Award No. 16807
Docket No. CL-17283

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

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

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6313) that:

1. Carrier violated the rules of the Clerks' Agreement in Office of Auditor of Revenues, Cleveland, Ohio, when on May 3, 1965, it arbitrarily transferred work from Seniority District No. 8 (Auditor of Revenues) to Passenger Traffic Department, Hoboken, New Jersey (Seniority District No. 21) without advance notice or negotiation and agreement.

2. Carrier shall now restore ticket distribution and related work for territory east of Port Jervis, New York and Blairstown, New Jersey, to Office of Auditor of Revenues, Cleveland, Ohio.

3. Carrier shall re-establish position of Ticket Distribution Clerk in office of Auditor of Revenues, Cleveland, Ohio which it abolished effective with the close of business April 30, 1965.

4. That the following employes:

C. J. Healy	Mary Ann Scanlon
Alberta M. Lawler	Alice L. Strigus
W. G. Hill	R. M. Auping
W. H. Volz	W. A. Mauerer
L. E. Woznick	F. R. Tracy
J. H. Feeney, Jr.	R. M. Cawley
P. D. Carbone	G. S. Joseph
J. J. Petrokonis	P. J. Kovary
	R. A. Boyle

and/or their successors shall be reimbursed for any and all wage loss sustained, retroactive to April 30, 1965, the date position of Ticket Distribution Clerk was abolished and to continue day by day as a continuing claim until such time as the violation herein complained of is discontinued and the work restored to Office of Auditor of Revenues, Cleveland, Ohio. (Claim 1633.)

CARRIER EXHIBIT E — General Chairman to General Manager–Labor Relations February 14, 1967.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute arose when the Carrier abolished the position of Ticket Distribution Clerk in the office of Auditor of Revenues, Cleveland, Ohio (Seniority District No. 8), on April 30, 1965. Some of the remaining work of the abolished position was transferred to the position of Ticket Stock Clerk in the Passenger Traffic Department at Hoboken, New Jersey (Seniority District No. 21) and some of the remaining work was transferred to the existing position of Passenger Revenue Mail Clerk in the office of Auditor of Revenues (Seniority District No. 8). The dispute concerns the work of the abolished position that was transferred from Seniority District No. 8 to Seniority District No. 21.

The Employes allege a violation of Rule 11 of the effective Agreement. Rule 11 bears the caption: "Employes Displaced or Position Abolished, Transferred or Consolidated." Primarily the dispute involves Paragraph (b) reading as follows:

> "When new departments are organized to take over work now being performed in other offices, or when other combinations or divisions of offices or departments are made, the rearranged positions will be bulletined and filled, insofar as possible from the employes affected, based on seniority rights. Employes awarded such positions and employes whose positions are transferred, either within or to another seniority district, will, if they follow such positions, carry their seniority with them but will continue to retain and accumulate seniority on their home rosters. Employes not electing to follow their positions may exercise seniority rights as provided in Paragraph (a) of this rule.
>
> Thirty (30) calendar days' advance notice will be given to General Chairman or his representative where such consolidations or transfer of work is contemplated, unless otherwise mutually agreed to."

In support of their contention that Rule 11 (b) was violated the Employes rely upon a letter dated June 24, 1957 from Carrier to the General Chairman which letter followed a conference concerning the Employes' request of May 13, 1957 for a change in the then existing Agreement of August 1, 1955. Employes' request for a change in the Agreement reads as follows:

> "It is agreed between the parties hereto that the consolidation of work or positions in one seniority district or city with work or positions in another seniority district or city, and the transfer of work or positions in one seniority district or city to another seniority district or city, shall not be done under the agreement between the parties governing hours of service and working conditions, effective August 1, 1955, except in accordance with the procedures set forth in Rule 54, thereof, and that with respect to such intended consolidation or transfer of work ninety (90) days' notice shall be given by the Carrier to the Representative of the Organization instead of the thirty (30) days' notice provided in that Rule."

Following conference on the Employes' proposal the Carrier's letter of June 24, 1957 was written. The specific portions of that letter relied upon by the Employes read as follows:

> "* * * We can assure you that we have no intention or will we knowingly permit deviation from our past practice of negotiating under the rule.
>
> We will agree that in the application of Rule 11 (b) that a notice of not less than thirty calendar days will be given to the representatives of the employes where such consolidations or transfer of work is contemplated, unless otherwise mutually agreed to."

The General Chairman replied to Carrier's letter of June 24, 1957 under date of July 29, 1957, stating:

> "This letter is to advise that I am accepting your letter of June 24, 1957 as final disposition of our Formal Notice above referred to."

We have often held that a request for a rule change is one of the best ways to indicate that the existing rules do not supply the authority to do what the proposed language covers. See Awards 11580, 12955, 13161, 15394, 15488.

The presently effective Agreement of July 16, 1962 superseded the Agreement of August 1, 1955. In the revision of the present Agreement Rule 11 (b) was amended only to the extent of adding thereto the following:

> "Thirty (30) calendar days' advance notice will be given to General Chairman or his representative where such consolidations or transfer of work is contemplated, unless otherwise mutually agreed to."

The first portion of Rule 11 (b) was carried forward to the new Agreement without change. The only portion of the letter understanding of June 24, 1957 that was carried forward to the new Agreement was that portion pertaining to the thirty days' advance notice. We have frequently held that understandings such as contained in the letter of June 24, 1957 are not carried forward or merged into a new agreement unless specifically so stated. See Awards 8172, 9500, 11331, 11730, 11842, 15928.

Employes' reliance on past practice to support the allegation of violation of Rule 11 (b) must be rejected for the reason that we have often held that practice is not controlling when the provisions of an agreement are clear and unambiguous. See Awards 4501, 9193, 9419, 14599.

Rule 11 (b) has to do with the rights of employes when their positions are consolidated or transferred as a result of new departments being organized to take over work being performed in other offices, or when other combinations or divisions of offices or departments are made. The rules does not address itself to the transfer of work where transfer of positions is not involved and which is the situation confronting us here. The same kind of a situation involving these same parties and the same Agreement was before us in another dispute which was denied by our Award 16730. There we found that Rule 11 had no application to the facts of that case. We similarly find that Rule 11 has no application to the facts of this case. Our opinion also conforms with Awards 6003, 6066, 6655, 11919, 15784 and others.

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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1968.

LABOR MEMBER'S DISSENT TO AWARD 16807
(Docket CL-17283)

The Opinion clearly acknowledges that:

(1) Carrier abolished the position of Ticket Distribution Clerk, Seniority District No. 8;

(2) Some of the remaining work of the abolished position was transferred to the position of Ticket Stock Clerk, Seniority District No. 21;

(3) The dispute concerns the work of the abolished position that was transferred from Seniority District No. 8 to Seniority District No. 21.

Carrier admitted in the record of this dispute that there would be no "deviation from our past practice of negotiating under the rule"; that Rule 11 "fully protects the rights of employes when there is a transfer of positions and work"; and "that a notice of not less than thirty calendar days will be given to the representatives of the employes where such * * * transfer of work is contemplated."

The Majority's first step was to eliminate in its entirety the Carrier's admitted past practice "when the provisions of an agreement are clear and unambiguous"; and, further, that:

"* * * The rule does not address itself to the transfer of work where transfer of positions is not involved and which is the situation confronting us here. The same kind of a situation involving these same parties and the same Agreement was before us in another dispute which was denied by our Award 16730. There we found that Rule 11 had no application to the facts of that case. We similarly find that Rule 11 has no application to the facts of this case. Our opinion also conforms with Awards 6003, 6066, 6655, 11919, 15784 and others."

Rule 11(b) clearly lends itself to a 30-day notice where such "transfer of work is contemplated." Had the parties intended "transfer of positions," the language to convey that point is available for their use. How the Referee opined that the second paragraph of Rule 11(b) does not apply to "transfer of work" is beyond comprehension.

No position was abolished in the dispute resulting in Award 16730. Carrier's arguments therein points to Refere Engelstein's decision in Award 11919, but Carrier avoided quoting a part thereof, i.e.:

"* * * In executing these [transfers from one seniority district to another] it did not abolish work or positions and it gave due consideration to the employes affected by the transfer."
(Brackets ours.)

Carrier also cited Award 6003, and we direct attention to that part of Referee Daugherty's Opinion which Carrier and the Majority here also saw fit to ignore:

"* * * It should be clearly understood that this interpretation and ruling is based on and confined to the facts of this particular case and the agreement involved therein." (Railway Express Agency, Inc. and Clerks.)

That Award set no precedent for the decision rendered in Award 16730.

Likewise, Award 6655, relied on by Carrier in Award 16730, dealt specifically with complete abolishment of an entire operation of specified work at one location and the transfer of all such positions performing that work to another location; it would border on the ridiculous to declare that the rules under which such transfer was made are similar to the rules involved in Award 16730 upon which precedent the decision in Award 16807 was based.

The Referee chose the above-mentioned Awards to support his Opinion of Board. We have not as yet been apprised of what particular facts and/or holdings in the Opinion of Board in Award 15784, which the Referee also cited, have to do with the dispute with which we are here concerned in Award 16807. In that dispute, the issue was one involving seniority, fitness and ability and the fact that a junior employe was assigned a position over a senior applicant; the rules involved were those pertaining to filling vacancies under seniority rules, promotion, vacancies and new positions not filled by seniority, qualifications, merit and capacity. The only thing therein which we find the same in Award 16807 is: "Award, Claim denied."

Pointing up the fallacy of relying upon "foolish precedents" in rendering "Opinions" based on erroneous awards or on awards clearly distinguishable, the seriousness of rendering such decisions is well summed up by Judge Curtis G. Shake in Award 4819, wherein he held:

> "To ignore the distinguishing facts and follow that award in the instant case would result in a dangerous precedent for the gradual and piece-meal substitution of a code of Board-made rules for the clearly expressed provisions of the negotiated agreement of the parties."

To follow foolish precedents and wink both eyes is much easier than to think.

I dissent.

C. E. Kief
Labor Member
12-16-68

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S DISSENT TO AWARD 16807, DOCKET CL-17283

Award 16807 is correct in all respects and clearly and concisely spells out the considerations, with citation of Board authority, that properly support the declination of the claim. The Labor Member's dissent merely registers his displeasure that the rule involved in the dispute does not grant the Organization the veto power that it sought to obtain through its request of May 13, 1957 for a change in the rule. The dissent does not in any manner detract from the soundness and correctness of the award.

Unfortunately an apparent typographical error occurred in the reference to Award 15784. Undoubtedly the reference was intended to be to Award 15785 which was cited in the Carrier Member's Memorandum presented to the Referee at the panel discussion.

G. C. White
R. E. Black
G. L. Naylor
P. C. Carter
W. B. Jones

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