Award No. 11488
Docket No. CL-11597

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

ILLINOIS CENTRAL RAILROAD COMPANY

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

(a) Carrier violated rules of the Clerks' Agreement at Memphis, Tennessee, when on January 15, 1958 it abolished Position No. 117 and Relief Position No. 24 without giving the proper advance written notice.

(b) L. W. Lawrence and R. D. Moore be compensated a day's pay at the pro rata rates of their former Positions Nos. 117 and Relief No. 24, respectively, for January 16, 1958 and each subsequent day to and including May 5, 1958.

EMPLOYES' STATEMENT OF FACTS: Clerks' bulletin No. Y-4, dated January 9, 1958, was issued as follows:

"All Concerned:

Effective with the completion of tour of duty on Wednesday, January 15, 1958, the following positions will be abolished.

Position No. 117 - Yard Clerk - Johnston - 11:00 P. M. - 7:00 A. M.

Relief Position No. 24 - Johnston and Iowa

/s/ F. J. Duggan

Terminal Sup't

cc: Clerks' Bulletin Boards
Mr. J. P. King (2)
Mr. T. E. Fauver (2)
Mr. W. B. McClintock (4)"

no notice was given, the Board, in Third Division Award 6354, said the following:

> "Article 37 provided for a 48-hour notice. The failure of the Respondent to give such notice was a violation of the Agreement but each employe adversely affected is entitled to **compensation only in such sums as would have accrued to him had the notice provision of the Article been complied with.**" (Emphasis ours.)

Here, too, the penalty, if any, could be for no more time than would have accrued to the Claimants had there been a violation of the agreement — three days — and certainly there is no basis for continuing liability as presented by the Organization. But in the instant case, unlike the above case, written notice was given; the Claimants exercised their seniority rights accordingly and were in no way adversely affected. Thus, there is no valid claim for three days each, much less a day's pay from January 16 through May 5, 1958.

The Carrier reiterates that the bulletin, posted on January 9, 1958, serving notice that the positions involved were abolished effective at the end of the tour of duty on January 15, 1958, constituted written notice within the meaning of Rule 18. The Claimants were not hurt or adversely affected in any way, and there is no basis whatever for their complaint.

The claim should be denied.

All data in this submission have been made known to the Organization and made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: So much of Rule 18 as is pertinent to this inquiry is, as follows:

> "(d) (1) When regularly assigned Group (1) or (2) positions are to be abolished, the occupants thereof will be given at least seventy-two (72) hours advance written notice.
>
> * * * * *
>
> "(3) Copies of notices to employes will be furnished the Local and Division Chairmen concerned, and will be posted on bulletin boards in the seniority district affected."

Claimants Lawrence and Moore were Group 1 employes. They were not given seventy-two (72) hours advance written notice of the abolishment of their positions as required by the Agreement. Carrier contends that a notice that the positions were to be abolished on January 15, 1958, were posted on the bulletin board on January 9th, six days prior thereto and copies were furnished to the Local and Division Chairmen; that both of these employes had actual notice and applied for and were permitted to exercise their seniority effective January 15th so that no one has suffered any monetary loss.

The first requirement in abolishing a position under Rule 18 of the Agreement is that the **occupants will be given at least seventy two (72) hours advance written notice**"; secondly, that **copies of notices to employes** will be posted on the bulletin board and furnished to the Chairmen. There has been, obviously, a violation of the Agreement as the first requirement has never been complied with.

Carrier further contends that there should be no monetary award as it has not been shown that either of these employes suffered any loss and there is no provision in the Agreement for a penalty. Petitioner, conversely, urges we need not concern ourselves with whether this is in effect a penalty, that it is compensation for the violation of a Rule and that the fact that the Rule carries no penalty provision is no bar to sustaining this claim. There have been many awards before this Division on this precise question. Whether or not an award in the nature of a penalty can be assessed against the Carrier where there has been no actual monetary loss by any employe?

In Award 10033 this Board adopted the following language:

> "Since the presidential fact finding Board in 1937 rendered its opinion in which it stated:
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> > '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. . . ."

In 25 Corpus Juris Secundum, Section 8 on page 466 we note the following:

> "Nominal damages are given, not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right, nominal damages are so called in contradiction to actual, substantial or compensatory damages."

It is perhaps unfortunate that the word penalty ever crept into the language of the Board.

For the violation of the Agreement, herein, each Claimant Moore and Claimant Lawrence shall be paid three days' pay at the pro rata rate.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 has been violated.