NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25308
THIRD DIVISION Docket Number CL-25253

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9784) that:

(a) Carrier violated Rules 6, 11, 18 and others of the Clerks' Agreement when they awarded Position C-31 to an employe junior to Mrs. Edith Ruth Duke on July 27, 1978.

(b) Carrier shall now be required to place Mrs. Duke on Position C-31 and reimburse her for all wages lost as a result of such violation beginning on September 19, 1978 and for each day thereafter until violation is corrected.

OPINION OF BOARD: The specific focus of the instant case is Carrier bulletined position of July 19, 1978, for position of Crew Dispatcher C-31. It was awarded on July 27, 1978, to an applicant that Carrier maintains was senior to Claimant due to existing past practice on property which Organization maintains was in contravention to the Agreement in force and therefore awarded to the junior applicant. Claimant E. R. Duke contended she held seniority and should have been awarded the bulletined position.

Carrier argues a violation of Section 3, First (i) of tie Railway Labor Act in that the Organization failed, until its final letter, and over three years later, to indicate what Rule was violated and subsequently added additional Rules 11 and 18. A review of the case as developed on property indicates that Carrier had full and complete understanding in its initial and subsequent letters of the Rules under consideration and the full meaning of the grievance submitted. As such, this Board dismisses this position as due process was protected and the Rule violation cited by the Employes in their letter of April 23, 1982, includes by reference Rules 11 and 18.

The complete record before this Board shows that the past practice on this property for many years had been to allow female employes, who desired to do so, to exempt themselves from protecting clerical work with outside responsibilities. The record of negotiations under way between the parties in reference to Claimant's earlier letter of June 14, 1978, claiming unjust treatment, establish that such pest practice was relevant and agreed between the parties. It was not denied by the General Chairman that by long standing and locally agreed position for the benefit of employes a practice had been maintained, whereby in filling clerical positions with outside responsibilities, women would be allowed exemption and yet be protected in their seniority. The record as developed on property indicates that the General Chairman was aware of this practice. Further, the seniority list issued on March 10, 1978, and the Claimant's own acknowledgment of the existence of the practice by letter of October 12, 1978, wherein she states that "there are five clerks younger than myself who have regular positions" stands unrefuted. All participants were aware of the pest practice on this property.

As such, Carrier stands by its position that the employe awarded the bulletined position is the senior employe because of the past practice on property of not awarding outside clerical positions to women, and allowing those women to protect their seniority in that event. The Organization maintains that the clear and overriding contract language of Rule 6 requires Carrier to award the bulletined position to Claimant, who held seniority. That the Agreement would require Claimant to be given the position on the basis of seniority is unrefuted, and the Claimant grieved.

The issue in the instant case is whether past practice takes precedent over a collectively bargained Agreement. The language of the Agreement is unequivocal and the past practice is documented, known to all and of long duration. Each side has cited Awards as to its position and after a thorough review this Board finds that the case at bar turns over whether the General Chairman agreed to the past practice and consented to it, at which time it would have support, or dissented prior to the claim and thereby put the Carrier on notice that such local past practice would no longer be agreed to.

The Board holds that the General Chairman had long been aware of the existing practice at Ashland, Kentucky. In the case as handled on property the unrefuted statement and sole probative evidence of dissent, in pertinent part stated:

> "Our organziation has advised Carrier officers on numerous. occasions thqt with the passage of the Civil Rights Act of 1964 assignment to positions or failure to assign to positions could not be made on the basis of the sex of employes. We have further advised that if an employe is qualified for a position, the employe must be assigned to the position, regardless of sex:

It is the determination of this Board that this is not sufficient notice. That certain unnamed members of the Organization advised in some unknown manner by telephone, by conversation or letter certain unnamed Carrier Officers that the Civil Rights Act of 1964 had changed circumstances is insufficient. This Board must hold the Carrier responsible at all times for Agreement compliance. Where local employe officials with the knowledge of the Organization enter into practices for the benefit of their employes, without Carrier pressure, and establish long term pest practice, this Board must hold the Carrier for compliance with such practice. We find the only probative evidence of notice to Carrier of a rejection of past practice to be without the vivid end sharp clarity to put Carrier on notice that the General Chairman succinctly rejected the practice at Ashland.

Organization's contention that the Agreement is controlling in the instant case is rejected by the Board. Claimant's notification of grievance more then fifty days after the event also does not put Carrier on notice that accepted pest practice is disputed, but instead is a penalty against Carrier for acting in good faith (see Third Division Award 11607). This Board has long held that the burden of proof for any claim is the responsibility of the moving party. That burden has not been met here.

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 end 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1985.