Award No. 718
Docket No. CL-696

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

BROHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE ALTON RAILROAD COMPANY

STATEMENT OF CLAIM: "(a) Claim of Employes in the Division Accountant's Office, Bloomington, Illinois, from which certain Timekeeping and related clerical work was transferred to the office of Comptroller **June 11, 1935**, that their seniority rights were violated when the Carrier failed and refused to permit affected employes to follow their work and retain positions in the Comptroller's Office.

"(b) Claim of such employes so electing, that they now be permitted to follow their work into the Comptroller's Office with retention of full seniority dates and rights therein.

"(c) Claim that employes be reimbursed for all wage losses suffered as a result of denial of their rights and violation of their agreement."

EMPLOYES' STATEMENT OF FACTS: "(1) The Division Accounting Office stipulated and referred to in above statement of claim comprises a separate and distinct seniority district as provided for in Rule 4 of the Agreement revised and effective August 1, 1930.

"(2) Prior to June 11, 1935, there had been established and maintained in that Seniority District certain Timekeeping positions, the classification and rates of which had been fixed by agreement of the two parties to this dispute.

"Among such timekeeping positions in existence prior to June 11, 1935, were two positions classified, rated and assigned as follows:

1—Transportation Timekeeper, Rate $161.16, assigned to Mrs. B. M. Pleonse.

2—Transportation Timekeeper, Rate $150.20 assigned to L. G. O'Brien.

"(3) The duties assigned to and required on those two positions were prior to June 11, 1935:

Sorting all time slips by dates and positions.
Checking time slips against form reports of train roster.
Post time in time books.
Post all deductions such as watch orders, board, insurance, or other miscellaneous deductions.
Drawing off in detail all various classes such as work train, passenger, freight, local, and motor car expense, and mileage, overtime number of trips straight time worked, deadheaded and time held away from home terminal, also yard crews, days, preparatory time and overtime.

of the timekeeping as could be adapted to machine operation was taken away from the timekeepers at Bloomington, leaving only such work as could readily be handled by the two timekeepers who were retained.

"It is the contention of the Carrier that Mr. O'Brien could not follow such part of the timekeeping work as was transferred to Chicago, on account of it being performed by machine operators, for which position he had absolutely no qualification, and because no new position was created when the change was made. He could not displace other clerks in the Chicago office, because the schedule rule providing for departmental seniority would not permit it. His seniority was at Bloomington only, and this is supported by the fact that he availed himself of this seniority to again place himself in the office of the Division Accountant on January 11th, 1938, as stated above. If the position of the Employes that Mr. O'Brien should have followed his work to Chicago is correct, then he would have lost his Bloomington seniority and would have been prohibited from finally exercising his seniority there, as was done. If the tabulating machines and the punch machine operators were employed in the Division Accountant's office at Bloomington, which is a branch of the Auditing Department, there could have been no question raised as to the propriety of the change and the effect on Mr. O'Brien would have been the same. Therefore, the fact that the change resulted in the work going to Chicago has no material bearing in the case.

"It is apparent that this controversy arose because of Mr. O'Brien's disqualification as Asst. Price & Shop Order Clerk, as is indicated in General Chairman Moore's letter of October 17th, 1935, in which he stated that he had no grievance with respect to Mrs. Pleonse, the other timekeeper affected, because she had placed herself on another position in the same office. It was not until after failure of efforts to have Mr. O'Brien returned to the Division Accountant's office that the case was prosecuted on the basis that these two timekeepers should have been allowed to place themselves in the Chicago office. With respect to Mrs. Pleonse, any grievance on her behalf is improper, as General Chairman Moore in his letter of October 17th, 1935, waived all protest concerning her case.

"It is the Carrier's position that the removal to Chicago of such part of the work of timekeeping in the Bloomington office as could be adapted to machine operation was not contrary to any schedule stipulation, and that in this transfer Mr. O'Brien could not follow this work to Chicago, because of lack of qualification, no new position created, and separate seniority maintained for the Chicago office.

"The carrier further contends that Mr. O'Brien was given a fair trial on the position on which he placed himself at Bloomington, when displaced from timekeeper's position, that he was given more than reasonable assistance, and that his disqualification was because of his incompetency, and for no other reason."

OPINION OF BOARD: The essential facts of this controversy are not seriously in dispute. Its disposition must, therefore, turn largely upon the interpretation and application of certain rules of the agreement between the parties. Rule 4 establishes, among others, Seniority District 4 in the General Offices of the carrier in Chicago and Seniority District 10 in Bloomington, Illinois. Prior to June 11, 1935, two positions of transportation timekeepers were maintained in the latter seniority district. Mr. O'Brien, a claimant in the present dispute, occupied one of these positions. On June 5, 1935, the carrier, without any consultation with the petitioner or its local representative, announced its intention to discontinue the two positions in question "on account of the Trainmen and Enginemen Timekeeping now being handled by Hollerith tabulating equipment. . . . ." On June 11, 1935, the carrier, in pursuance of this announcement, discontinued the positions in the Bloomington office and transferred the work to the General Offices in Chicago. The carrier, while denying that any new positions were created in the

General Offices and while denying that new employes were engaged to handle the work so transferred, admitted that the equivalent of a day's work was added to the work of the General Offices in Chicago as a result of the change. The record indicates that with the exception of the typing of payrolls, the work formerly performed by the occupants of the positions in the Bloomington office has, since the transfer of work to Chicago, been performed by machines in the Chicago office.

At the time the carrier announced its intention to discontinue the two positions in question, it also announced that "employes holding these positions will place themselves on other positions as their seniority and ability permits." The carrier did not, however, offer to the employes involved any opportunity to follow the work formerly performed by them into the Chicago office. The two employes shortly after June 11, 1935 did bid in positions in the Bloomington office, Mr. O'Brien bidding in the position of Assistant Price and Shop Order Clerk. The carrier, at the expiration of thirty days, removed him from the position in question because of his alleged inability to perform the work required of him. The carrier, in taking this action, acted under the provisions of Rule 9 of the agreement. As there was no vacancy or position which Claimant O'Brien, in terms of his seniority and qualifications, could bid in, the carrier furloughed him. He continued on furlough until January 11, 1938 when he was again assigned to work in the Bloomington Seniority District.

The petitioner in support of the claim herein presented relies upon numerous rules of the agreement between the parties. It will not be necessary, however, to review all of the rules cited. Rule 4 establishes the various seniority districts on the lines of the carrier, including the one in the Bloomington office and the one in the General Offices at Chicago. Rule 5 sets forth the conditions under which an employe acquires seniority in a given seniority district. Rule 7, strongly relied upon by the petitioner, provides:

> "In case of transferring to another department or district under this agreement, employes will start as new employes and will forfeit only their seniority privileges. When a position is transferred from one district or department to another the employe may retain his position, and seniority will be shown on the roster to which transferred with date of his original seniority. Employes who do not elect to follow their positions may exercise their displacement rights as provided for in Rule No. 6. Employes promoted from one group to another (as established in Rule No. 1), will rank in such group from date of transfer, but will retain their seniority and may exercise displacement rights in the group from which transferred in the event of reduction of forces."

Rule 16, also relied upon by the petitioner, provides:

> "Established positions shall not be discontinued and new ones created under a different title covering the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

The position of the petitioner is, in brief, that the carrier in transferring the work in question from the Bloomington Seniority District to a seniority district in Chicago without the consent of the petitioner and without giving the employes of the first seniority district the privilege of following their work violated the rules cited, and are, accordingly, entitled to the relief asked for in the claim now before the Division.

The carrier in its submission asserts that the claim which the petitioner has presented to the Division is not the claim which it originally presented to it following the change of work complained of. It asserts further that "when the transfer of part of the timekeeping to Chicago was made on June 11, 1935, neither Mrs. Ploense nor Mr. O'Brien made any request to be

placed in the Chicago office, following their work." In a later connection the carrier asserts that "it was not until after failure of efforts to have Mr. O'Brien returned to the Division Accountant's office that the case was prosecuted on the basis that these two timekeepers should have been allowed to place themselves in the Chicago office."

The carrier, in making these assertions, does not clearly indicate their significance or its purpose in making them. It certainly does not draw from them the inference that the petitioner failed to discuss the claim involved in this dispute with the carrier as a condition of presenting it to this Division. The carrier may have intended to create the inference that the petitioner presented this claim only because it could not secure a satisfactory settlement of the claim that Mr. O'Brien had been mistreated when he was assigned to another position after the discontinuance of his former position, disqualified at the end of thirty days, and then furloughed. If this is the purpose of the assertions in question, the answer is that, if the agreement between the parties has been violated as claimed, the motive which prompted the petitioner to present the claim is not material. The carrier intimates, if not asserts, that if Mr. O'Brien could have been placed in the Bloomington office as satisfactorily as Mrs. Ploense had been, this controversy would never have arisen. This may be so. If, however, there has been a breach of the agreement, the petitioner should not be penalized by a denial of a claim based on an alleged breach merely because it attempted to settle one or both controversies on the property of the carrier.

It is likely that the carrier, in making the assertions quoted above, intended to create the inference that the petitioner by its conduct and the manner in which it handled the claim waived or relinquished its privilege to ask for appropriate relief for the alleged breach of the agreement. The evidence of record, however, does not support such an inference. The fact that neither of the employes affected by the carrier's action made a request to follow their work into the Chicago office has little probative value tending to show that they individually intended to surrender such rights as they had. As a matter of fact, the carrier offered them no opportunity to follow their work. The carrier states that "it was not until after Mr. O'Brien was disqualified that any protest was made." While the General Chairman may have been willing to forego the claim here presented as a quid pro quo for a satisfactory placement of Mr. O'Brien, his unsuccessful effort to effect such a settlement cannot be regarded as evidence that he intended to waive his rights with respect to the alleged breach of agreement which is now before the Division. The General Chairman, in his letter of July 29, 1935, to Mr. Langham, Division Accountant at Bloomington, and in later communications, clearly and unmistakably protested the action of the carrier which is the basis of the present claim. Although a separate controversy—the controversy with respect to Mr. O'Brien's alleged improper treatment when disqualified for the position which he bid in at Bloomington—crept into the correspondence between the parties, the Division is of the opinion that the evidence of record does not justify an inference that the petitioner by its conduct or the manner in which it handled this claim waived its privilege to ask for appropriate relief for the alleged breach of the agreement, the basis of the present claim.

On the merits of the controversy, the Division is of the opinion that the carrier, in the action that it took on June 11, 1935, violated Rule 4 and Rule 7 of the agreement between the parties. Prior to the time that the change complained of in this dispute was made, the employes of the Bloomington Seniority District, by virtue of Rule 7, clearly had a right to the positions in that district. These employes under the same rule just as clearly had a contractual right to follow these positions when moved out of the district into a new district.

The carrier insists, however, that the rules in question do not apply because no new positions were created in the Chicago office, that all of the

work formerly performed in Bloomington has been integrated to machine processes, and that there are not in the Chicago office, identifiable positions comparable to those which formerly existed in the Bloomington office. These statements may be taken as accurate. It cannot be denied, however, that two regularly established positions were discontinued in one seniority district, and that the work formerly covered by them has been moved into another seniority district. The carrier admitted that the equivalent of eight hours of clerical work was added to the work of the office in Chicago. The fact that the carrier was not required to create new positions or to engage new employes in the accomplishment of its purpose is not material. Nor is it material that the work transferred cannot now be identified in terms of positions. The purpose of Rule 7 would be largely defeated, if the carrier could escape the consequences of a discontinuance of positions in one seniority district, and a transfer of the work involved to another seniority district, by a distribution of the transferred work among different employes in the second seniority district. The fact that the work formerly carried on in the Bloomington office has been integrated to machine processes in the Chicago office is not a justification for a violation of Rule 7. If this integration had taken place in the Bloomington office, it is clear that the employes of that senority district formerly performing the work would have been entitled under the rules of the agreement to claim the work regardless of the titles of the positions under which it would have been performed. It seems equaly clear that these employes under Rule 7 enjoy the same privilege when the work is moved out of one seniority district and integrated to machine processes in another seniority district.

The carrier strongly urges that it was justified in taking the course of action in question because Mr. O'Brien was not qualified to perform the work as it was carried on in the Chicago office. This may or may not be true. In any event, if the claimant could not have qualified for the work as carried on in Chicago, the carrier under authority of Rule 9 could have disqualified him.

Under Rule 4 and Rule 7 the right to follow work into a new seniority district belongs not only to the occupants of the positions when they are transferred but to all employes of the seniority district from which the positions were moved. It follows that the carrier, on its own admission that it transferred the equivalent of a day's clerical work into the Chicago office, should have given the employes of the Bloomington Seniority District an opportunity to bid on at least one position in the seniority district to which the work was transferred. The Division, however, does not have before it sufficient information on which it can determine what position in the Chicago office the carrier should now bulletin for the benefit of employes in the Bloomington Seniority District. This is a problem which the parties should be able to settle in conference. It is accordingly referred to them for negotiation in accordance with this opinion.

The petitioner does not make a claim for wage loss on behalf of Mrs. Ploense as she is satisfied with the position to which she was assigned immediately after her former position was discontinued. The petitioner does, however, make such a claim on behalf of Mr. O'Brien. The carrier, having violated the agreement in the manner indicated, is under an obligation to compensate him for the wage loss which he has sustained as a result of its wrongful action. The exact amount of O'Brien's loss is a matter for further negotiations between the parties.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

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 carrier in the action that it took on June 11, 1935, violated Rule 4 and Rule 7 of the agreement between the parties.

AWARD

(a) The claim is sustained in accordance with the findings in the Opinion of the Board.

(b) The claim is sustained in accordance with the findings in the Opinion of the Board.

(c) The claim of Claimant O'Brien for monetary loss is sustained in accordance with the findings in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of August, 1938.

DISSENT TO AWARD NO. 718

This award is in error resting as it does upon the finding that Rules 4 and 7 were violated, which finding in turn rests upon the statements in the next to last paragraph of the "Opinion of Board" reading:

> "Under Rule 4 and Rule 7 the right to follow work into a new seniority district belongs not only to the occupants of the positions when they are transferred but to **all employes of the seniority district from which the positions were moved.** It follows that the carrier, on its own admission that it transferred the equivalent of a day's clerical work into the Chicago office, should have given **the employes of the Bloomington Seniority District** an opportunity to bid on at least one position in the seniority district to which the work was transferred." (Underscoring added).

The facts are undisputed that one of the occupants of the two abolished positions immediately exercised her seniority rights under Rule 7 to a position in the seniority district in which the positions were abolished and where she held such rights. The other occupant, a claimant in this case, acknowledged to be unqualified to perform the machine work of which such of the timekeeping work as was transferred to other seniority district was thereafter constituted, likewise exercised his rights in the seniority district in which the positions were abolished and where he held such rights; his later disqualification on the position thus accepted is not involved in a determination of the correct meaning and application of Rules 4 and 7. The rendition of this award however, does so fallaciously extend the wording and meaning of these rules, and particularly that of Rule 7, as to require exposure of the rule here in clear comparison with the opinion of this award. Rule 7 reads:

> "In case of transferring to another department or district under this agreement, employes will start as new employes and will forfeit only their seniority privileges. When a position is transferred from one district or department to another the employe may retain his position, and seniority will be shown on the roster to which trans-

ferred with date of his original seniority. Employes who do not elect to follow their positions may exercise their displacement rights as provided for in Rule No. 6. . . ."

The situation and the rule are before us: The first paragraph of the rule is not involved, as it refers to employes making voluntary transfer. The second paragraph is not involved, inasmuch as it relates to transfer **of positions;** even though it were conceded (and it is not) that this paragraph meant also transfer of work, the paragraph would not be involved in this case, for the work as it existed on the positions involved was not transferred; that part of it which remained in kind remained in the district in which the positions were abolished; that part of it which was changed to machine work was of a character which neither of the occupants of the abolished positions were qualified to perform. The third paragraph became directly and strictly applicable. Extended argument upon that obvious fact would be only a waste of words and effort.

The simple fact is that the finding of a violation of Rule 7 in this instance on the opinion that, ". . . . the right to follow work into a new seniority district belongs not only to the occupants of the positions when they are transferred but to all employes of the seniority district from which the positions were moved. . . .," is a capricious declaratory statement without semblance of foundation in the rule, in precedent, or, in fact, anywhere except in unwarranted and distorted interpretation of the rule and the purpose of the agreement.

/s/ C. C. COOK
/s/ GEO. H. DUGAN
/s/ A. H. JONES
/s/ J. G. TORIAN
/s/ R. H. ALLISON