Award No. 13719

Docket No. CL-14119

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5339) that:

1. Carrier violated the Clerks' Rules Agreement at Seattle, Wash. when it abolished Warehouse Checker Position No. 6627 while its duties remained to be performed and arbitrarily assigned the preponderant duties of that position to the occupant of Position No. 6616 without benefit of bulletin of the consolidated positions.

2. Carrier shall now be required to compensate employe Blanche Leech at the regular rate of OS&D Clerk Position No. 6616 for eight (8) hours for each regularly assigned work day of the position subsequent to June 1, 1962 that she has been deprived of work resulting from the establishment of the new position the duties of which she was physically unable to perform.

EMPLOYES' STATEMENT OF FACTS: Prior to June 1, 1962 employe Blanche H. Leech, who has a clerical seniority date of April 12, 1943 and non-clerical date of January 16, 1946 in Seniority District No. 45 was the regularly assigned occupant of OS&D Clerk Position No. 6616 in the Freight House at Seattle, Washington.

The principal duties of Position No. 124 (renumbered 6616) as assigned by bulletin were:

> "Handling and tracing claims and other matters pertaining to OS&D work. Applicant must be competent typist."

Copy of Carrier's Bulletin No. 3 dated February 15, 1962 is submitted as Employes' Exhibit "A".

Prior to June 1, 1962 employe N. McDonough, who has a clerical and a non-clerical seniority date of January 16, 1946 in Seniority District No. 45, was the regularly assigned occupant of Warehouse Checker Position No. 51 (renumbered 6627).

In other words, when, as a result of the abolishment of Position No. 6627, the Carrier assigned the remaining duties of abolished Position No. 6627 to Position No. 6616 without rebulletining Position No. 6616, there occurred no violation of schedule rules or agreements, but to the contrary, such action on the part of the Carrier was entirely proper and in accordance with standard and accepted past practice.

The Carrier at this point wishes to direct attention to Third Division Award No. 8428 which fully and conclusively supports the Carrier's actions and position in the instant dispute:

> " * * * First, under the Parties' Agreement does Carrier have the right in general to change the hours of a position? The general answer is that Rule 16 grants this right as such, if 36 hours notice is given. Second, does Carrier in general have the right under the Agreement to require the incumbent of a position to work at two locations when the original bulletin of the position specified only one location? The general answer, given in a number of awards in which we concur, is that nothing in the Agreement prohibits same, particularly if the starting and ending location is the same and if the work in both locations is similar (in the same group) and in the same seniority district. Third, under the Agreement does Carrier in general have the right to add to, subtract from, or otherwise change the duties originally assigned to a position and its incumbent? The general answer, also supported by a number of awards, is affirmatively the same as that given to the second question above. The net effect is that Carrier can in general do any of these three things without creating a new position that has to be re-bulletined."

The Carrier would point out that even had Position No. 6616 been rebulletined, and we do not agree that there is any schedule rule or agreement which so provides, such action would not have allowed claimant Leech to exercise her seniority to displace on another position because under schedule rules employes can only exercise seniority to displace on another position in cases where their positions have been abolished or where they themselves have been displaced through the exercise of seniority, neither of which took place in the instant dispute.

As there is absolutely no schedule rule or agreement which in any way supports the instant claim it will be readily apparent that by the instant claim the employes are attempting to secure through the medium of a Board Award in the instant case something which they do not now have under the rules and in this regard we would point out that it has been conclusively held by the Third Division, as well as by the other three Divisions and the various Special Boards of Adjustment, that your Board is not empowered to write new rules or to write new provisions into existing rules.

In view of the foregoing it will be readily apparent that there is absolutely no basis for the instant claim and the Carrier respectfully requests that the claim be denied.

(Exhibits not reproduced).

OPINION OF BOARD: Carrier abolished Position No. 6627 and assigned the remaining duties to Position No. 6616, which was held by the Claimant. Claimant protested that she was physically unable to perform the new duties and, when Carrier refused to change them, she voluntarily relinquished the

position and was furloughed. Under Rule 8 (b) of the applicable agreement she was not able to displace any of the employes junior to her and she, therefore, remained on furloughed status. Rule 8 (b) reads as follows:

> "(b) An employe voluntarily relinquishing his permanent position cannot displace a regularly assigned employe but will be considered furloughed as of date of relinquishment and, if he desires to protect his seniority rights, must comply with the provisions of Rule 12 (b)."

Petitioner contends that Carrier so changed the duties of Position No. 6616 that it became a new position which Carrier was obliged to bulletin by the requirements of Rule 9 (a), which reads as follows:

> "(a) New positions or vacancies (except those of thirty (30) calendar days or less duration) will be promptly bulletined in agreed upon places accessible to all employes affected for a period of five working days, exclusive of Sundays and holidays . . ."

Petitioner then argued that if Carrier had bulletined Position No. 6616 as a new position, Claimant would not have had to relinquish the post and would, consequently, have been cligible to displace a junior employe. She would have worked during the entire period she was furoughled and, therefore, was damaged by having suffered a loss of wages by reason of Carrier's violation of the Agreement. Claimant asked damages therefor.

Petitioner argues that there was nothing voluntary about Claimant's relinquishing her job. She was "physically unable to perform the new duties". Some doubt was cast upon this argument by the fact that her successor in the job was a woman who was physically able and did perform the duties thereof. Moreover, we are not certain that relinquishment was the only recourse open to her, and if there were others she cannot claim she was compelled to act as she did. The claim does not, however, need to be decided on the circumstances of her relinquishment, but on whether Carrier was obliged to bulletin the position as a new position as required by Rule 9 (a). If Carrier was not so obliged, her case falls. We think that Carrier was not so obliged.

While Rule 9 (a) seems to require the prompt bulletining of a new position, there is no Agreement Rule which required that a position be deemed new because duties are added. Carrier's right to add duties is not challenged. Awards 8428, 10603.

The Agreement defines other changes in a position which the parties agreed would make it new. It provides:

> "RULE 14—CHANGING ASSIGNED STARTING TIME, DAYS OF ASSIGNMENT OR DAY OF REST
>
> "(b) The regular starting time shall not be changed without at least twenty-four (24) hours' notice to the employes affected. When the established starting time of a regular position is changed more than thirty (30) minutes for more than five (5) consecutive working days; or changed in the aggregate in excess of one (1) hour during a period of one 1) year; or(if either or both assigned rest days are changed; or if the home terminal of a rest day relief position is changed, the position will be considered a new one and will be bulletined in accordance with Rule 9."

Rule 20 provides, in part, ". . . changing of a rate of a specified position shall constitute a new position."

The parties have themselves particularized the changes in a job which they agreed should be considered as making it a new position. The fact that they have not said that a change in duties should be so considered must not be deemed an oversight nor must it be read in as an implication. It is a rule of construction that the listing of particulars implies the exclusion of items not expressly included. That it was not an oversight is borne out by the fact that in an earlier case, the Organization argued that Carrier was required by no rule to bulletin a position account "change in duties". See Employes' Exhibit "L", CL-12625.

The Organization makes a strong argument that the change in duties was so substantial that the job must be deemed new. They were so substantial that Claimant, a capable employe for some 19 years, could no longer perform them. Sympathetic as we may be to this argument, it is an appeal to subjective criteria. What is substantial to one may be inconsequential to another. It is a dubious doctrine under which a contract violation can be based on the shifting sands of subjective criteria.

The Organization deplores the possibility that the Carrier may be able unilaterally to change a position merely to force a disliked person out. This was not the case here, and such fears, if real, call for the negotiation of new rule. This Board is powerless to do so, and it has no equity powers. We are led to the inevitable conclusion that Carrier was not required to bulletin this position because of the added duties. It follows that Claimant was not "forced" to relinquish her position because of contract violation by Carrier.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of July 1965.

LABOR MEMBER'S DISSENT TO AWARD 13719, DOCKET CL-14119

Reasonable men, presented with the facts of record in this case, would

have had to agree that the position here involved was indeed a new position.

To escape the obvious the Referee chose to rule that only when the starting time, rest days, home terminal, or rates of pay of an established position are changed, is a "new" position created.

Such reasoning is absurd. The sound theory described as "an exception establishes the rule as to things not excepted" or "exceptio probat regulam de rebus non exceptis" just does not fit this or like cases.

Rather it should have been borne in mind that there was, and is, no need to spell out that which is obvious e.g., a new position is a new position. On the other hand, the parties observed that certain changes—i.e., starting time, rest days, home terminal, rates of pay, while not actually creating a new position, would be considered as a new position.

In other words, the Referee totally failed to grasp the reasons for stating that the listed changes "will be considered" and "shall constitute" a new position. Those changes were "particularized" for the simple reason that established positions, in those events, remained the same positions with only the starting time, rest days, home terminal, rates of pay etc., changed, which changes, in and of themselves and absent Agreement, would not otherwise have been considered new positions i.e., a position which had not theretofore existed. Therefore, by the language in Rule 14 (b) and 20, the parties agreed that such changes would require Carrier to comply with Rule 9 (a) and promptly bulletin the changed position as a "new" position thus affording senior employes an opportunity to obtain it if, by such change, it had become more attractive to them.

All that needed to be decided in this case was whether or not, from the facts presented, the position involved was a new position. If it was (and it most assuredly was) Rule 9 (a) required that it be promptly bulletined. It is obvious that the Referee found, as the Employes had argued, that it was a new position, for in the Opinion the changes (changing the position from one of a sedentary nature working in the office to one requiring considerable physical exertion outside the office and exposed to the elements) were found to have been " * * * so substantial that Claimant * * * could no longer perform them * * * ."

It was solely a question of fact and the Employes most assuredly supplied sufficient facts to prove that the position was indeed a new position. Any number of examples could be cited wherein the addition of like duties could be added which would merely increase the workload and would not, under any sensible argument, constitute a new position. However when, as here, unlike duties, duties which changed the entire makeup of the position, were combined with and/or substituted for duties formerly comprising the position, which duties assigned thereto governed the classification and demanded the negotiated rate of pay, it can not reasonably be said that a new position was not thereby created. (See Award 1314).

Moreover, there is no showing in the record to support the statement that "Claimants' successor was a woman who was physically able and did perform the duties thereof." There is evidence in the record that the position which Claimant had to give up, not because of the amount of work, but because of the type of work which was added, was awarded, by bulletin dated June 13, 1962, to Margaret M. Shaw; that the same position was again advertised because of a vacancy therein by bulletin dated June 15, 1962 and awarded, by

bulletin dated June 25, 1962, to an employe identified only as B. J. Whalen. There is absolutely nothing in the record to support any statement that Margaret M. Shaw was physically able to and did perform the duties of the position and nothing showing whether B. J. Whalen is a male or female employe. Therefore, if any inference could be drawn from the record it would be that the position was unsuitable for a female employe for there is no showing that any female employe ever performed the duties of the position Claimant was forced to relinquish.

If the Referee had stayed away from those "shifting sands" he referred to perhaps he would have been able to see the forest notwithstanding all of the trees.

The Award is in error and I therefore dissent.

D. E. Watkins, Labor Member
7-28-65

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 13719, DOCKET CL-14119

(Referee Wolf)

The weakness of the employes' claim is best reflected by their efforts to support it with statements such as the one appearing in the Labor Member's Dissent that "a new position is a new position." But the undisputed facts were that the position was a previously established position (a new position at that time) and existing at the time of this dispute.

The petitioner's efforts were necessarily directed to convincing the Referee that an established position would be considered as a new position upon the addition of duties.

The denial award is in line with the Labor Member's given reason for the rule listing the various changes causing a position to be considered new, appearing in paragraph 5 of the dissent, reading:

> " * * which changes, in and of themselves and absent agreement, would not otherwise have been considered new positions, i.e., a position which had not theretofore existed."

The Labor Member ignores the fact that by his own statement the disputed position could not be a new position. It was an existing position and could not, therefore, have been "otherwise considered new". There was no agreement rule providing that it be considered new. As a matter of fact, this organization, in progressing another claim on this property, argued that there was no rule in the agreement requiring a position to be bulletined because of a change in duties.

Since there is no such rule and if the organization feels one is needed the proper procedure is negotiation because it is well settled this Board cannot write such a rule.

In view of the organization's apparent difficulty in making up its mind, the criticism of the Referee in the Labor Member's Dissent is not only unfounded but in extremely poor taste.

The Referee should be commended for rendering a sound and well-reasoned award.

/s/ W. M. Roberts
W. M. Roberts

/s/ G. L. Naylor
G. L. Naylor

/s/ R. A. DeRossett
R. A. DeRossett

/s/ W. F. Euker
W. F. Euker

/s/ C. H. Manoogian
C. H. Manoogian