Award No. 10033
Docket No. CL-9931

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 3-C-1 (c) and 3-C-2, when three positions of Trucker-Loader, S. Julian Freight Station, Norfolk, Va., were abolished, effective July 11, 1956.

(b) S. L. Whitley, P. L. Whitley, and R. V. Hall, incumbents, each be paid eight hours' pay at time and one-half from July 11, 1956, and each working day until August 22, 1956, as a penalty.

(c) Raymond Spence, William Fuller, and R. H. Simmons, extra Trucker-Loaders, who were displaced by the incumbents, each be paid eight hours' pay at time and one-half from July 11, 1956, and each working day until August 22, 1956, as a penalty.

Dockets 110-111)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimants in this case held positions and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also 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.

any work which may have remained from the abolished positions. Consequently, it must be concluded that Rule 3-C-2 is not involved in this dispute before your Honorable Board.

III. **Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "greivances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment, and obligations with reference thereto, not agreed upon by parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION.

The Carrier has shown that despite its failure to post bulletins concerning the abolishments in question, the incumbents thereof received the advance notice required by the applicable Agreement and the other three Claimants were informed of the abolishments when they were "bumped" as a result thereof. Thus, the Carrier has established that not one of the six Claimants in this case suffered any loss whatsoever as a result of the Agreement violation complained of and consequently they are not entitled to any of the compensation which they claim.

It is, therefore, respectfully submitted that the claim here before your Honorable Board is not supported by the facts or by the Clerks' Agreement and should be denied.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimants, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all of the same.

All data contained herein have been presented to the employes involved or to their duly authorized representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimants herein were employed by the Carrier as trucker-loaders. On July 11, 1956 the Carrier found it necessary due to a steel strike to abolish three trucker-loader positions. These positions were held by the Claimants named in (b) of the claim. They exercised their seniority rights and as such bumped the three men named in (c) of the claim.

The facts in this case are not in dispute. The Organization claims that the Carrier violated rule 3-C-1 (g) which provides:

> "An employe whose position is abolished shall be given as much advance notice as possible, in writing, which shall be not less that 36 clock hours, and a bulletin shall be promptly posted in the seniority district showing the position abolished, symbol number where such number has been assigned to the position, location, name of incumbent, roster number and date abolished."

The Carrier admits that it did violate 3-C-1 (g) in that they failed to post the notice of the abolishment of the positions. The record discloses that they gave the three employes whose positions were being terminated adequate notice but that they failed to also post the notice thus depriving all effected employes who might be bumped of the opportunity to know that their positions might be jeopardized by the Carrier's action.

While the Carrier admits violation of the Agreement it contends that there was no monetary loss and therefore the claim should be denied.

After a serious consideration of the record this referee feels that as to claim (b) the position of the Carrier is sound. The claimants there received personal written notice of the abolishment of their position and it is impossible to see, as to them, how the failure to post the bulletin in any way jeopardized their position.

The same stance, however, can not be taken as to the Claimants in (c) above. It is the judgment of this referee that the failure to post promptly these abolishments could and possibly did injure these people financially. While the record is silent on the question of whether they had bumping privileges themselves, the fact nevertheless remains that if they did not, then they would be furloughed employes and as such might have been able to make other arrangements sooner if they had received the notice established by the Agreement. It is not the function of this Board nor the function of any person called in as a neutral to rewrite Agreements between the parties but it is our duty to require fulfillment of the Agreement, whether it be Carrier or Organization. This case is goverened by Award 4661 which is quite similar on its facts.

The Carrier in this case has contended that there were no monetary damages and the argument has been made by the Carrier on the premises and here that this Board has no authority to award a penalty.

Since the presidential fact finding Board in 1937 rendered its opinion in which it stated:

> "The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violations."

This division and others has continued to characterize awards in such cases as a penalty. The fact is that what we are dealing with is nothing more than a Contract violation and an award of damages for such breach. Granted that in some cases the award may be greater than the actual damage sustained but as long as this issue is not properly presented on the premises this Board

has been forced to establish some criterion in the way of liquidated damages when the facts show that as a result of the breach some damage potentially flowed. It is perhaps unfortunate that the word "penalty" ever crept into the language of the Board.

In this case, however, the organization has asked that the Claimants in (c) be paid time and a half for the period they were off. This claim is excessive under the circumstances. It is the judgment of this Referee that they should be paid at the pro-rata rate for the time in question.

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 Agreement was violated in part. See Opinion.

AWARD

Claim (a) sustained. Claim (b) denied. Claim (c) sustained, but at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August, 1961.

DISSENT TO AWARD NO. 10033, DOCKET NO. CL-9931

Award 10033 correctly holds that Claim (b) should be denied because "The Claimants there received personal written notice of the abolishment of their position and it is impossible to see, as to them, how the failure to post the bulletin in any way jeopardized their position."

By this very reasoning Claim (c) should also have been denied. The Award is in error in sustaining Claim (c) on such conjectural and speculative phrases as — "might be bumped" — "might be jeopardized" and — "might have been able to make other arrangements", and we dissent.

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD NO. 10033, DOCKET NO. CL-9931

The record shows, as the Award clearly points out, that claimants in Claim (b) were given proper notice under Rule 3-C-1 (g) and, therefore, were not adversely affected. However, a bulletin was not posted in accordance with Rule 3-C-1 (g) in order that claimants in Claim (c) could properly protect themselves by "speculating" in advance of the abolishment as to whom they might displace, etc.

In view of the fact that Carrier admitted that it violated Rule 3-C-1 (g), we can only conclude that the Dissenters are engaging in super-technicalities in an endeavor to impress upon the superficial observer that Carrier should have been released from the consequences of its acts by denying damages to claimants in Claim (c). The Rule clearly provides for advance posting of the abolishment of a position in order that the employes may "speculate" or "conjecture" as to whom they may displace in case they are displaced. Therefore, the so-called "conjectural and speculative phrases" contained in the Award are clearly justified from the meaning and intent of the governing Rule. In Award 4661, Referee Carmody, the Board sustained a similar claim without a dissent. The Board ruled:

> "In the light of the effect the abolishment of positions is likely to have and actually does have on employes in many cases, even to the point of separating some of them, not occupying the abolished positions, from other positions as they are affected by the bumping process, we think this is not an unreasonable request, (i.e., posting Notice **when** position abolished). * * * For the purposes of our conclusion here that the Agreement was violated we think this is what the language, as it now appears in the rule, means and requires." (Emphasis added)

Therefore, the Award properly disposed of the dispute.

/s/ J. B. Haines
J. B. Haines
Labor Member