

C E H

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22388
Docket Number CL-21883

Dana E. Eischen, Referee

(Brotherhood of Railway, Airline and
(**Steamship Clerks**, Freight **Handlers**,
(**Express** and **Station Employees**
PARTIES TO DISPUTE: (
(Norfolk and Western Railway **Company**

STATEMENT OF CLAIM: Claim of the System **Committee** of the **Brotherhood**
(GL-8248) that:

1. Carrier violated and **continues** to violate the **Agreement** when, without **proper** notice as **required under** Article VIII, Section 3 of **the** February 25, 1971 Mediation Agreement, it abolished **the** second shift Operator position at Bison **"F"** Office **and** combined the work **and/or** functions **with** that of clerical positions and non-contract clerical positions and refused to allow affected **employee C. Nestor who lost** her position as a result, **the** benefits provided for in Section 6 of Article VIII.

2. Claimant C. **Nestor**, shall be **allowed the protection** provided in **Section 6**, Article VIII, from the date affected as a result of **the abolishment**.

CARRIER DOCKET: CLK-BUF-75-166

OPINION OF BOARD: In **this case**, Claimant seeks a displacement allowance under Article VIII, Section 6 of the February 25, 1971 **Mediation** Agreement, alleging that she was directly or indirectly adversely affected by **the** application of Section 3 of that Article. The cited contract **provisions** read as **follows**:

"Section 3.

(a) **On** and after the dates seniority rosters are combined in accordance with the provisions of this Article, **the** Carrier may combine work **and/or** functions performed by clerks and telegraphers. **When** new positions are created and/or when positions are abolished as a result of the combining of such work **and/or** functions the carrier **shall** give at least 30 days **written** notice to the **General** Chairmen **involved**. Such new positions shall be assigned on the

"basis of seniority, fitness and ability (fitness and ability being sufficient, seniority shall prevail) to the employees affected by the **combining** of said work and/or functions and on the **basis** of their combined **roster** seniority. If the affected employees do not desire assignment to such new positions, the new positions will be bulletined to **employees** on the combined seniority roster. If rosters have been combined under Section 1(a) or **(b)** of this Article, the new positions will be designated **"C"** or **"T"** in accordance with the **designation of the initial employees** assigned to such positions. In the event an employee has no such designation, the designation will be determined by the Organization without liability to the Carrier."

* * * *

"Section 6. On and after the date rosters are **combined** under Section 1 of this Article employees on such rosters adversely affected either directly or indirectly, as a result of job **abolishments** resulting from the application of Section 3 of **this** Article, shall receive the protection afforded by Sections 6, 7, 8 and 9 of the Washington Job Protection Agreement of May 1936, except that for the purposes of this Agreement, Section 7 is amended to read 100% (less earnings in outside employment) instead of **60% and extended** to provide period of payment equivalent to length of service not to exceed 5 years, **and to provide further that allowances in** Sections 6 and 7 be increased by subsequent general wage increases. **"**

The **gravamen** of the claim on the property was that Carrier combined the work and/or functions of the former second shift operator position at Bison **"F"** tower with a non-contract position of Assistant Chief Clerk, after abolishing the **Operator's** position on June 6, 1975. The claim was filed on June 21, 1975 in favor of Ms. **Nestor and** asserted adverse affects upon her through the following chains of displacement: 1) Second-shift Operator position occupied by **H. Figura** abolished effective June 6, 1975; 2) Operator **H. Figura** exercised seniority and displaced **T. Lynch** from position of **Second-shift Assistant Chief Clerk**, effective **June 7, 1975**; 3) Clerk **T. Lynch** exercised seniority and displaced Claimant **C. Nestor from**

a position on the clerks' guaranteed Extra Board No. 1 effective June 7, 1975; 4) **Claimant** had insufficient seniority to hold a regular position on Buffalo **Terminal**, Seniority District No. 51 and was placed on furloughed status effective June 7, 1975. Thereafter, the instant claim was filed for **Ms. Nestor** by the Local **Chairman** on June 21, 1975.

Claimant **remained** on **furlough** until by letter of February 17, 1976 she was recalled to service to a position of **NoBill** Clerk. Claimant orally **notified** Carrier of her intention to protect the **NoBill** Clerk position effective **March** 1, 1976. But before she could **commence** work she was displaced from that position by a senior Clerk, W. Decker. Accordingly, **Claimant** again was placed (remained) in furlough status. Thereafter, she was recalled to service effective May 14, 1976. She declined the recall and instead requested a **personal** leave of absence which Carrier denied, but later granted upon appeal by the Local **Chairman**.

On **August** 3, 1976 Claimant was advised as follows:

"We have learned that you **worked** for Sisters' **Hospital** of Buffalo; New York as an **EKG** Technician on June 22, 23, 24, 25, 28, 29, 30, July 1, 3, 5, 6, 7 and 8, 1976 while you were absent from **work** on leave.

Rule 17-C of the Master Agreement provides: 'An employee absent **on** leave, or absent account of personal sickness or disability, who engages in outside employment without written **agreement** between Management and the General **Chairman** will be **considered** out of the service and automatically forfeits all seniority.'

As there was **no** written agreement **made** between the **Management** and the General Chairman to permit you to engage **in** outside **employment** during the period of **time** you **were** on leave of absence, you have forfeited all **seniority** and your record with this Carrier is closed."

No **exception** was taken to Claimant's termination but the claim filed on her behalf in June 1975 was still **pending** and was **not** resolved on the property. Following final denial on October 20, 1975 **proceedings** were instituted before this Board on July 8, 1976.

At the outset, Carrier raised several procedural/jurisdictional arguments which **must** be addressed. We find no violation of the **Time Limit** on **Claims** Rule since the claim was brought to us "within 9 months" of the top level denial **on** the property. Nor do we find that this claim is dismissible under the principle that substantial variation in the claim will not be permitted upon appeal. We do not reject the time honored view **that** substantial alteration or amendment of the claim is not permissible and constitutes a fatal procedural/jurisdictional defect 'under Section 3, First **(i)** of the Act. See Awards 20279, 20147, 20008, 19564 and 18322, et al. But, **however, we** continue to apply that principle within bounds of reason, recognizing that the Act does not elevate form **over** substance or technicalities over reality. Our Award 19573, quoting from 13229, made that point persuasively as follows:

"... Though the first paragraph of the Statement of Claim presented to this Board is not couched in the identical language used in the claim originally presented to the Carrier on the property it raises **substantially** the same issue as originally raised. It cannot, therefore, be seriously urged that the Carrier **has been** misled as to the issue or claim confronting it. Unless there is a real and substantial variance between the claim presented to this Board and the one presented to the Carrier on the property, this Board would not be justified in dismissing this claim; therefore, the request for a dismissal of this claim is denied. See Award **3256--Carter**; Award 6656 **--Wyckoff.**"

We think that the foregoing reasoning applies equally to the instant claim and we will not dismiss it out of hand. Finally, we do not agree with Carrier's assertion that the entire claim is rendered moot by Claimant's subsequent declination of work and her ultimate constructive quit. While these events and actions are relevant to the question of possible liability and computation of damages, if any, they do not render the underlying substantive claim entirely moot.

Turning to the merits, it is evident that to prevail on behalf of Claimant **Nestor** who was derivatively affected by the abolishment, the **Organization** must address persuasive **evidence**

that **Figura's** position was abolished "as a result of the combining of (his) work and/or functions" with those of the Assistant Chief Clerk. The **Organization presented** substantial eye witness evidence to **that** end which has been met only by **bare** denials from **Carrier**. Admittedly the evidence is circumstantial since it goes to work performed by the Assistant Chief Clerk before and after the **abolishment** but it nonetheless is substantial and persuasive, especially since Carrier has not effectively refuted it **on the property**. In lieu of rebutting the Organization's evidence, Carrier relies upon the **theory** of "**exclusivity**" to defend against the claim. The exclusivity concept **is** an interpretive tool **for** construing and applying ambiguous or general Scope **Rules** but in our judgment it has no place in the application of Article VIII, Section 3 of the **February 25, 1971 National Agreement**. Nor are we persuaded by Carrier assertions that so-called "Special Agreements" of October 26, 1965 and April 7, 1971 supersede the **requirements** of the February 25, 1971 Agreement in this case. So far as we can tell the so-called Telex Agreement of April 7, 1971 has no application whatever in the facts of the present case. As for the October 26, 1965 Implementing Agreement in ICC Docket 21820 **it** does not serve to **immunize** Carrier **from** liability for violating the February 25, 1971 Agreement.

Based upon all of the foregoing we shall sustain Part 1 of the claim. As for **damages** claimed in Part 2, on this record Claimant is entitled to Section 6 **protection** only between the dates of June 7, 1975 and May 14, 1976.

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

Part 1 of the Claim is sustained.

Part 2 of the **Claim is sustained** only to the **extent** indicated in the **Opinion**.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order** of Third Division

ATTEST:

A.W. Paulose
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1979.

