Award No. 9541

Docket No. CL-9104

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

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

THE TEXAS AND PACIFIC RAILWAY COMPANY

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

1. Carrier violated and continues to violate the Clerks' Agreement beginning Thursday, January 12, 1956, when it relieved Baggage Checker W. W. Tatum on one of his assigned rest days with a regular assigned group 2 employe.

2. Carrier now be required to compensate Mr. Tatum at rate of time and one-half of the rate of his assigned position begining Thursday, January 12, 1956, and each Thursday of each week thereafter until this claim is satisfactorily disposed of.

EMPLOYES' STATEMENT OF FACTS: Prior to January 12, 1956, the following positions were working in the Baggage Room and Depot Ticket Office, Fort Worth, Texas:

For the reason stated above, this claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant is a Baggage Checker at Fort Worth, Texas. His position under the Clerks' Agreement is in Seniority Group 1. After the January 1956 abolition of a regular relief position which had covered his job on rest days, his Thursday rest day was not regularly assigned.

This "tag-end rest day" was filled thereafter by one of two Mail Handlers who are in Seniority Group 2 under the Clerks' Agreement. The Mail Handlers had regular assignments as such, working five days a week for a regular work week of forty hours. However, the Carrier relieved them of Mail Handler work on Thursdays to assign them to Claimant's rest day work. The individual Mail Handlers, in addition to their Group 2 seniority, also had established Group 1 seniority by virtue of work prior to the situation involved here.

Contentions of the Parties

Claimant contends that this procedure was in violation of Rule 30 (f) which provides:

> "Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe assigned that class of work."

It is agreed that the work is "not part of any assignment". Claimant contends that the Mail Handlers are not "available extra or unassigned employe[s]" because they hold regular assignments as Mail Handlers. Further, it is argued that they cannot be used to fill this unassigned day's work because their regular assignment removes them from the category of employes "who will otherwise not have 40 hours of work that week".

Claimant and the Organization assert that Award 9257 (Weston), between the same parties and involving essentially the same kind of claim under the same Agreement, governs this case.

The Carrier responds that this case is significantly different from that in Award 9257 because here the Group 2 Mail Handlers had established Group 1 seniority whereas in the prior case the Mail Handlers only had Group 2 seniority and no Group 1 seniority.

It is contended that this factor means **that as to the Group 1 position** they are extra, they do not have a regular assignment, and they do not "otherwise . . . have 40 hours of work that week".

Discussions of Contentions

Essentially the same arguments were made by the Carrier in CL-8673 which resulted in Award 9257. The Board said:

> "To hold Bennett and Jones 'unassigned' and 'available' in this factual situation would, in our opinion, distort and do violence to the plain and ordinary meaning of the language contained in Rule

30 (f). As it now stands and in the absence of added language, Rule 30 (f) contains no intimation or fair inference that 'unassigned' and 'available' employes include those who are regularly assigned to Class 2 so long as they are not assigned to Class 1 positions."

Under this view of Rule 30 (f) it is hard to see what significant difference it makes that the Mail Handlers in this case also have Group 1 seniority. They are no less regularly assigned as Mail Handlers than they were in the earlier case involving these same parties and the same Agreement.

Carrier cites only one precedent in support of its proposition. Award 5705 (Wenke). It dealt with "short vacancies" and the specific provisions relating to that subject as well as "unassigned days". There is no indication that it has been followed on the point in issue here during the eight years since its adoption. The Award itself cited no authority but apparently employed the reasoning of the overtime cases arising under the 40-Hour Week Agreement which also are cited in this case as persuasive precedents to be followed here.

In cases such as Awards 5798 (Yeager) and 6018 (Parker) it was held that hours worked in one seniority group were not to be added to hours worked in another seniority group for overtime purposes. But see Award 8897 (Murphy) which is a departure from that rationale. Those cases (Awards 5798, 6018 and those following them) were decided on the basis of very specific contract language relating to overtime pay only. They do not stand for the proposition that for all contract purposes work in different seniority groups are not to be related. Nor do they stand for the proposition that the forty hours worked in one seniority group are not to be counted for purposes of the "unassigned day" rule.

Moreover, the cases involving overtime where an employe works on two different positions also turn on the proposition that the "work week" for overtime pay purposes was that attaching to the **position.** In contrast, Rule 30 (f) is cast in terms of the hours worked within a week by the **employe.**

Award 9257 on this property cannot be reconciled fully with Award 5705. We therefore follow and adopt the more recent award because its reasoning is persuasive and it concerns the same parties and the same Agreement.

But for the Carrier's action in removing the Mail Handlers from one day of their regular assignment they would "otherwise" have had forty hours of work within the normal meaning of the words and hence the meaning of Rule 30 (f). This is an additional factor which excludes them from the category of employes who properly are assignable to an unassigned day in preference to a "regular employe".

For these reasons we hold that the fact that the Mail Handlers who performed the unassigned day's work also had Group 1 seniority is an element that supplies a distinction without a difference from the situation involved in Award 9257.

Claim 1 is sustained.

The Remedy

Earlier in the controversy of which the present case is only a part, the Organization, in its representation of this Claimant, argued that the Carrier

was in violation of Rule 30 (f) when it assigned Group 2 Mail Handlers to the Group 1 Baggage Checker's unassigned days. It urged that the Carrier use men with regular Group 2 assignments who also had attained Group 1 seniority.

The course advocated by the Organization before this case arose was the course pursued by the Carrier. It is the same course which gave rise to this dispute. The Organization's position was more than a mere argument against the earlier practices; it was advocacy of the assignment method challenged in this case.

We do not question the Organization's right to change its mind as to its view of the proper meaning of Rule 30 (f) because of changes of time or circumstances. The interpretation and application of this and other rules associated with the Forty-Hour Week Agreement have caused real perplexity to Carriers, Labor Organizations and this Board.

Under the special circumstances of this case, however, it seems particularly inappropriate to make a money award for a contract interpretation which the Organization itself actively had sought earlier in the controversy over the the same Rule.

For that reason Claim 2 is 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 Employe involved in this dispute are respectively Carrier and Employe 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 Contract was violated.

AWARD

Claim 1 sustained; Claim 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August, 1960.

DISSENT TO AWARD NO. 9541, DOCKET NO. CL-9104

The Majority Opinion in this Award holds:

> "Award 9257 on this property cannot be reconciled fully with Award 5705. We therefore follow and adopt the more recent award because its reasoning is persuasive and it concerns the same parties and the same Agreement."

This holding of the Majority shows complete failure to comprehend the vast difference between **Award 5705** and **Award 9257.** There is no possibility of reconciling the difference. The facts and positions of the parties are as far apart as the poles.

Award 5705 (Referee Wenke): The three employes the Carrier used to perform the service for which claims were denied in **Award 5705,** held regular assignments in Group 3, **but also held seniority in Group 1.** The rules involved in **Award 5705** were as follows:

> Rule 25½, which reads word for word with Rule 30 (f) involved in the present dispute.
>
> Rule 21, Section 2 (i), which provides in part:
>
> > "The term 'work week' * * * for unassigned employes shall mean a period of seven consecutive days starting with Monday."
>
> and reads word for word with Rule 26½ (i) in the confronting Award.

Referee Wenke, in denying the claims of the Organization in **Award 5705,** held:

> "When Ramsey, Melton and Yeager were properly called to do this unassigned work they did so as unassigned employes in Class 1 and subject to the working conditions of that class of employes.
>
> * * * * *
>
> "Within these rules Ramsey, Melon [sic] and Yeager were unassigned employes who did not otherwise have forty hours of work that week."

The facts and rules controlling in **Award 5705** are four-square with the facts and rules involved in the case before us, therefore, a denial Award was in order in the confronting dispute.

Award 5798 (John W. Yeager), **Award 6018** (Jay S. Parker), **Award 6266** (Donald F. McMahon), together with other Awards cited support a denial of the confronting dispute.

Further, the dispute in Docket CL-9104 was one of three involving the same parties. **Award 8564** (Weston, which dismissed claim account of procedural defect on the part of the Employes, was adopted **December 11, 1958. Award 9257** (Weston), which sustained claim as to violation of Rule 30 (f), was adopted **February 26, 1960.** In both **Awards 8564 and 9257** the Carrier used employes holding seniority in Group 2, **but holding no seniority in Group 1.**

In both **Awards 8564 and 9257** the Interpretation placed on Rule 30 (f) by the Organization and approved by President Harrison is in accord with **Awards 5705, 5798, 6018 and 6266,** referred to herein, and is exactly what was done by the Carrier in this dispute, by using Group 2 employes **who held seniority rights in Group 1,** to perform the unassigned work in Group 1, and and is exactly what the Employes insisted should have been done in **Awards**

8564 and 9257. However, while Docket CL-8673 was pending before this Board, Docket CL-9104, the dispute now before us, was submitted to the Board long before **Award 9257** in Docket CL-8673 was adopted.

In this dispute, the Organization abandoned its interpretation of Rule 30 (f) and argued that the Carrier violated the Agreement when it used regularly assigned Group 2 employes to perform the unassigned work in Group 1, notwithstanding the Group 2 employes held seniority in Group 1 and were properly used.

It is apparent that the Organization, not having had **Award 9257** when the confronting dispute was submitted, played both ends to the middle, calculating that if they lost in Docket CL-8673 (Award 9257), they would win in Docket CL-9104; thus, they placed the Carrier in jeopardy.

The net result of this Award is that the two employes so used are deprived of the benefits of their rights and Carrier is deprived of their services in Group 1 until such time as a regularly assigned position is bulletined for bids.

For these reasons we dissent.

/s/ C. P. Dugan

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ J. F. Mullen

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9541, DOCKET NO. CL-9104

I agree with the Dissenters that there is a "vast difference" between Award 5705 and Award 9257. That the "facts and positions of the parties" in these two disputes "are as far apart as the poles". This is also true of the instant dispute, covered by Award 9541. It is obvious from a review of the records in all three of the disputes that Award 9257 and 9541 are clearly distinguishable from Award 5705. The latter dispute involves the B.R.C. vs. Mo. Pac. RR, under "Position of Employes", page 18, Peitioners stated:

> "* * * it was understood and construed to mean that employes cut off in force reductions in the higher group and roster and who reverted to the lower group and roster and who retained their seniority rights under the higher group and roster **would be required to return to service in the higher group and roster in the order of their seniority rights in the higher group** * * *." (Emphasis added)

for temporary or permanent employment in accordance with Rule 14(e). The Group 3 laborers involved were "working from day to day in Group 1 in accordance with their seniority rights". (Item 1, Statement of Claim). Consequently, they had moved from their regular assignment in Group 3 to work extra in Group 1 in accordance with the agreement and agreed upon interpretation thereto. Referee Wenke recognized this distinction when he held (p 30):

"Rule 14 (g) of the parties Agreement provides:

> 'Employes holding seniority rights in a higher group who are displaced therefrom and holding a regular assignment in a lower group, may, except to meet emergency situation, waive the requirements of Section (e) of this rule to short vacancies of three days or less duration, including positions bulletined pending assignment * * *. Employes failing to file notice of waiver will be notified and required to report for such vacancies * * *.'

The factual situation here brings Ramsey, Melton and Yeager squarely within this Rule and Carrier was obligated to use them, since they did not waive Carrier's obligation in this regard. * * *

* * * * *

Within these rules Ramsey, Melton and Yeager were unassigned employes who did not otherwise have forty hours of work that week."

There are no comparable rules or understandings in the Agreement between the Clerk's Organization and the Texas Pacific RR. in the two disputes covered by Awards 9257 and 9541. For that reason, the majority here followed and adopted the holdings in Award 9257, which was on all fours with the instant dispute. That the Group 2 employes used in Award 9257 had no Group 1 seniority, while the Group 2 employes here did have such seniority, is a distinction without a difference. In both cases, the employes were regularly assigned to Group 2 positions and, therefore, were not "extra or unassigned employes", as that term is comprehended in Rule 30(f), in either Group 1 or Group 2.

It is crystal clear that the Dissenters' contention that the "facts and rules controlling in Award 5705 are four-square with the facts and rules involved in the case before us" is not sustained by the facts of record. It is they, who, apparently, are unable to comprehend the "vast difference" between Award 5705 and Award 9257, as well as the instant dispute.

They also failed to quote Rule 26½ (1) in its entirety. It reads:

> "The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days beginning with Monday."

The Group 2 employes here involved were "regularly assigned employes" with a "work week" beginning on the first day on which their assignments were bulletined to work. It is hard to understand what relevancy this rule has to the instant dispute, unless Carrier Members are more concerned with working an employe on his assigned rest days, or the 6th and 7th day of their work week at pro rata rate, than they are in the proper exercise of an employe's seniority rights. This is apparent, however, from their reliance upon Awards 5798, 6018 and 6266, which involved claims for the difference between the pro rata rate and time and one-half rate for work performed on such days. That the Awards may be erroneous in denial of the claims, is beside the point. See Awards 8897 and 9487. The fact still remains, however, that that issue is not involved here. In fact, the Group 2 employes were

removed from their regular assignments on an assigned work day to perform work not a part of any assignment in violation of Rule 30(f).

Thus, the specious argument that the interpretation placed on Rule 30(f) in both Awards 8564 and 9257 "by the Organization and approved by President Harrison is in accord with **Awards 5705, 5798, 6018 and 6266,**" is patently erroneous. These Awards were based on entirely different rules and circumstances than those involved in Awards 8564 and 9257, as previously explained.

The Dissenters charge that the Organization "played both ends to the middle", thereby placing "Carrier in jeopardy" is not well taken, nor, is such an allegation supported by the record. The record shows that carrier was not misled by the position taken by the Organization, quite the contrary, as it was the Carrier who introduced a multitude of irrelevant, immaterial, inconsistent and extraneous matters in an endeavor to confuse the issue. Thereby, evidencing the weakness of its position. Such tactics are not uncommon with this Carrier, as a review of the dockets from this property will show.

It is apparent from the Dissenters' remarks that they are of the opinion that an inconsistent interpretation, or argument, presented by a General Chairman of the Organization has the effect of changing the meaning of a clear and unambiguous agreement, particularly where such fits their convenience. If this assumption is correct, the Division's work has been greatly simplified and sustaining awards must be rendered on all disputes now pending. However, Referee Bakke placed this subject in its proper perspective in Award 6611, by stating:

> "The Carrier complains that the employes are assuming an inconsistent position with that they took in Award 6065. There is nothing new about that. Life is full of inconsistencies, and the work on the Board is full of them, if for no other reason that frequently the agreements themselves are inconsistent; it just happens that this one must be resolved in favor of the employes."

The false impression left by the last paragraph of the Dissent, that the "two Group 2 employes used are deprived of the benefits of their rights" until such time as a regularly assigned position is bulletined for bids, is based entirely upon pure conjecture and supposition and not on fact. That question was not before the Board in this dispute and any references thereto is outside the scope of Award 9541. Should the involved Carrier proceed upon such an assumption, it does so at its peril.

/s/ J. B. Haines

J. B. Haines
Labor Member