

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

THE BALTIMORE AND OHIO RAILROAD COMPANY

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

(1) The Carrier violated the terms of the currently effective Agreement when on September 1, 1951, it arbitrarily and unilaterally removed work occurring within the Toledo and Indianapolis Division Seniority Roster heretofore performed by employes on that roster and transferred such work to the Cincinnati Terminal Division Roster, and

(2) That such work shall now be restored to the Toledo and Indianapolis Division Roster and Employe Verna Snowden or other employes affected be paid at overtime rates for work opportunities of four hours per day denied them beginning with September 1, 1951, until correction is made.

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representatives of the craft or class of employes in which the claimants in this case hold positions and the Baltimore and Ohio Railroad Company, hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement effective July 1, 1921 (revised June 1, 1927—revised March 1, 1947) between the Carrier and this Brotherhood covering all that class of clerks and other office and station employes represented by the Brotherhood which is on file with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

Middletown, Ohio, is located on the Toledo and Indianapolis Division Roster designated under Rule 28 as Roster 79. Cincinnati, Ohio, is located on the Cincinnati Terminal Division Roster designated under Rule 28 as Roster 77. Roster 79 and Roster 77 are separate seniority rosters and cover clerical employes at the two points.

to meet a condition as here presented is a matter for negotiation between the parties. We can neither legislate nor can we write into the agreement that which is not there."

This same principle was phrased by Referee Curtis T. Shake assisting this Division in Award No. 6208 as follows:

"The language of the rule is clear and there is nothing for us to construe. We have no authority to rewrite the rule."

In Award No. 6096 this Division held:

"It is well settled that this Board cannot make rules. Its function is to interpret the agreement as written and apply the agreement to the facts in the particular case."

For all the reasons herein contained the Carrier submits that the claim made here at parts (1) and (2) is entirely without merit and respectfully requests this Division to deny the claim in all its parts.

OPINION OF BOARD: Middletown, Ohio, is located on the Toledo and Indianapolis Division Roster designated under Rule 28 as Roster 79. Prior to September 1, 1951 and subsequent thereto, the Claimant, Verna Snowden, occupied the position of Rate Clerk at Middletown.

Cincinnati, Ohio, is located on the Cincinnati Terminal Division Roster designated under Rule 28 as Roster 77.

Prior to September 1, 1951, in addition to certain other duties, the position of Rate Clerk at Middletown handled all the necessary rating and billing on cars loaded at industries in and about Middletown for dispatchment to Cincinnati, as well as certain business handled by truck out of that point. On September 1, and again on October 9, 1951, changes were made by the Carrier in the work of the position without the Employee Representative's concurrence.

The case is at issue on joint submission and, by reference, the Employees' statement of facts is adopted and made a part hereof to show how the work was rearranged and handled after September 1, 1951. It is well to note, however, that the Rate Clerk position at Middletown was assigned to be worked from 9:30 A. M. to 6:30 P. M. Actually, no change in duties was brought about by Carrier action, but certain work with an established situs at Middletown and assigned to Roster 79 was sent to Cincinnati to be performed on Roster 77, outside the assigned hours of the position from which the work was removed.

The Employees are wrong when they say Rule 46 is not applicable where, as here, only a portion of the work of a position is transferred. Paragraph (a) of Rule 46 relates to the transfer of "positions or work" from one seniority district to another. It is clearly shown by the record that the word "work" was purposely included in the rule at the Carrier's insistence to make certain that the rule would have the same application, so far as the exercise of seniority is concerned, whether the position was transferred to another seniority district or whether work was transferred to another seniority district.

The crux of this dispute is whether there has been a bona fide application of this and related rules of the schedule, more particularly Rule 28 which specifically provides that seniority districts cannot be changed except by mutual agreement on the part of the parties to the Agreement.

We note first, that Rule 46 allows the employee, at his election, to follow his position or work, in the event of transfer of either or both "work" and/or "positions" on the basis of his "home district seniority" and to exercise same "against any employee on that district with less seniority." The exercise of

seniority is permissive and not mandatory, but the rule does provide the mechanics or means for the employe to carry his "home district seniority" with him if he elects to follow his work or position from one division roster to another.

It is in this permissive right of the employe to exercise seniority that the Carrier sees an "affirmative condition" stipulated by rule whereby "positions or work" may be transferred from one seniority district to another seniority district, as was done in this case, at the Carrier's election. That is to say, the Carrier seems to be of the opinion that Rule 28 bears no relationship to and has no bearing on Rule 46. The Employee Representative is of a contrary opinion.

It is the Board's duty to give all possible credence and effect to both rules without doing violence to either, and to construe them in such manner as to carry out the mutual intent of the parties as we find the same expressed or clearly implied.

It has been difficult to follow the argument that the rules are not related. Greater difficulty has been posed by an expression of views within the Board, that restrictive language should have been written into the body of Rule 46, similar to that found in Rule 45, and making the transfer of work "subject to negotiation between the parties signatory hereto," if that were the intent of the parties.

Both arguments lose sight of how elaborate and complex are the rules of the Agreement on the subject of seniority alone. It would have been needless repetition to have written language into each separate rule to express the intent that any change bearing upon seniority is subject to negotiation. We can think of no better way of expressing the intent concisely and more forcefully in this case than by rule of general application.

Rule 28 and Rule 46, the same as many other rules found in the Agreement, are on the subject of seniority. Reference by Rule 28 to pages "58 to 61," and examination of those pages, shows the rigidity with which the lines of seniority are drawn. Those lines are relaxed to the extent, and we believe only to the extent, that we can find a clear expression therefor in Rule 46. That rule admits of an equally valid interpretation that the subject matter is transfer of employes, and, in the absence of an express grant of right, the Carrier should not be heard to say, in our opinion, that despite Rule 28, Rule 46 serves as authority for the transfer of work or positions without mutual agreement between signatory parties.

Finally, it is held by some on the Board, that the language of Rule 28 does not admit of the construction that a majority of the Board places on it, since the effect of the Carrier's action in this case, according to one point of view, has not been to make a change in seniority districts.

The employe has a property right in the seniority that gives him a place on the seniority roster. That seniority attaches to the work, position, and roster in the seniority district where the employe has earned rights. Where the position or work is transferred to another roster in another seniority district, the employe who follows his work in accordance with Rule 46, is protected in his seniority, but at the expense of the one who has rights in the district to which the work or position is transferred. So on the one hand we have an employe with his feet in two puddles, and on the other hand, we have an employe whose rights otherwise would have been secure in his seniority district, except for the invasion of his territory by one from another seniority district. It seems to us that this amounts to a change in seniority districts.

The Employee Representative is charged with making Agreements, collective in scope, and for the benefit of all employes covered thereby. Thus, its first duty is to all and not just a few, and while it may, as it has done by Rule 46, contract without discrimination on behalf of a smaller group similarly situated and to be treated alike at the expense of the whole, its action

in doing so is subject to close scrutiny and rules like Rule 46 are to be strictly construed. Finding nothing in the express language of that rule as opposed to Rule 28 that would indicate the Employees collectively intended to give up all right to be consulted in the matter of transferring "positions or work" from one seniority district to another, the collective and indiscriminate rights of all employees under the Agreement can best be preserved by allowing the Employee Representative to now exercise its inherent right to an equal voice in whether the work should be restored to the Indianapolis Division Roster or remain at its present location.

Accordingly, claim (1) will be sustained. The Employees have now had restored to them all rights to which Rule 28 entitles them, and we leave it to the Carrier Officers and Employee Representatives to bargain out their difference about the future situs and status of the disputed work, but will sustain the balance of claim (2) at pro rata rates of pay.

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 Employees involved in this dispute are respectively carrier and employees 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

The Agreement was violated.

AWARD

Claim (1) sustained; claim (2) denied in part and sustained in part, in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of March, 1955.

DISSENT TO AWARD NO. 6938—DOCKET NO. CL-7007

This Award is based upon the erroneous premise that Rule 28 places a limitation on Rule 46 to the extent that the former superimposes on the latter the requirement expressed in the former for "mutual agreement between the parties." If the parties had intended to so limit Rule 46 it would have been a simple matter for them to have included language to that effect. This Board is without authority to supply language which the parties themselves have not put into a rule but must confine itself to interpreting the rule as written.

In addition, the instant Award is in conflict with the well established principle followed by innumerable Awards of this Board that special Rules control over general rules.

For the above reasons this Award is in error and we dissent.

/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ E. T. Horsley