Award No. 1887
Docket No. CL-1893

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that carrier violated and continues to violate the Clerks' Agreement:

(1) When on August 1, 1941 it arbitrarily appointed A. G. Robrecht to to a clerical position in the General Accounts Bureau located at 143 Liberty St., New York City, and failed and refused to bulletin and assign said position in accordance with agreement rules, and

(2) Said position shall now be bulletined to the employes of the Consolidated Accounting Department Roster and be assigned to the senior qualified applicant.

(3) That such senior qualified applicant and all other employes affected by reason of said violation be reimbursed for wage loss suffered retroactive to August 1, 1941.

EMPLOYES' STATEMENT OF FACTS: Effective August 1, 1941 the carrier created a new clerical position in the General Accounts Bureau at New York City, said position being filled by the appointment of A. G. Robrecht, whose seniority date is January 1, 1919, and who prior thereto had been employed as Clerk in that same office at rate of $175.20 per month.

Since being appointed to the newly created position here in dispute Clerk Robrecht's duties have been similar, in many respects, to those of the position vacated by him, but the carrier has refused to bulletin and assign the position in accordance with the agreement provisions, its contention being that Clerk Robrecht now performs some work formerly performed by the Comptroller, Mr. Bayfield, and that the position is therefore an excepted position and not subject to the application of agreement rules.

The carrier and the organization have mutually agreed upon excepted positions in the Comptroller's office and the General Accounts Bureau, these positions being designated as Chief Clerk, Personal Secretary and General Accountant in the Comptroller's office, and the position of Chief Clerk in the General Accounts Bureau as shown on list of agreed upon excepted positions. Exhibit "A."

POSITION OF EMPLOYES: There is in effect an agreement between the parties bearing effective date of March 1, 1939 from which the following rules are quoted:

places accessible to all employes affected, in the district where they occur for a period of five (5) working days, except in Bethlehem and Philadelphia General Offices, Traffic Department (New York), No. 6 Broadway, and Assistant Freight Claim Agent's Office, where the period shall be three (3) working days.

"Unless otherwise mutually agreed, Group 2 positions will not be bulletined, but Group 2 employes will, upon request, of the supervising officer, be allowed to exercise seniority rights to such positions, subject to the Note in Rule 29."

It will be noted that the rule requires only "Group 1—New Positions" to be bulletined. Examination of the positions listed in the Scope Rule as Group I shows no position similar to this, or that could be identified with it by name or by nature. No such position existed prior to August, 1941, nor was there any such position in the contemplation of the parties when the agreement with the Brotherhood was executed.

"Group 1" of the Scope Rule cannot be stretched to cover this position. The coverage of that rule is limited to the positions listed therein. If it can be arbitrarily extended to include every position involving some incidental work of a clerical nature, there is no job on the railroad that might not be claimed.

A clerk, as defined by the agreement, is an employe who devotes four hours or more regularly to the writing and calculating incident to keeping records and accounts, etc. (Rule 2—Definition.) Since the entire work of the Comptroller's Department is the keeping of accounts, whatever any member of it does, might be called incidental to that work. That applies equally well to the work of the Comptroller himself. The point is that Mr. Robrecht's work is not **regular routine** clerical work, such as is clearly contemplated by the rule, but original creative work, varied in nature and in no sense regular or routine. To attempt to bring such position within the Scope Rule is not only unreasonable and illogical, but a plain distortion of the rule.

In conclusion the Carrier submits that Mr. Robrecht's position being that of a confidential assistant to the Comptroller, is official and not clerical within the meaning of the Scope Rule. It is not one of those included in Group I of that rule, either expressly or impliedly. As Rule 42 requires only the bulletining of positions listed in Group I, there was no violation of the rule in failing to bulletin Mr. Robrecht's position. There is, therefore, no merit in the claimant's contention and the Carrier respectfully submits that the claim should be denied.

OPINION OF BOARD: Stripped of all repetitious argument, this dispute resolves itself into two relatively simply stated propositions, but their resolution confessedly is not so simple.

These propositions are: (a) The Carrier created a new **official** position, which admittedly the agreement does not cover. (b) The work done by Robrecht was not of the clerical character covered by the agreement. If both of these propositions can be resolved in the affirmative the claim must be denied, otherwise sustained.

The Board is of the opinion that neither of the above propositions can be resolved in the affirmative.

(a) It may be that the Carrier tried to create an official position here, but its own admission shows that it was not accomplished. The Carrier very frankly says in explaining the reason for not asking the approval of the President for the creation of the position "It was simply that the Comptroller wished to select the appointee himself and feared that he could not do so if a high sounding official title were given the position. * * * There is a distinction between selecting a member of the comptroller's force to assist him in

his own work without title, and formally establishing the position with an official title." We agree that there is such a distinction, and that the only way the work can be taken out of the agreement by the "official position method" is by **formally** establishing the position as "official." The title may not be so important but the formalities of making it an official position must be complied with. Quoting again from the Carrier: "The head of the department can usually control the one situation but not always the other, and there was the probability in the latter case that the appointee might come from outside the department, which would be not only unfair to the Comptroller's force but also unsatisfactory to the Comptroller." Here we have an honest confession of discrimination, which we can understand from the viewpoint of an official wanting to protect one of "his own boys," but clearly in violation of the seniority rights of claimant and others. Surely this Carrier may not ask this Board to approve an action he was afraid to submit to the President of the railroad. There was no official position created in this instance.

(b) On the second proposition Carrier says it is willing to let its case stand or fall on its Exhibit 3, which consists of fifteen pages of small print, columns, figures, and data, being "a cost study compiled in the office of the Interstate Commerce Commission in Washington in connection with a rate case, known as Docket No. 28,300." Carrier says "Exhibit No. 3 was not compiled by Mr. Robrecht, or any other employes of the Lehigh Valley Railroad Company."

The only purpose it was intended to serve in this case says the Carrier (Comptroller) "This and many similar cost studies are presented in rate cases and the exhibit (3) is merely an example of one of many such exhibits prepared in rate cases in which I found it necessary to employ some additional help to study and collaborate with me * * *." (Does a high executive officer of a railroad speak of an associate officer as "additional help?" Hardly.)

Carrier says Robrecht was a man of 23 years experience in the department of accounts, and possessed unusual qualities. It is not reasonable to suppose that none of the 82 men who outranked him in seniority were not as well qualified, and we believe it fair to say that many of them could do everything in relationship to Exhibit 3 that was required of the Carrier in connection with this case. We think the work is covered by the agreement.

One rule which was not particularly relied upon but which we think important in connection with this case is No. 9 of the agreement which reads (omitting surplusage as applied here): "When there is a * * * change in the character of the service required * * * established positions will not be discontinued and new ones created * * * under different titles covering relatively the same class or grade of work, which will have the effect of * * * **evading** the application of these rules."

Rule 82 provides how these rules may be modified. No attempt at compliance was attempted.

We think the claimant has made his case and that the claim (1, 2, and 3) should be sustained.

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

Carrier has violated the agreement and claim (1, 2, and 3) should be sustained.

AWARD

Claim (1, 2, and 3) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of July, 1942.

DISSENT TO AWARD NO. 1887, DOCKET CL-1893

No demonstration is needed of the maxim that a record misconceived, taken as basis for interpretation of an Agreement, can result in anything but a confused and incorrect interpretation. Such is the result of the expressions in the Opinion of Board, as they will here be consecutively noted:

In paragraph (a) of the Opinion it is held "that the only way the work can be taken out of the agreement by the 'official position method' is by **formally** establishing the position as 'official.' " Such formal establishment, of course, could be only by the Carrier's unilateral action, extraneous to any provision of the Clerks' Agreement, because the Agreement is wholly void of any reference thereto.

If the omission of formal but unilateral procedure by the Carrier, extraneous to any provision of the Agreement, gives basis for the decision that the Agreement was violated, certainly it is fair to conclude from the same declaration and reasoning that if the Carrier had employed such formal though unilateral procedure in establishing an official position the Agreement would not have been violated. Such holding would not be acceptable even to the beneficiaries of this Award, and it is clear demonstration of the Opinion's fallacy.

The inapprehension next apparent in the fourth paragraph of the Opinion, apparently resulting from the omission of a sentence from the Carrier's position essential to an understanding of the sentence which the Opinion does quote, may be exhibited briefly and fairly by quoting completely the full paragraph from which the quotation is taken.

> "The next criticism relates to the Carrier's reason for not giving an official title to the position. That reason was set forth in Carrier's Oral Argument and discussed orally at the hearing. It was simply that the Comptroller wished to select the appointee himself and feared that he could not do so if a high-sounding official title were given the position. The statement of the employes that they would have protested if the President had made the appointment is beside the point. There is a distinction between selecting a member of the Comptroller's force to assist him in his own work without title, and formally establishing the position with an official title. The head of the department can usually control the one situation but not always the other, and there was the probability in the latter case that the appointee might come from outside the department, which would be not only unfair to the Comptroller's force but also unsatisfactory to the Comptroller. There is no doubt that he handled the situation in the best interests of all concerned."

Now note the conclusion of the Opinion, viz., "Here we have an honest confession of discrimination, * * * clearly in violation of the seniority rights of claimant and others." That declaration is discredited and confounded by any real apprehension of the Carrier's position as above quoted, as it is by the facts of the record. The facts are undenied that Robrecht, who was appointed to the new position, was promoted from a position covered by the Clerks' Agreement and given a rate of $45.00 above that which he had previously received. Certainly there was no unjust discrimination there.

The next fact is taken from the Employes' rebuttal statement in this record reading:

> "The vacancy caused by Mr. Robrecht's appointment was bulletined and awarded to Mr. B. Frank Hendricks (See Docket 1891) disregarding the application of Mr. Nolan."

Award No. 1888 in that Docket CL-1891, concurrently rendered by the Referee rendering the instant Opinion and Award, speaks for itself in its Opinion, flatly declaring "that there is no basis for the deduction that the discrimination there (this Award 1887, Docket CL-1893) was general against all those who were on the other seniority districts etc.," and that included the claimant Nolan in Docket CL-1891, who by Award No. 1888 was denied the right to promotion to the position vacated by Robrecht. Certainly there can be no doubt that there was no unjust discrimination found against the claimant Nolan in Docket CL-1891, who made claim for the position vacated by Robrecht and filled by Hendricks. The Award, No. 1888, in Docket CL-1891, so found.

That Award, No. 1888, broke any possible chain of discrimination, declared by the Opinion in this Award, No. 1887, to be found in the circumstances of Docket CL-1893. Confirmation of discontinuance of any chain of discrimination is found in the Opinion in the next and last of these three cases of concurrent Awards, Award No. 1889, Docket CL-1892, which Awards declares that "in the absence of anything but a suspicion of bias on the part of the Carrier, we think no monetary loss should be recovered etc.," —a definite finding that there was no bias or discrimination,—only a suspicion of it.

With Awards 1888 and 1889 in those two Dockets, CL-1891 and CL-1892, which of themselves might definitely present a question of bias or discrimination, declaring it not to be found therein, it is pure sophistry to attribute discrimination as an element or as a basis for upholding the claim in the instant case.

Clearly in this case there could have been no question of bias or discrimination between persons; the Opinion to that effect is fallacious. Equally as clear is it that the question presented by this dispute was a substantive one of whether or not work had been removed from the Clerks' Agreement. The Opinion in that respect, to the effect that the omission of the Carrier's formality in creating an official position (an element not covered by the Agreement) constituted a violation of the Agreement through removal of work therefrom, is so lacking in reason as to be self-condemning of its error.

In paragraph (b) of the Opinion it is stated that the "Carrier says it is willing to let its case stand or fall on its Exhibit 3," and then proceeds to quote brief extracts from that which the Carrier did say. This absolute statement, that the Carrier said it was thus willing, is as incomplete in respect to that which the Carrier did say and mean as is the abbreviated quotations which follow from the Carrier's statements in giving the meaning of that which was said by the Carrier. Such limited quotations and the impropriety,

to say the least, of attributing meaning not intended can be shown most clearly, without further comment, by simple extraction from the record of that which was said.

First, as to the willingness of the Carrier in respect to its Exhibit 3, note the complete paragraph in which statement in that respect appeared:

> "No disinterested person who will examine the evidence submitted by the Carrier as to the nature of the work performed by Mr. Robrecht, particularly Carrier's Exhibit No. 3, will seriously contend that there is any similarity between it and the work ordinarily done as a matter of routine by the clerks in the Accounting Department, including the office of the Comptroller. The carrier could confidently rest its case on Exhibit No. 3 without further argument. However, examination of Carrier's Exhibit No. 2, in which Mr. Robrecht outlines the nature of his duties on the new position, so conclusively establishes the distinction between the work he was doing and that performed by any other clerk on the railroad, that any attempt to show that they are similar in any respect is futile."

Next, in respect to the further abbreviated quotations:

The further extractions in that paragraph (b) and the succeeding paragraphs are paraphrases of that which was said by the Carrier as the last matter of record in the file, and it thus stood without refutation by the Petitioner. It was the complete explanation of the Carrier in respect to the representations of the Employes, which latter were indeed brief enough as the record will show. The Carrier's explanation was in the form of a letter by the Comptroller to the Carrier's representative, clearly exhibiting the real situation in respect to this Exhibit 3 which did of itself evidence in all reasonable and practical consideration that the person filling a position responsible for handling that work would be one in official capacity. The full letter is here quoted:

> "Returning herewith Mr. Haines' letter of May 16, 1942, relative to the controversy with the Union in regard to the position held by Mr. Robrecht as my Assistant. I am returning herewith all papers which were attached, which include the employes' answer to Carrier's rebuttal brief. This answer very clearly shows how little Mr. Buckley (General Chairman) knows about the work performed. He states that sheets 199 and 200, exhibit No. 3 is a yearly summary of charges to Maintenance of Equipment Form Ga 184. He follows this up by saying that sheets Nos. 201 and subsequent are yearly summaries of system freight train car expense for the Transportation Dept. and sheet No. 202 is a yearly summary of Maintenance of Way and structure charges, Form GA 173. Similar descriptions are given to other pages in exhibit 3.
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> "They go on further to say that the work performed on the yearly reports, being done by Mr. Robrecht, was simply taking information from the 12 monthly reports and assembling it for the one or yearly report.
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> "Not one of these statements has the slightest foundation in fact. First of all, I will say that Mr. Robrecht does not assemble any records from GA 184 or GA 173, he does not make the annual summary of these statements but that they are prepared in the Auditor of Disbursements office by the statistical clerk who has done this work for years and I doubt if Mr. Robrecht has ever even seen the statements GA 184 and GA 173 or any of the other statements attached to Mr. Buckley's letter.
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> "Exhibit No. 3 was not compiled by Mr. Robrecht and was not compiled in the offices of the Lehigh Valley Railroad, but was compiled for Docket 28300 in the Cost Study Department of the Inter-

state Commerce Commission in Washington. This and many similar cost studies are presented in rate cases and the exhibit is merely an example of one of many such exhibits prepared in rate cases in which I found it necessary to employ some additional help to study and collaborate with me in determining whether the formula for division as between the cost of various services was satisfactory to us or whether we would raise any objections in the rate case hearings in which such exhibits were presented. Take, for instance, exhibit 3, page 200—the figures in column 3 show various selected M.E. accounts, also equipment rental accounts, and it will be noted that several of the accounts do not appear on this form GA 184 which is probably immaterial because, as I stated above, Mr. Robrecht had nothing whatever to do with form GA 184 and did not insert the figures shown in column 3, page 200 of your exhibit No. 3.

"However, the principal work involved in analyzing this page 200 is first of all to check the apportionment factors as shown by column 4, and it will be noted that some changes were made in that, then to figure out the allocation as between locomotives road and yard, then to figure out the proper apportionment of freight train cars between a mileage proportion and a time proportion. This latter item is one of the controversial items as division of this kind is merely on a more or less arbitrary basis which, in the opinion of the maker of the statement might be justified. We analyze this and after determining that the calculations are correct we then decide as to whether the percentages are acceptable to us or not. Page 2 does not contain any of the expense accounts but does contain various factors arrived at by use of regular statistics based on special studies made for the purpose of obtaining some of the factors. It then becomes necessary for us to determine whether these studies would produce a correct result when applied to the expenses. Page 202, column 3 shows expenses taken from the annual report to the I.C.C., which are then divided on a formula proposed by the maker of the exhibit to indicate the amount of expense in running service, train switching, yard switching, station service or general overhead.

"It should not be necessary to go much further into the rebuttal of Mr. Buckley's letter of May 14, 1942, because it is plain that Mr. Buckley has not the slightest conception as to what exhibit 3 consists of and certainly he is entirely in error when he states that it was made up by Mr. Robrecht from GA 184 and GA 173. As stated above, it was not made up by Mr. Robrecht at all, was not taken from GA 184 or 173 and Mr. Buckley's statement in paragraph 6 on page 2 of his letter of May 14, 1942, is wrong in every respect."

Even without the facility to review the forms of Exhibit 3, which were too extensive for attachment hereto, it will be apparent to anyone with knowledge of the study and analysis required in connection with a rate case before the Interstate Commerce Commission that peculiar and definite knowledge, attainments, and experience, attaching by the very nature of circumstances to an occupant of an official position, would be the requisite for the position which the Comptroller of this railroad required in this instance. If there had been demonstration of some substance contrary to that which the Comptroller asserted in the above letter, some justification for an inquiry or possibly a review of the situation may have been warranted. But this record, as stated, contained not even refutation, let alone substantive demonstration of anything contrary.

Yet what is the Opinion's disposition of it? Consider these:

"(Does a high executive officer of a railroad speak of an associate officer as 'additional help?' Hardly.)"

And then following in the next paragraph with the unrealistic declaration, contrary to such evidence as the record contained as to the needed qualifications for the position, and reckless of consequences, that:

> "It is not reasonable to suppose that none of the 82 men who outranked him in seniority were not as well qualified, and we believe it fair to say that many of them could do everything in relationship to Exhibit 3 that was required of the Carrier in connection with this case."

And the conclusion:

> "We think the work is covered by the agreement."

Comment would be superfluous.

If further prima facie basis for condemnation of this Opinion were needed, reference to the last three paragraphs, the first of which deals with Rule No. 9 of the Agreement, would be all that is necessary to cite. That Rule, of general inclusion in Clerks' Agreements, stipulates that "* * * established positions will not be discontinued and new ones created * * *," having the effect of evading the application of the rules. The next paragraph of the Opinion then proceeds to say that there was no attempt to comply with Rule 82, which "provides how these rules may be modified." This is the rule customarily referred to as the "terminating rule" and is also of general inclusion in Clerks' Agreements.

The next and final paragraph thereupon concludes "that the claimant has made his case and that the claim (1, 2, and 3) should be sustained."

Such misapprehension of facts and misunderstanding of a rule (Rule 9) which refers to discontinuance of positions when in fact there was no discontinuance of a single position involved by the case, either under the Agreement or outside the Agreement, but, to the contrary, an addition of one position, followed by an attempt to apply a rule, 82, providing for method of modifying the Agreement, to a dispute which only related to a change in rate of pay or working condition as covered by the Agreement, constitutes such inapprehension or disregard of record, rule, and evidence as to warrant all that has been stated by, or in the absence of the complete record in the case for review, that which properly may be inferred from this dissenting opinion.

The Award is unreal, unsound, unwarranted, and a misinterpretation of the Agreement with which it deals.

/s/ C. C. Cook
/s/ R. F. Ray
/s/ R. H. Allison
/s/ A. H. Jones
/s/ C. P. Dugan