established principles long recognized and adhered to by this Division of the Board.

We are not disposed to prolong this Opinion by detailing the evidence touching disputed facts to which we have previously given little attention. Neither are we inclined to labor or again refer to the uncontroverted facts establishing what happened between the time the involved positions were established and discontinued. It suffices to say that after carefully reviewing all the evidence and giving it the weight to which we deem it entitled we think the record discloses that in April, 1942, due to extraordinary conditions caused by a war then in progress, it was necessary for the Carrier in the proper operation of its business to supplement its then existing Transportation Clerk force; that for the purpose of expediting the movement of war materials, and without reducing the number of Transportation Clerk positions then in existence, it created the two positions now in question and required the employes assigned thereto to perform work which, while it was work of the kind they had formerly been performing, was nevertheless work which would have been neither in existence nor required except for the war; that at the close of the war, due to the disappearance of wartime traffic, the work which had been assigned to such positions on account of the extraordinary conditions existing at the time they were established had practically disappeared; that by reason of that situation the maintenance of the positions was no longer necessary or required to properly carry on the Carrier's operations and that because thereof Carrier discontinued such positions on August 28, 1945, without creating any new positions, with the intention they should remain permanently abolished.

There are two principles, so well established there is no occasion for citing Awards supporting them, that must be given consideration in determining the rights of parties under the confronting facts as we have construed them. The first is that except insofar as it has restricted itself by the Agreement the assignment of work necessary for its operations lies within the Carrier's discretion. The second is that in the absence of any rules of the Agreement precluding it from doing so it is the prerogative of Management, so long as it actually intends to accomplish such a result, to abolish a position if a substantial part of the work thereof has disappeared. We have construed the facts and expressly found that a substantial portion of the work of the involved positions had disappeared, that they were no longer necessary to the proper maintenance of Carrier's operations and that they were discontinued under circumstances disclosing an actual intent on the part of the Carrier to permanently abolish them. Thus, testing the facts by the foregoing rules, it becomes crystal clear the sole question remaining is whether there is anything in the Agreement which precluded the Carrier from abolishing such positions on August 28, 1945.

The Organization's principal contention is that the Carrier's action resulted in a violation of Rule 79-A providing that established positions shall not be discontinued and new ones created under the same or different titles covering relatively the same class of work which will have the effect of reducing the rate of pay or evading the application of these rules. We have considered this claim in the light of the existing facts and have decided it cannot be upheld. There were no new positions created when those in question were abolished. The result is that under the facts and circumstances of this case such rule has no application and hence was not violated.

It is suggested, but not strenuously argued, Carrier's action was in violation of Rule 79 prohibiting the transfer of rates from one position to another. This suggestion has less merit than the contention just disposed of. It cannot be said or held the fact a position is actually abolished results in the transfer of its rate to another position.

Finally, in support of its overall position paragraph (a) of the claim should be sustained, the Organization directs our attention to Decision E-1508 of Express Board of Adjustment No. 1 and our own Award 5931 and insists that the claims therein involved were upheld on factual situations similar to those of the instant case. We do not agree. Resort to the records of those cases will reveal that the essence of the claims therein involved was that the Carrier had discontinued established positions and created new ones under a different title covering the same class of work at a lower rate of pay in violation of rules similar to Rule 79-A of the current Agreement and that the sustaining decisions therein were predicated upon that premise. We have no such factual situation here. Therefore, such decisions are not in point and hence do not support the Organization's position.

We have been unable to find any rule of the Agreement which, under the existing facts and circumstances, was violated by the Carrier in abolishing the positions in question. The result is that paragraph (a) of the claim must be denied.

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 action of the Carrier as set forth in paragraph (a) of the claim did not result in a violation of the Agreement but, for reasons set forth in the Opinion, Claimants are entitled to compensation as claimed in paragraph (b) thereof to December 6, 1946.

AWARD

Paragraph (a) of the claim is denied. Paragraphs (b) and (c) are sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of November, 1952.