Award No. 1151
Docket No. CL-1241

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that—

"(a) The Carrier has violated and continues to violate the current agreement by establishing on October 1st, 1939, a new position of Assistant Rate Clerk, rate $5.75 per day (rate adjusted to $6.04 per day, retroactive to October 1st, 1939), in the Local Freight Office at Shreveport, La.; the established rate of pay for a similar position in the same office, doing the same work, being $7.69 per day, and

"(b) That the Carrier shall now be required to establish the rate of $7.69 per day on the additional position established under the title of Assitant Rate Clerk, retroactive to October 1st, 1939; and to compensate employes for all wage losses suffered as a result of the Carrier's violation of our agreement."

EMPLOYES' STATEMENT OF FACTS: "On October 1st, 1939, and for many years prior there has existed in the Kansas City Southern Ry. Company's Local Freight Office at Shreveport, La., a position of Rate Clerk, rate of pay $7.69 per day.

"Effective with October 1st, 1939, the Louisiana & Arkansas Ry. Co. closed their Local Freight Office and Warehouse in Shreveport, La., and all work formerly done in this Office and Warehouse was taken over by the Kansas City Southern Ry. Co.

"A 'Memorandum of Understanding' (copy of which is attached and made a part of this submission) governing the operation of the coordinated Offices and Warehouses of the Kansas City Southern Ry. Co. and the Louisiana & Arkansas Ry. Co., effective October 1st, 1939, was signed on September 22nd, 1939, by the Representatives of the two interested Carriers and of the Brotherhood.

"Section 3 of this 'Memorandum of Understanding' reads as follows:

> '3. It is understood that the coordinated operation will be under the supervision of the Kansas City Southern, and covered by the agreement between the Brotherhood of Railway Clerks and the Kansas City Southern, except as herein specifically set forth, and as otherwise provided for under the terms of the Washington Agreement;

OPINION OF BOARD: As of October 1, 1939 the Louisiana & Arkansas Railway Company (hereinafter called the L. & A.) and the Kansas City Southern Railway Company (hereinafter called the K. C. S.) effected a coordination of their local freight forces at Shreveport, Louisiana.

The coordination was made pursuant to a **Memorandum of Understanding** between the two carriers and the Brotherhood dated September 22, 1939. The Memorandum listed the positions in the coordinated office and named the employes from each road who were to fill them, but said nothing about wage rates. The former L. & A. employes who were assigned to the coordinated office continued to be paid their old rates, which were lower than the K. C. S. rates.

The claim here, on behalf of one of these employes, is for the higher rate. The claim is based upon Clause 3 of the Memorandum, which provided that the coordinated operation would be under the supervision of the K. C. S. and covered by the agreement between the K. C. S. and the Brotherhood. Rule 58 of that agreement reads:

> "The wages for new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district where created."

The employes contend, and the carrier denies, that the positions assigned to L. & A. employes in the coordinated office were "new positions" within the meaning of Rule 58, and therefore should have been paid at the K. C. S. rates for similar positions.

The carrier makes two objections to our jurisdiction.

The first is that the employes are merely seeking a wage increase, which is a matter for mediation only. This argument rests on the following propositions: (1) The L. & A. positions in the coordinated office were not "new positions" within the meaning of Rule 58; (2) therefore there was nothing in the K. C. S. agreement to compel the payment of rates different from those set by the L. & A.; (3) therefore the claim is for a wage increase, over which this Board has no jurisdiction. Granted the truth of proposition (1), propositions (2) and (3) follow. But proposition (1) is the very issue to be tried. If, as the employes assert, these **were** "new positions" under Rule 58, then the K. C. S. agreement, by force of its terms, compels the higher rates, and the employes are seeking not a wage increase but the application of an agreement.

This Board certainly has jurisdiction to try that issue. The carrier's argument goes to the merits of the case, not to the power of the Board to hear it. Of course, if the Board should decide the ultimate issue in favor of the carrier, it would follow that the employes were seeking what they had no right to obtain and what this Board had no power to give them; but that would follow in every case decided adversely to the claimant.

The first ground of jurisdictional objection must therefore be overruled as a **jurisdictional objection;** it is simply another way of stating the issue to be tried.

The carrier next contends that if any agency has jurisdiction to decide this controversy it is the Arbitration Committee set up by Section 13 of the so-called **Washington Agreement** of May 21, 1936. That Agreement, pursuant to which the Memorandum of Understanding was made, was designed to facilitate coordinations; and the parties here, together with numerous other carriers and representatives of employes, executed it. Section 13 of the Agreement provided in part:

> **"Section 13.** In the event that any dispute or controversy arises (except as defined in Section 11) in connection with a particular coordination, including an interpretation, application or enforcement of

any of the provisions of this agreement (or of the agreement entered into between the carriers and the representatives of the employes relating to said coordination as contemplated by this agreement) which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement . . ."

Either party could have referred this case to arbitration under the above section. The carrier has argued otherwise, on the theory (which simply begs the question) that the claim was for a wage increase. The employes have argued otherwise, on the theory that the claim is based on a schedule rule,—which is only partly true, since the application of a coordination agreement is also in issue. Moreover the language of Section 13 is very broad, covering "any dispute or controversy" (other than certain realty matters covered by Section 11) "arising in connection with a particular coordination."

But though either party could have referred the case to arbitration and the other would have been bound thereby, neither has done so, or taken any steps to do so. The case has been brought here; it is within our jurisdiction since it involves a schedule rule; and in the circumstances just mentioned we see no impediment in the way of our proceeding, or any good reason why we should decline to exercise the jurisdiction we possess.

Section 13 does not set up an exclusive remedy. It does not say that coordination disputes "shall" be decided by arbitration, which is the usual language of arbitration clauses in agreements where the parties intend arbitration to be the exclusive remedy. Section 13 merely says that disputes "may be referred by either party" to the joint Arbitration Committee. To sustain the carrier's contention we should have to add to this phrase a clause reading: "and neither party shall have any other remedy." That may or may not have been the intention, but in the absence of any evidence of such intention we are scarcely at liberty to read into the agreement something which is not there.

We turn, therefore, to a consideration of the merits. And first it is proper to ask whether there is anything in the Washington Agreement or elsewhere in the record which sheds light on what the parties actually intended to be the consequences of making the K. C. S. schedule applicable to the coordinated operation.

The Washington Agreement provided a scheme of dismissal allowances and other safeguards for employes, including assurances that their wage rates would not be **lowered** as a result of shifting from one carrier to another. Nothing in the Agreement indicated any intention that rates should be **increased** in the process. The parties, of course, were free to make adjustments upward if they so wished.

Was that the intention of the Memorandum of Understanding in making applicable the K. C. S. agreement? The Memorandum said nothing about rates, and this omission was deliberate because the parties could not agree upon a rate provision, the carrier insisting that the rates of the L. & A. men, who were being assigned to the coordinated office, should remain unchanged, while the Brotherhood insisted that if they were to do both L. & A. and K. C. S. work the K. C. S. rates should apply. In the end the parties left out any rate provision and signed the Memorandum knowing that a controversy would follow. The carrier believed that the legal effect of the Memorandum was to leave the L. & A. rates unchanged. The employes believed that its legal effect was to make the K. C. S. rates prevail. How confident the employes' belief may have been is irrelevant, and consequently it is unnecessary to discuss the Mediation Agreement of November 8, 1939, in which the Brotherhood obtained certain incidental increases for the former L. & A. men through mediation rather than as a matter of contractual right.

We are reduced, then, to inquiring into the legal effect of the Memorandum, without any guide from the parties as to what they intended. We must take the document they signed and determine its effect from the language that was used, giving to that language its ordinary everyday meaning.

The Memorandum said quite simply that the K. C. S. agreement would cover the coordinated operation. There is no dispute about that, or about the fact that new positions arising in the coordinated office **after its establishment** would be "new positions" within the meaning of Rule 58. Clause 7 of the Memorandum specified how such "new positions," arising "on and after October 1st, 1939," were to be filled—implying that the positions specified in the Memorandum, effective October 1st, were not "new positions." Rule 58 itself, taken in conjunction with other rules in the K. C. S. agreement, suggests the same conclusion.

Rule 58 says that the wages for new positions shall conform to the wages "for positions of similar kind or class in the seniority district where created." This seems to imply a certain order of events: (1) A seniority district is established, with its original constituent positions. (2) Rule 58 then take effect upon it. (3) Positions thereafter created are "new positions."

Here, (1) the Memorandum of Understanding established a new, composite, seniority roster with employes from each road assigned to the constituent positions and taking their home seniority with them. (2) Rule 58 then took effect upon the coordinated office. (3) Positions thereafter created in the coordinated office would be "new positions" within the meaning of Rule 58, and as contemplated by Clause 7 of the Memorandum of Understanding, which specified how they should be filled.

The term "new positions," wherever used in the K. C. S. agreement, is consistent only with the above interpretation. It uniformly implies an increase in force in a previously established seniority district entitling the holders of existing positions to exercise their seniority. Thus, Rules 3 and 4 speak of the right to bid on "new positions"; Rule 6 speaks of the "seniority rights of employes to . . . new positions"; Rule 9 requires "new positions" to be "promptly bulletined . . . in the seniority districts where they occur," and covers the application of employes "desiring such positions"; and Rule 64 refers to "employes exercising seniority rights to new positions."

The term "new positions" as used in Rules 3, 4, 6, 9 and 64 is not applicable to positions filled by assignment in an agreement establishing a coordinated office. The term would, however, be applicable to positions thereafter created in the coordinated office. We think the same thing is true of the term "new positions" as used in Rule 58.

This conclusion does not involve a refusal to apply Rule 58 to the coordinated office. Rule 58 does apply, and applies fully, but the "new positions" it speaks of are those thereafter arising, which may be bid on and filled in the manner provided in Clause 7 of the Memorandum of Understanding.

It is true that the L. & A. by notice "abolished" the positions in its Shreveport freight office effective as of the close of September 30, 1939; and this is relied on to show that "new positions" were necessarily thereafter created. But the old L. & A. positions were never completely "abolished" except in a technical sense, because by the Memorandum of Understanding the employes retained their L. & A. group insurance, hospital and pass privileges, and were entitled, in case of displacement and upon exhausting their seniority in the coordinated office, to return to their home district, and for this purpose to retain and continue to accumulate seniority rights in the home district. Moreover the L. & A. contributed its share of the expense, including the wages, of the coordinated office.

Thus what actually happened was that the old L. & A. positions were transferred, with the seniority of their incumbents, into the new coordinated office created and supported by both carriers; and the constituent positions of this office, with their roots in both roads, had already been filled by agreement at the instant that Rule 58 took effect, so that they were not "new positions" within the meaning of that Rule or of any of the other Rules where the term is used.

Similarly, though the old L. & A. positions were, in a technical sense, "abolished," the former L. & A. employes assigned to the coordinated office were not "new employes" within the meaning of Rule 26, which calls for the approval or disapproval of applications of new employes within ninety days after the applicants begin work. Rule 26 applies to the coordinated office just as Rule 58 does, but the word "new" in both rules refers to what may occur after the establishment of the coordinated office.

There being nothing in the K. C. S. agreement to require an increase in the rates of the former L. & A. employes, this Board is without power to grant an increase. It may readily be conceded that the coexistence in the same office of two or more similar positions carrying different rates of pay is a novel situation which may lead to unforeseen complications and difficulties. But equally novel is the coexistence in the same office of two sets of employes, one of whom has come over from another carrier and retains seniority rights and other privileges accorded by that carrier, while at the same time enjoying seniority rights in the coordinated office and having the opportunity, as vacancies occur, to bid upon positions carrying higher rates than those paid by the home carrier.

The fact of the matter is that coordination is a new field which is just beginning to be tilled, and for that very reason obstacles which arise in the process should wherever possible be disposed of by mediation or arbitration.

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 current agreement was not violated.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of July, 1940.