Award No. 4291
Docket No. CL-4092

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Le Roy A. Rader, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) Rule 3-C-2 was violated by the Carrier when positions of Truckers, Philadelphia Transfer, held by Pattie S. Hayes, Mary Gambrell, Eula O. Smith, Ora Dorsey and others, were abolished effective May 13, 1946 and the work assigned to Contract Employes not covered by the Rules Agreement.

(b) These positions be re-established and the incumbents, as well as any others adversely affected, be compensated for any monetary losses sustained. (E-355, E-357 & E-358)

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes, between the Carrier and this Brotherhood, which is on file with your Board, and will be considered as a part of this Statement of Facts. Reference to various Rules thereof may be made herein from time to time without quoting in full.

The Claimants were employed as Truckers (freight) at Philadelphia Transfer, Philadelphia, Pa., until May 13, 1946, when the positions held by them were abolished. Subsequently the work of these abolished positions was performed by Contract Employes, who are not covered by the Rules Agreement.

The Claimants held seniority in Group 2 on the Philadelphia Terminal Division and were prevented from exercising seniority to other positions by the Carrier; nor were they permitted by the Carrier to return to their former positions which were being filled by Contract Employes commencing May 16, 1946.

It is agreed between the parties that this claim has been properly instituted and progressed in accordance with Rules 7-A-2 and 7-B-1 of the Rules Agreement, effective May 1, 1942.

POSITION OF EMPLOYES: This dispute is submitted to your Honorable Board to determine whether or not the Carrier can abolish positions of Trucker, established under the Rules Agreement and assign work of the abolished positions to employes of an outside agency who hold no rights under the Rules Agreement, and if not, are the employes thus affected entitled to be restored to their former positions and be compensated for any monetary losses sustained.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreements between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION.

The Carrier has shown that under the applicable Agreement between the parties to this dispute the Claimants are not entitled to be restored to service or receive any compensation because of their failure to comply with certain mandatory provisions of the controlling Agreement.

It is, therefore, respectfully submitted that the claim finds no support in the applicable Agreement and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts, contentions of the parties, citation of awards and rules of the effective Agreement, are fully set out in the submissions presented.

The great majority of claimants are females, who entered the Carrier's service during the manpower shortage occasioned by World War II. It is contended that they acquired seniority rights under the Agreement, and that they are covered by the Scope Rule and Rule 3-C-2. On May 11, 1946 claimants received the following notice:

> "Effective at the close of business Monday, May 13th, your assignment as extra trucker is discontinued."

It is further contended in support of the claim that while Carrier refers to the assignments as that of "extra trucker", it admits that they held seniority rights; also, that the work performed by claimants was immediately thereafter turned over to an independent contractor. It is alleged that by reason of the action taken, claimants were denied their seniority rights to displace a junior employe, although new men were employed and contract employes used. Cited on behalf of claimants in support of their position are Awards 180, 323, 331, 360 385, 751, 1647, 1771, 2006, 2701, 2988, 3060, 3251, 3423, 3587, 3687, 3825 and 3826.

On the proposition that "there were other positions at this location to which the work of the abolished positions should have been assigned * * *," there are cited Rule 3-C-2 and Awards 3583, 2825, 2826, 3870, 3871, 3877, 3878, 4043, 4044, 4045, 4086 and 4140.

Claimants do not request a penalty for the alleged violation, but do ask that their positions be reestablished and that they be compensated for monetary losses sustained.

Carrier contends that it acted within the rules of the Agreement in discontinuing claimants on the date in question, and cited on behalf of the Carrier are Rules 3-A-1 (a), 3-A-1 (c), 5-C-1, 4-A-8, 3-C-1 (e), 2-A-1 (b) and (c), 3-C-3 (a), (b), (c) and Award 4049.

Award 4049 rendered on August 10, 1948 deals with the same parties and Agreement as does this dispute and holds:

> "* * * We think that the provision of the rule (3-A-1 (c)) which expressly covers a new employe, or, as in this case, a transferred

employe, and says that his seniority cannot be established until he has received a bulletined position controls; * * *."

and

"The importance of seniority to employes is so great, that there should be fixed and settled rules for the guidance of the Carrier. Ordinarily, it is of little consequence to the Carrier as to who holds seniority in a given office or craft. Fixed and definite rules benefit the employe, and serve to prevent injustices. We are of the opinion that the common interest of all employes will be best served by construing the rule here involved as requiring seniority to date from the day an employe begins work on an established position, then in process of being bulletined and awarded, and not at some date, many times vague and uncertain, when an employe may have performed intermittent work in the same office or district, with no seniority rights therein, or any assurance of a situation arising under which such rights would develop. * * *"

Claimants stress the finding made in Award 3587:

"* * * However, these positions * * * were full time positions requiring eight hours work, and it appears that when they were established as such * * *, they were properly filled by persons brought under the Agreement. It is clear that the work involved comes within the scope of the Agreement, and the failure of the Carrier to establish this work as a regular position for a period of more than seven months, and during this period use persons not covered by the Agreement to perform the work on a full-time basis, in our opinion, constitutes a clear violation of the Agreement. * * *."

The above constitutes a brief review of the record in this case and the contentions and arguments of the parties. To review the entire record and supporting arguments is not deemed necessary and such review would needlessly extend this Opinion.

Carrier presents many technical arguments to show that the positions in question were not regular but were extra positions. Also, that the claimants could have done several things to more carefully protect their job status, which they failed to do. However, the fact remains that claimants and others similarly situated held these positions over a long period of time, working every day, overtime, etc. The fact situation brings this claim within that as previously passed on by the Board in Award 3587, with Judge Herbert B. Rudolph sitting with the Board as referee. The reasoning expressed in that Opinion is well founded and will be followed in the instant case. Apparently there is a conflict with the Opinion, as stated, in Award 4049. In this award, seemingly Judge Fred L. Fox, as referee, takes the position that the construction given to the rules of this Agreement will promote and "provide a definite and safe guide"; while construction contended for by Petitioners in that case "would lead to uncertainty, confusion and inevitable disputes between employes, and with consequent embarrassment to the Carrier, * * *."

It would seem that the fact situation herein does not lend itself to such a construction. Applying the facts to rules of the Agreement in the instant case it would seem that Carrier seeks a continuation of a confusing situation by the defense presented, and a misinterpretation of the Agreement as it applies to the present claim.

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 claims (a) and (b) be sustained.

AWARD

Claim (a) sustained.

Claim (b) sustained on the reestablishment of the positions for those listed and others adversely affected; that monetary losses sustained be confined to proof of the same, with deductions allowed from earnings from other sources during the period under consideration.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of January, 1949.

DISSENT TO AWARD 4291, DOCKET CL-4092

The inappropriateness of following the reasoning expressed in the Opinion of Award 3587 for decision in the instant case is apparent when noting the application of that reasoning to the fact that the claim there was in behalf of claimants as to whom the parties were not in controversy as to whether the claimants had or had not acquired seniority rights which by the Agreement are required to entitle them to occupy the claimed positions involved in that case. The employes contended that with such rights the claimants were entitled to perform the involved work on overtime as necessary. The Carrier, not questioning such rights, contended that the inability to either secure clerical help or thus use claimants under the circumstances there prevailing warranted use of other employes without violation of the Agreement.

In the instant case the claims were in behalf of employes in respect to whom the parties were in conflict on that question,—the employes contending in this case and under these circumstances that the claimants held such rights, while the Carrier contended that the claimants, not having regular positions prior to the date of the partial reduction of the extra forces here involved, had not acquired such seniority rights as by the Agreement prohibited the Carrier from reducing such extra forces or as privileged the claimants to exercise any seniority rights under those circumstances except as stipulated by Rule 3-C-1 (a), which latter rights by their inaction the claimants had forfeited.

It is thus apparent that the reasoning of Award 3587 did not pass upon the issues presented by the instant dispute and is inappropriate as a basis for decision here.

The award is also faulty in its failure to observe, as has heretofore been done by awards in analogous cases whose claims in part included claim for restorations of positions, that the Division has refrained from sustaining that part of the claims which asked for such restoration because obviously the Carrier is under no obligation to do so when within the terms of its Agreements it can adopt other methods of correction of the declared violations.

/s/ C. C. Cook.