



Award Number 17229

Docket Number TE-16469

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

NORFOLK AND WESTERN RAILWAY COMPANY
(Involving employees on lines formerly operated by the
Wabash Railroad Company)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Norfolk and Western Railway (Western Region), that:

1. Carrier violated an agreement between the parties hereto when it failed and refused to properly bulletin and fill a telegrapher position in "RO" Telegraph Office, Buffalo, New York with an employee from the Montpelier Division seniority roster.
2. Carrier shall, because of the violation set out above, commencing March 22, 1965, and continuing thereafter so long as the violation complained of continues, compensate the senior idle telegrapher, extra in preference, or in the absence of such, the senior telegrapher idle on his rest day or days, eight (8) hours pay at the rate of \$2.8228 per hour, for each work day Monday through Friday.

EMPLOYEES' STATEMENT OF FACTS: An Agreement between the Norfolk and Western Railway Company (Western Region), hereinafter referred to as Carrier, and its employees represented by the Transportation-Communication Employees Union (formerly The Order of Railroad Telegraphers), hereinafter referred to as Employees and/or Union, effective September 1, 1955, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

At page 23 of the said Agreement, under Rule 27, is among other things, listed the position of telegrapher in "RO" Telegraph Office, Buffalo, New York on the Montpelier Division Seniority District. For ready reference the listing reads:

"Buffalo 'RO'T..... \$1.93 1/2

* * *

The above listing of the position in "RO" Telegraph Office, Buffalo, establishes: that a position classified as a telegrapher in "RO" Telegraph Office, Buffalo, New York with a rate of \$1.93 1/2 on the Montpelier Seniority District existed as of the effective date of said Agreement.

Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514. Copy thereof is attached hereto and made a part hereof, marked Carrier's Exhibit "B."

Section 11 thereof deals with the retroactive application of implementing agreement following transfer of work throughout the merged or consolidated system.

No time claims in favor of any identified employee were presented to the Superintendent of the Carrier in the usual manner as a result of the work which had formerly been performed by the former Wabash telegrapher at Buffalo being performed by the occupant of the former Nickel Plate position in that office. However, the General Chairman presented the following alleged claim as here pertinent in his letter to the Superintendent dated May 4, 1965:

"Statement of Claim;

Carrier violated the Telegraphers' Agreements when on the 22nd day of March, 1965, when, by its unilateral action, it caused required and permitted a position known as 'RO' Office, Buffalo, New York, not to be bulletined and filling this said position by an employee coming within another Carrier's Telegraphers' Agreement and by an employee not covered by the Montpelier Division Seniority Roster.

Carrier shall compensate the senior idle Telegrapher and/or a regular assigned employee coming within the Telegraphers' Agreement on his rest day and/or rest days for each and every day, Monday through Friday, at the rate of \$2.8228 per hour for eight (8) hours per day, totaling \$22.5724."

Copy of all of the correspondence had between the representatives of the parties to this dispute is attached hereto and made a part hereof, marked Carrier's Exhibit "C."

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute arose because of the failure to re-bulletin the vacancy of the telegrapher's position at Carrier's "RO" Office at Buffalo, New York and the filling of said position by an employee not in the Montpelier Division Seniority Roster.

On March 12, 1965, Carrier bulletined for bids the vacant telegrapher position at "RO" Office at Buffalo, however, no one bid in for the position. Carrier then assigned the work that was performed by the former Wabash telegrapher who vacated said position to the former Nickel Plate Railroad telegrapher, who worked in the same "RO" office at Buffalo.

The Organization alleges that Carrier violated Rules 16, 27, Article VIII, Section 1(c) of the January 10, 1962 Agreement herein, when it permitted the aforesaid act of giving the work in question to an employee of another Carrier and to one outside the seniority roster.

"Rule 16 — PROMOTION AND RIGHTS

"(a) Employees seniority rights will date from the last time of entering the service and will extend over each Superintendent's district only.

"(b) Employees covered by these rules are in line for promotion and when qualifications are sufficient seniority will prevail.

"(c) When a vacancy occurs or a new position is created on any division, all employees, including non-telegraph agents in service on that division, shall be notified by bulletin within ten (10) days and will be allowed ten (10) days in which to make application for such position, and position will be permanently filled within thirty (30) days from date of vacancy, and employee thus assigned will be notified in writing, and the Local Chairman furnished with a copy of the assignment. All bulletins to show rate of pay, hours of assignment and assigned weekly rest day.

"Note—In the application of this paragraph positions or vacancies for which no applications are received will be rebulletined each thirty (30) days until permanently filled.

"(d) An employee who declines to accept promotion, shall not thereby forfeit his seniority rights.

* * * * *

The Organization's contention is that said Rule 16 required Carrier to rebulletin the position in question every 30 days until permanently filled; that under the Scope Rule of the Agreement the position in question belonged to the telegrapher's craft of the Montpelier Seniority Division; that under Section 1(c) of the Merger Agreement involving the Nickel Plate Railroad and the Norfolk and Western Railroad, the Carrier herein agreed to assume all contracts, schedules and agreements between the Nickel Plate Railroad and the craft organization's signatory thereto.

The Carrier's chief defenses are as follows: (1) Claims herein are presented on behalf of unnamed claimants for unspecified dates in violation of Rule 28 and Article 1, Section V of the August 21, 1954 Agreement; (2) Carrier is not obligated to fill the position in question with employees working other assignments on their rest days; (3) Section 1(b) of the January 10, 1962 (Merger) Agreement permits Carrier to transfer the work of employees throughout the merged or consolidated system; (4) Section 1(d) of the January 10, 1962 (Merger) Agreement provides for the procedure to be followed to resolve this claim and therefore this Board does not have jurisdiction to decide this dispute.

First, in regard to Section 1(d) of said January 10, 1962 (Merger) Agreement, it provides as follows:

"(d) For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement is deleted and the following provision inserted in lieu thereof:

In the event any dispute or controversy arises between Norfolk & Western and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 11 thereof) or of any implementing agreement entered into between Norfolk & Western and individual organizations which are parties hereto pertaining to the said merger or related transactions, which cannot be settled by Norfolk & Western

and the labor organization or organizations involved within thirty days after the dispute arises, such disputes may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select one member of the arbitration committee and the two members thus chosen shall endeavor to select a third member who shall serve as chairman, in which event the compensation and expenses of the chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the two members be unable to agree upon the appointment of the third member within ten days, either party may request the National Mediation Board to appoint the third member, whose compensation and expenses shall then be paid in accordance with existing law. The decision of the majority of the arbitration committee shall be final and binding."

It is clearly seen that the word "may" is used in said Section 1(d) of said January 10, 1962 Agreement, thus making it voluntary rather than mandatory for a party to use the grievance machinery so provided for in said clause. Therefore, inasmuch as the Organization elected to have this claim decided by this Board, we have jurisdiction to hear this dispute.

Concerning Carrier's contention that Section 1(b) of the January 10, 1962 (Merger) Agreement authorizes it to transfer the work here in question throughout the merged or consolidated system, first, the record is bare of proof that the position was abolished, as Carrier argues that it was, and second, the work in question was not transferred as such within the intent and meaning of said Section 1(b). The work remained at the "RO" office in Buffalo and is presently being performed by the former Ficke, Plate Telegrapher at said same location. Therefore, Carrier's argument that said Section 1(b) of the January 10, 1962 (Merger) Agreement authorizes such a transfer of work as was done here is without merit.

It is undisputed by Carrier that the work involved herein did come within the Scope of the Agreement involved herein. In fact Carrier recognized this when it bulletined said position for bids prior to assigning said work to the former Nickel Plate telegrapher after no bids were received for said position. Therefore Carrier violated the Agreement when it unilaterally assigned said work to an employee outside the Montpelier Seniority Roster.

We reach the final question as to whether or not the Organization failed to comply with Rule 28 and Article 1, Section V of the August 21, 1954 Agreement by failing to have named the individual claimants involved in the dispute.

This Board in a number of Awards has held that when the identity of a claimant is readily ascertainable, the requirement of Section 1(a) of the Article V of the August 21, 1954 Agreement is satisfied. See Award 14591.

Therefore, for the aforesaid reasons, it is the opinion of this Board that the Claim must be sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17229, DOCKET TE-16469

The majority Award concludes that we should assert jurisdiction to hear this dispute, thereby stultifying the very procedure of arbitration agreed to by the parties in their agreement of January 10, 1962. Thereafter, as if to compound its error, the majority proceeds to interpret the merger agreement by concluding that the work in question was not transferred as such within the intent and meaning of Section 1(b) of said agreement.

Without commenting on the paucity of sound reasoning lending support to such conclusion, the record should show that a long list of awards reaching different conclusions with respect to identically-worded expressions in similar agreements were called to the attention of the majority. Among others, we refer specifically to Award 6302 (Shake), 9388 (Rose), 13767 (Weston), 14471 (Ives), 14979 (Ritter), 15696 and 16552 (Dorsey), 16869 (Franden), 16924 (McGovern), and 17054 (Myers).

The cavalier treatment given this proceeding by the majority is best highlighted by noting that in no manner and in no place does the majority admit that the cited awards, among others, were placed before it for consideration and guidance.

More importantly, the majority in no manner indicates why it apparently so studiously avoided the guide-lines developed through the line of awards cited to it. The absence of such matter causes the majority opinion herein to be suspect—such “free-wheeling” conclusions should not serve in the future to detract from the cited line of awards which, with others, represent the state of the law.

We dissent.

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

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

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ C. L. MELBERG chm
C. L. Melberg

/s/ HARRY S. TANSLEY
H. S. Tansley