Award Number 17472

Docket Number TE-16543

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert C. McCandless, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the New York, New Haven and Hartford Railroad, that:

(1) A violation of the Agreement between the Carrier and the Transportation-Communication Employees Union is presented when a deduction was made from the check of Providence Roster District Agent-Operator E. C. Crowell in the amount of $173.04 which was his amount when diverted under Article No. 29 after he was assigned to position of Agent under Article 33 at Worcester, Massachusetts for two weeks starting June 11 and June 18, 1965. Then diverted to cover the agent operator's position at Guilford Connecticut which is also in violation of Article 13, paragraph A.

(2) Inasmuch as he was so assigned to Worcester, Massachusetts and amount was so deducted that he shall be reimbursed in the amount of $173.04 he was so assigned under Article 13 and the qualifications so stated at the time of such change cannot be so supported and the amount covers the Article No. 29 Agreement.

(3) That such charges as those stated as being improperly assigned is immaterial and as such was made it shall stand and that no employee should have to suffer such deductions after such was of no fault of the employee and qualifications shall be looked into completely and cannot apply in one place and not in another.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the New York, New Haven and Hartford Railroad Company and this Union dated September 1, 1949, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

This claim was presented and progressed in accordance with time limits provided by the Agreement, up to and including appeal and conference with the highest officer designated by the Carrier to receive appeals. Having failed to reach a settlement, the Employees now appeal to your Honorable Board for adjudication.

CARRIER'S STATEMENT OF FACTS: The claimant in this dispute, Mr. E. C. Crowell, was a spare operator and on June 14, 1965, he was assigned to the agent's position at Worcester, Massachusetts. On the same date, spare Operator A. J. Jackson was assigned to cover as agent-operator at Guilford, Connecticut.

On June 16, 1965, it was brought to the attention of the chief train dispatcher that Mr. Jackson was not selling tickets at Guilford due to the fact that he had not been requalified on this work. Since Mr. Jackson was not qualified in the selling of tickets, he was assigned to Worcester where a clerk performs the ticket work, and Mr. Crowell was assigned to Guilford as he was properly qualified in the handling of ticket sales. This change was made on June 17, 1965.

Claim was instituted on behalf of Mr. Crowell for $173.04 representing travel time payments erroneously made and later deducted from his pay. The claim was presented by the claimant on the theory that he was diverted to Guilford under the provisions of Article 29 of the Agreement dated September 1, 1949.

Attached in exhibit form is a copy of the pertinent correspondence as follows:

"A"—General Chairman's appeal.

"B"—Carrier's decision.

Claim was denied on the property on the basis that there was no diversion under Article 29 as this rule does not apply to other than regularly assigned employes and therefore payment of travel time to a spare employe is not required.

Copy of the Agreement dated September 1, 1949, as amended, between the parties is on file with this Board and is, by reference, made a part of this submission.

(Exhibits Not Reproduced)

OPINION OF BOARD: The facts in the instant case are not in dispute, but their interpretation and that of the existing Agreement are squarely in conflict.

Claimant Crowell, an extra employee, was notified to protect an agent vacancy at Worcester, Massachusetts, on June 12, 1965. He arrived on June 11 to familiarize himself with the position and did hold that position through June 16, when at Carrier's direction he was sent to Guilford, Massachusetts, where on June 17 he commenced to protect an agent vacancy there. Extra employee Jackson, not a claimant here but involved in the fact situation from which this controversy arose, had been assigned as of June 14 to protect an agent vacancy at Guilford. Carrier ascertained that Jackson was not qualified to perform these duties at Guilford, and consequently Carrier effected an exchange of these extra employees, sending Claimant Crowell to Guilford and Mr. Jackson to Worcester. As it developed, Jackson was senior to the Claimant and the position at Worcester carried a higher rate of pay. It is not clear as to why Carrier had not originally assigned Jackson to Worcester.

Two articles of the existing Agreement have been cited by both Carrier and Employes, and are here set out below:

ARTICLE 13 EXTRA WORK, EXTRA LIST, ETC.

(a) Extra work, as distinguished from call service and overtime incident to a regular assignment, will be assigned to and performed by extra employes who will be called according to their seniority standing on the roster, providing they are qualified and available. An extra employe will not be permitted to work more than one shift in a twenty-four (24) hours period if other qualified extra employes are available. One extra employe will not be permitted to displace another extra employe on an unfinished assignment.

(b) Extra employes will receive the compensation of the position to which assigned, together with proportion of commissions earned, or any other special allowances made, on the day or days the position is covered by the extra employe.

(c) Employes holding regular positions and giving notice of desire to relinquish same and go on the extra list of their own seniority district shall be relieved and placed on the extra list, with full roster standing, within thirty days from date of notice.

(d) Where work is required by the carrier to be performed on a day which is not a part of any assignment it may be performed by an available extra or unassigned employe who will otherwise not have forty hours of work that week; in all other cases by the regular employe."

"ARTICLE 29 RELIEF SERVICE BY REGULAR EMPLOYES

Regularly assigned employes will not be required to work at other than their regular positions, except in cases of emergency. When required to work temporarily at other than their regular positions, employes shall be paid at the higher rate of the two positions and in addition shall be allowed any actual necessary expenses incurred and straight time rate for time consumed in traveling and waiting enroute to and from such temporary assignment. In no event will the employe receive less pay than he would have received had he not been used in such emergency service."

Claimant asserts that, for whatever reason, he was assigned by Carrier to Worcester and under **Article 29** "stood in the shoes" of the regularly assigned agent and was therefore entitled to all the protection, rights and emoluments accruing thereunder. When he was replaced by Jackson, Claimant asserts that **Article 13** was violated since he was displaced from an unfinished assignment, and that he is due the travel allowance of a regular employee as stipulated in **Article 29.**

Carrier maintains that it is within their managerial discretion to rectify mistakes and to assign employees and reassign them in order to best meet the requirements of service. Carrier further claims there is no rule which prohibits it from transferring an extra employee from a temporary assignment which he is not qualified to fill. Carrier also denies that Claimant was a regular employee, and that therefore he is not protected by **Article 29.**

Although there is a plethora of awards dealing with the differentiation of "extra" from "regular" employees, there is a dearth of guidance for

application to the present fact situation and the specific Agreement to which we must look. This Opinion limits itself to these specific facts and the articles before us.

Claimant responded to Carrier's directive to go to Worcester. He had reason to believe that that was where he was to stay for a period certain. He made his plans and acted accordingly. Through Carrier's own mistake, Extra Employee Jackson was evidently miscast in his position at Guilford. This Board does not deny Carrier's authority to rectify its mistakes and take whatever personnel action necessary to protect its service, but we do not believe that Claimant should bear the price of this mistake. For these purposes, we find that Claimant had acted in good faith in proceeding to Worcester and was due the protection of **Article 29** as at least a "constructive" regular employee, standing in the shoes of the regular agent who would have been so protected against Carrier's action in this case. In this posture, Claimant can rightfully claim a violation of **Article 13** and his travel allowance under **Article 29**.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17472, DOCKET TE-16543

Initially we confess that we are at a loss to understand the first paragraph of the Opinion which reads as follows:

> "The facts in the instant case are not in dispute, but their interpretation and that of the existing Agreement are squarely in conflict."

To our mind, facts are facts and require no interpretation. How the facts or the interpretation of such facts, if such is possible, can be in conflict with the Agreement between the parties is beyond our comprehension. We hope

the Referee will enlighten us in a reply to this dissent. As we understand the situation, what is required is an application of the rules that have been agreed upon by the parties to the facts of the dispute. That has not been done in Award 17472.

The Referee's recitation of the facts in the second paragraph of the Opinion leads one to believe that he understood at least one essential fact by his statement reading:

> ". . . and consequently Carrier effected an exchange of these extra employes, . . ." (Emphasis supplied).

But this essential fact was overlooked or purposely ignored in the remainder of the Opinion.

We are in disagreement with the Referee that a "plethora" of awards exist dealing with the differentiation of "extra" from "regular" employees. There are many such awards and a number of them were furnished the Referee for his consideration, but no "plethora" exists. Neither are we in agreement that there is a dearth of guidance for application of the fact situation and rules involved in this dispute. The awards furnished the Referee make it clear that there are but two classes of active employes: viz; "extra" and "regular", and this is also clear from the Agreement. A "regular" employe would have been entitled to the travel allowance claimed in this dispute and also for any loss of compensation but which was not claimed in this instance. An "extra" employe was not entitled to such payments. Included in the awards furnished the Referee was Award 17432 of this Division involving the same parties, the same Agreement, as well as Article 29 thereof. Upon being furnished with copy of that award the Referee acknowledged it with a short derisive laugh and a facetious remark to the effect that he was happy to be enlightened by Referee Devine's award.

It is apparent the Referee recognized that there are but two classes of active employes and that Claimant, an extra employe, was not entitled under the Articles of the Agreement to the travel allowance claimed. However, in an effort to find some kind of ground on which to sustain the claim, for reasons not disclosed, he concocts out of the figment of his imagination a new designation of "constructive regular employe"; a designation that does not exist in the Agreement, nor anywhere else.

By holding that the claimant is a "constructive regular employe" this Board has, by interpretation, added a new designation of active employe to the Agreement between the parties and in doing so has exceeded its jurisdiction. Award 17472 is therefore invalid and of no force or effect.

G. C. White
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