NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23177
THIRD DIVISION Docket Number CL23076

John J. Mikrut, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline 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 (GE8841) that:

1) Carrier violated the Clerks' Rules Agreement at Bensenville, Illinois when it failed and/or refused to promptly bulletin Revising Clerk-Grade B Position No. 89000 upon the retirement of occupant W. J. Pugesek.

2) Carrier shall now be required to compensate employe E. W. Harris au additional eight (8) hours at the pro rata rate of Revising Clerk-Grade B Position No. 89000 commencing on February 27, 1978 and all subsequent work days until the violation was corrected.

OPINION OF BOARD: Ou February 10, 1978, Carrier was notified by Employe W. J. Pugesek, Revising Clerk-Grade B Position No. 89000, that upon the completion of his vacation on February 18, 1978 he was going to retire from Carrier's service. Employe Pugesek retired as announced thus creating a vacancy in his position. Carrier, however, took no immediate action at that time to bulletin the vacancy or to abolish the position.

Several days later, on February 27, 1978, Claimant, Bill and Expanse Clerk Position No. 86620, filed a Claim protesting Carrier's failure to promptly bulletin Position No. 89000 vacancy. Said claim was denied by Carrier on March 10, 1978. Pursuant to said denial, however, Carrier, on March 8, 1978, as per Article II of the parties' existing Memorandum of Agreement, provided Organization with thirty (30) days' notice of its intent to abolish Position No. 89000. Said position was abolished effective April 7, 1978, as announced in Bulletin No. 164 dated March 23, 1978, and the remaining duties thereof were transferred to Revising Clerk-Grade B Position No. 89010.

Organization's basic contention is that Carrier violated Rules 3, 7 and 9 of the parties' Rules Agreement when it failed and/or refused to promptly bulletin Position No. 89000 upon the retirement of Employe Pugesek. According to Organization, "Carrier knew well in advance of the impending vacancy and therefore had the opportunity to either bulletin the position promptly or abolish it."

Additionally, Organization argues that since the abolishment of Position No. 89000 was not made known until March 8, 1978, then Carrier should have rebulletined said position, irrespective of the provisions of Article II, Section l(c), since said notification requirement, which is specified therein, was not fulfilled by Carrier.

In countering Carrier's procedural arguments, which will be offered herein later, Organization maintains that while Carrier does have the right to blank (abolish) a position, such right must be exercised in accordance with other modifying considerations such as the "prompt bulletining" requirement contained within Rule 9. Further, Organization maintains that the remedy which Claimant seeks in this dispute is not a "penalty" as Carrier contends, but is "only the pro rata rate on the workdays she would have worked the position had it been promptly bulletined as required by Rule 9(a)."

Carrier maintains that it possesses the unqualified managerial right to determine whether to blank a position either in whole or in part, and because of this, "it cannot be said or held that Carrier violated the Agreement in the instant case when Position 89000 was not bulletined during the period (February 20 through March 7, 1978) the Carrier was exercising its managerial prerogatives and judgement as to whether or not Position 89000 need be retained in existence." Thus Carrier argues that the "prompt bulletining" requirement specified in Rule 9 was not applicable until Carrier had decided to abolish Position No. 89000.

Further, Carrier contends that its March 8, 1978 letter notifying Organization of the abolishment of Position No. 89000 and all actions subsequent thereto, were in accordance with Article II of the Memorandum of Agreement, and, therefore, according to Carrier, were proper.

Apart from the merits portion of Carrier's arguments presented above, Carrier also proffers argumentation regarding various technical issues which have arisen in this dispute. In this regard, without prejudice to its basic position, Carrier asserts: (1) remedy requested by Claimant constitutes a demand for penalty payment and thus is improper since Rules Agreement does not provide for such a penalty and, moreover, Board is without authority to make such an imposition; (2) Claimant "received the same rate of pay as abolished Position 89000 for 21 out of 30 days of the total claim period," and the proper claim period, therefore, should be for 9 rather than 30 days; (3) because so many employes are senior to Claimant, if Position No. 89000 would have been rebulletined, "it is very likely that Claimant . . . would not have been the senior bidder on said position"; and (4) since Carrier provided Organization with required 30 days' notice of abolishment on March 8, 1978, the claim period should end on that date.

After carefully reading and studying the complete record in this matter, it is clear that the resolution of this dispute rests almost exclusively upon the interpretation and application of the ambiguous and seemingly contradictory language contained in Article II and Rule 9. In this regard, it is indeed unfortunate

that the parties have made little or no effort in their argumentation to resolve or comment upon the contradictory nature of these two cited clauses. Be that as it may, however, because of the particular set of factors which are involved in this instant dispute, and because labor agreements must be interpreted as whole documents rather than as parts, Article II and Rule 9 must be interpreted in combination and neither maybe ignored.

Throughout its presentation Carrier has contended that this dispute involves management's right to "blank positions either in whole or in part." While it is true that the dispute does involve the "blanking of positions," that statement is an over-generalization and is not completely accurate since Organization does not contest Carrier's right to blank positions, but instead, correctly contends that said blanking must be effectuated in accordance with the applicable rules. Also in this same context, it is further significant to note that Claimant's initial protest in this matter was filed on February 27, 1978 and was prompted by Carrier's alleged failure to promptly bulletin the vacancy in Position No. 89000. Carrier's thirty (30) day notice of abolishment of said position, however, was not sent to Organization until March 8, 1978, which was approximately 30 days after Employe Pugesek announced his retirement, 20 days after the retirement had taken effect, and 10 days after Claimant had filed her protest. Because of these determinations, Carrier's contention that Organization's claim is an improper infringement upon its managerial right to blank a position is rejected because the issue involved herein is not the abolishment of Position No. 89000 but rather the prompt bulletining of said position prior to March 8, 1978 when it was still considered to be a "vacancy."

Given the above conclusion, our attention once again turns to an analysis of Article II and Rule 9 and their application to the facts to this instant dispute. After carefully reading these clauses, it becomes quite obvious that each applies to a completely different set of circumstances. Article II, on the one hand, specifies that, "(I)n any case where Carrier decides to 'permanently discontinue a position', . . . a thirty (30) calendar day notice will be given," and that "(T)he requirements of this Article will apply only in case of a permanent abolishment (elimination-discontinuance) of a position . .." (emphasis added by Board). Rule 9, however, specifies that "(N)ew positions or vacancies (except those of thirty (30) calendar days or less duration) will be promptly bulletined in agreed upon places accessible to all employees affected for a period of five working days exclusive of Sundays and Holidays" (emphasis added by Board).

As can be seen from the preceding extrapolations, Article II applies to "permanently abolished positions" and Rule 9 applies to "new positions or vacancies of more than thirty (30) calendar days." In view of the particular facts which are present in this instant dispute, it is further clear that the issue involved is not that of a single abolished position, or a single new/vacant position, but rather the same position which was vacant for a period of time and then later abolished. Hence, what we are confronted with is a "dual-type" of situation which is covered in part by Article II and in part by Rule 9.

By applying the above considerations to this case, the Board can find no fault with Carrier's action relative to the March 8, 1978 Notice of Abolishment or with any related actions which were undertaken subsequent thereto. Carrier possesses the right to permanently discontinue Position No. 89000; the requisite thirty (30) calendar days notice was properly tendered; and all other contractual requirements were met. This Board concludes, therefore, that Article II was not violated, and any claim in this regard is rejected.

Concerning the matter of the vacancy which occurred in Position No. 89000 during the period of February 18, 1978 to March 8, 1978, obviously, such a situation is covered by Rule 9. Equally obvious is that this entire dispute could have been avoided had Carrier simply abolished said Position on the date on which it became vacant. "What should have been done" and "what was done," however, are two different matters; and though we might now hypothesize as to what course of action Carrier could/should have taken, we are constrained by the realities of the situation, and we must address ourselves to the known facts as they have been presented.

Following Employe Pugesek's retirement from service on February 18, 1978, Carrier did not immediately abolish Position No. 89000, as was its right to do, but, instead, proceeded in "... exercising its managerial prerogatives and judgement as to whether or not Position 89000 need be retained in existence" (Carrier submission, p. 23). This "exercise" took approximately nineteen (19) days and was completed on March 8, 1978, at which time Carrier submitted its Notice of Abolishment to Organization's General Chairman. It is at this point that the real controversy in this dispute occurred, and the pivotal question, therefore, is "Did Carrier's action in this regard violate Rule 9"? Or, given the specific language of Rule 9, stated more correctly, "Was the disputed vacancy 'promptly bulletined"'?

Carrier argues that no bulletining was required because it (Carrier) was contemplating the abolishment of Position No. 89000. Organization, however, maintains that Carrier knew of Employe Pugesek's impending retirement as early as February 10, 1978, and could have made its decision at an earlier date; and, more importantly, "(I)f Carrier would be allowed to use this reasoning, it could in essence, indefinitely 'contemplate' the abolishment of a certain position, thus violating the meaning and intent of Rule 9(a)" (Employe's Exhibit "E").

Obviously the term "promptly bulletined" is one which is extremely vague and susceptible to a great number of interpretations. A careful examination of the accompanying language contained in Rule 9 as well as a detailed reexamination of the complete record which has been provided, however, fails to offer any clue as to the "meaning and intent" of the disputed language. Of the many Board awards which have been submitted by the parties in support of their respective positions, only one is sufficiently on point with the facts of this instant dispute so as to make it helpful in this analysis. In Award 18554, Referee Rimer, in analyzing a delay of approximately three (3) weeks, in

a dispute between the same parties and involving the language of Rule 9, considered such matters as a "flagrant and unexplained delay," and "reasonable promptness" on the part of Carrier. As a result of these considerations, Referee Rimer concluded that "Carrier had acted with reasonable promptness" and, therefore, the three (3) week delay was not considered as being in violation of Rule 9. In similar fashion, because of Organization's failure to provide any specific showing that Carrier violated an express term of the parties' Rules Agreement and also because of the direction which has been provided by the above-cited Award, this Board must find that Carrier's actions in this instant dispute were reasonably prompt and, therefore, sufficient in compliance with the language contained in Rule 9.

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.

A W A R D

Claim denied and dismissed as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: 
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1981.

LABOR MEMBER'S DISSENT
TO
AWARD NO. *23177*, DOCKET NO. CL-23076
(Referee Mikrut)

After essentially all of the arguments involved in the instant case were set out in the majority's writings, the question was reduced to:

"Was the disputed vacancy 'promptly bulletined'?"

The obvious, and factually correct answer to that question is, NO! Rather than find that answer the majority goes on to examine why the vacancy was not "promptly bulletined" as required by Rule 9. They then determine that the term "promptly bulletined" is "extremely vague and susceptible to a great number of interpretations" and then settle on an interpretation which appears to uphold the Carrier and, coupled with Third Division Award No. 18554, appear to think that anything up to approximately three (3) weeks is "reasonably prompt." Award 18554 dealt with the successful bidder not being "transferred promptly" to his new assignment. As the majority there stated:

> "The substance of the claim rests upon 9(e) above and requires a determination of whether the Carrier was justified in deferring the transfer of the Claimant." (emphasis added)

After considering the "difficulties" Carrier had with obtaining personnel so the successful bidder could be transferred. the majority there proceeded to effectively hold that Carrier was justified in deferring the transfer. If one were to study the facts in that case, involving interpretations of Rule 9(e), as

opposed to the present case, involving Rule 9(a), one would surely find a distinction as between transferring an employe "promptly" and "promptly" bulletining a vacancy and it is most unreasonable to graft that interpretation of Rule 9(e) into Rule 9(a). For example, in Carrier's Statement of Facts in the matter covered by Award 18554, the Carrier states:

> "Prior to the commencing date of the instant claim, i.e., December 6, 1968, Claimant D. LaRue was the regularly assigned occupant of Road Caller Position No. 0960 which was assigned 3:00 P.M. to 11:00 P.M. Thursday through Monday, with Tuesday and Wednesday rest days, and with a rate of $25.0376.
>
> "On November 21, 1968, Carrier issued Bulletin No. 183 advertising for bids the position of Road Caller, Position No. 0959, assigned hours 7:00 A.M. to 3:00 P.M. Tuesday through Saturday, with rest days Sunday and Monday, due to the regularly assigned occupant thereof, Employe R. Richter, making application for and being assigned by bulletin, to another position. A copy of Bulletin No. 183 is attached hereto as Carrier's Exhibit 'A.'
>
> "On November 29, 1968, Bulletin No. 186 was issued, a copy of which is attached hereto as Carrier's, Exhibit 'B,' assigning Road Caller Position No. 0959, advertised in Bulletin No. 133 (Carrier's Exhibit 'A'), to Employe Larry Baltutis who was regularly assigned to a relief road caller position.
>
> "As a result of Employe Baltutis being assigned to Road Caller Position 0959, it was necessary to bulletin his regularly assigned relief road caller position, and this was done on November 29, 1968, through the issuance of Bulletin No. 187, a copy of which is attached hereto as Carrier's Exhibit 'C.' The relief position, as advertised therein, was assigned as follows:
>
> Sunday & Monday -Road Caller Pos. NO. 0959-7 A.M. to 3 P.M. - $25.0376
>
> Tuesday & Wednesday -Road Caller Pos. No. 0960 -3 P.M. to 11 P.M.- $25.0376
>
> Thursday -Road Caller Pos. No. 0961 -11 P.M. to 7 A.M.- $25.0376

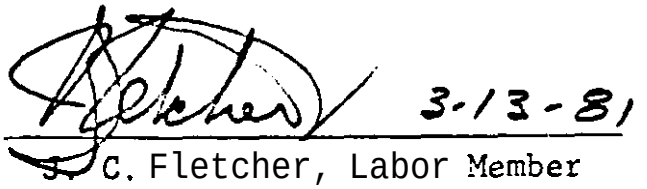
"On December 6, 1968, Claimant LaRue, the regularly assigned occupant of Road Caller Position 0960, was assigned to Employe Baltutis' regular assigned relief road caller position by Bulletin No. 199. a copy of which is attached hereto as Carrier's Exhibit 'D.'

"As a result of Claimant LaRue being assigned to relief road caller position advertised in Bulletin No. 187 (Carrier's Exhibit 'C'), it was necessary to bulletin claimant's regularly assigned Road Caller Position No. 0960 which was accomplished on December 6. 1968, through the issuance of Bulletin No. 200, , . . "

Did the majority really desire to determine what "promptly bulletined" means? If so, I would strongly suggest they should have looked at the facts involved in the only award which they felt was helpful. In Award 18554 the Claimant was assigned to Road Caller Position No. 0960. The chronology of events, set forth above, from Carrier's Statement of Facts, clearly show that each time there was a vacancy the vacancy was Promptly bulletined in compliance with Rule 9(a). In fact, the advertising bulletin was included in the bulletin advising of the assignment to the. prior advertised position, i.e., the vacancy created on November 29. 1968 by awarding the successful applicant to the position advertised on November 21, 1968, was bulletined on November 29, 1968. The vacancy created by awarding the position bulletined on November 29, 1968 was bulletined on December 5, 1968 at the same time as it occurred and Carrier there complied with the intent and meaning of Rule 9(a). In the instant dispute Carrier did not comply with the intent and meaning of Rule 9(a) and should not have been excused from doing so.

In the future, I would strongly suggest that the majority not be so intent on excusing Carrier's violations that they overlook the facts which clearly show a violation.

The award is in error and Rule 9(e) still requires that vacancies be promptly bulletined, even though Carrier was so gratuitously excused in this instance.



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R. C. Fletcher, Labor Member