Award No. 6388

Docket No. CL-6403

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Emmett Ferguson, Referee

PARTIES TO DISPUTE:

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

THE UNION TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that —

(1) The Carrier (The Union Terminal Company — Dallas) violated the agreement and continues to violate the agreement in the following respect:

(a) When effective May 28, 1952 the Carrier (Union Terminal Company) without previous conference and understanding with the Organization, unilaterally required position of First Trick Gateman to relieve the Telephone Operator on rest and lunch periods for the purpose of avoiding overtime payments to the PBX Operator, and

(b) That D. W. Estes, First Trick Gateman, was, on June 1, 1952, ordered to abandon his regular assignment and perform service as a Telephone Operator, as set out in (a); and that when protest was made he was told that "he might as well go home" if he could not perform PBX work, and

(c) That when the said Estes again reported for duty on June 3, 1952 he was told "to get off the property", and has performed no subsequent service, and

(2) That when formal protest was timely made against requiring the said Estes to abandon his position of First Trick Gateman and to perform PBX work, the position was abolished, readvertised with the same title designation, same rate of pay, same daily assignment, same rest days and same hourly assignment, and

(3) That the Carrier (Union Terminal Company) shall now be required by an appropriate Award and Order of the Board to reconcile the said position of First Trick Gateman with the conditions, personnel and assignment of work that obtained thereon prior to May 28, 1952; and that the said D. W. Estes, First Trick Gateman, and any and all other employes directly or indirectly adversely affected by the illegal procedures that were followed, be made whole for all monetary losses sustained.

on the property was disrupting the business being carried on, the Carrier was entirely within its right to request his leaving the property.

Part 2 of the Statement of Claim reading:

> "That when formal protest was timely made against requiring the said Estes to abandon his position of First Trick Gateman and to perform PBX work, the position was abolished, readvertised with the same title designation, same rate of pay, same daily assignment, same rest days and same hourly assignment, and" (The Statement of Claim then goes on to Part 3).

is incorrect in that the position was abolished May 29, 1952 and Estes did not attempt to place himself upon this position until June 1, 1952.

Part 3 of the Statement of Claim requests, "That the Carrier shall now be required by an appropriate Award and order of the Board to reconcile the said position of First Trick Gatemen with the conditions, personnel and assignment of work that obtained thereon prior to May 28, 1952."

As pointed out in our Statement of Facts, on June 30, 1952, the position established by Bulletin No. 12, effective May 29, 1952, was entirely abolished and other arrangements have been made to take care of this work. We know of no requirement within the Agreement stating that positions no longer needed be reestablished. As a result, we do not believe your Board will comply with the Organization's request in your Award in this case.

As to the final portion of Part 3 of the Organization's claim requesting that the claimant and all other employes adversely affected be made whole for monetary loss—it must be first established that there has been a violation of the Agreement before any payment for monetary loss can be required by an award of your Board.

It is apparent from the foregoing that the Organization's claim is entirely without merit and has no foundation in either practice, or agreement rules.

Inasmuch as no rules of the controlling Agreement were violated, we respectfully petition the Board to deny the claim.

It is hereby affirmed that all of the foregoing is, in substance, known to the petitioning Organization.

OPINION OF BOARD: The facts of this case are generally as follows: D. W. Estes was a regular assigned gateman with seniority from January 17, 1918. On May 16, 1952, while he was on vacation, the duties of his job were changed by a bulletin requiring him to relieve the switchboard operator during lunch and rest periods. The Brotherhood objected on May 18, and on May 29, Estes protested in writing and thereby put the Carrier on notice that claim would be made for a continued violation. A bulletin dated May 28 was filed by the Carrier, abolishing Estes' position, and an additional bulletin, bearing the same date, was posted, establishing a new position of gateman and requiring the new position to relieve at the switchboard at the exact same times as noted in the bulletin of May 16.

Estes reported for work June 2, and upon admitting that he was not qualified for the switchboard work was told "that under the circumstances that he would have to go home". He again reported for duty on June 3, and "was advised that it would be necessary for him to leave the property". J. E. Newton's letter of June 5 from which the above quotations are taken, also offers "Mr. Estes the same opportunity to qualify", on the switchboard. It is also noted that the bulletin of May 28 required bids for the new position to be submitted on or before May 31, and that Mr. Landrum was, on June 2, occupying the job on his bid.

In the light of all these facts, we must draw our conclusions. These are bare facts and do not disclose the motivation behind the timing of the various bulletins, nor the manner of Mr. Estes' demand for his job upon returning to work. If all that was desired was to arrange scheduled relief periods for the switchboard operator, there must have been a simpler way to accomplish this end. The docket is silent on any negotiations prior to May 16, but beginning with that date, events occurred hastily.

This Board concludes that Rule 14, which forbids the transfer of rates from one position to another and which also limits the company's right to abolish and recreate positions, has been violated. We reach this conclusion after noting that the PBX switchboard operator position is not written into the Scope Rule of the governing Agreement, but is recognized, under an oral understanding, as a female position.

The rules having been violated, the claim must 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

That the rules having been violated, the claim must be sustained.

AWARD

Claim sustained in accordance with Opinion and Findings. The named claimant, D. W. Estes, and only the name claimant, shall be made whole for all monetary losses sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of October, 1953.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 6388, DOCKET NO. CL-6403

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: The Union Terminal Company (Dallas, Texas).

Upon application of the representative of the Carrier involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3 First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

When this case was argued there was no evidence before the Board that the claimant had returned to work. That fact was unofficially noted after the arguments and before the award was adopted.

The Carrier in its request for interpretation relies upon the letter of June 5, 1952 and takes from context the sentence, "Mr. Estes will be given the right to exercise his seniority on any job that he is qualified to hold and on which his seniority will permit him to place himself." This letter, taken as a whole, denies Estes the right to work on the job from which he had been removed and which at that time included the PBX duties. No other meaning can be attached to it. This conclusion is reinforced by noting that in the Carrier member's brief, Point 12, the letter is described as an offer of an opportunity to qualify on PBX work, or any position that he was qualified to hold.

On June 30, 1952 the job in question was abolished in its entirety. The question raised by this request for interpretation now is — Does such abolishment authorize the Carrier to cut off the pending claim of Estes as of that date?

There is no proof before this Board concerning the character or manner of the abolishment of June 30, 1952. If it was a reduction in force Estes would probably still have been retained but there is no proof as to the job details of the remaining positions against which Estes' qualifications could be measured.

From various correspondence given in the docket and the request for interpretation and answer thereto, it is obvious that the claim was seen as a running claim. Significance attaches to that letter of the General Chairman dated December 1, 1953, while Award 6388 was under discussion between the parties, which indicates that while this docket was under consideration by this Division, the Carrier refused to serve notice that a job was available for Estes, and the General Chairman sent a telegram indicating that such was his understanding as of September 16, 1953. This being so, we are forced to conclude that both parties were during the pendency of this claim, maintaining the status quo which originated at the time Estes presented himself for work and was denied. Accordingly, it is the opinion of this Board that he should be paid what he would have earned from the time he was denied work

until the time he returned to work, minus any sums received under the unemployment provisions of the governing statutes.

The claimant shall be paid what he would have earned from the time he was denied work until the time he returned to work, minus any sums received under the unemployment provisions of the governing statutes.

Referee Emmett Ferguson who sat with the Division as a member when Award No. 6388 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of March, 1954.

DISSENT TO AWARD NO. 6388 AND INTERPRETATION NO. 1 THEREOF
DOCKET NO. CL-6403

The error of the Referee in this Award 6388 has been compounded in his interpretation thereof. The basis of the Award is found in the fourth paragraph of the Referee's Opinion, which reads:

> "This Board concludes that Rule 14, which forbids the transfer of rates from one position to another and which also limits the company's right to abolish and recreate positions, has been violated. We reach this conclusion after noting that PBX switchboard operator position is not written into the Scope Rule of the governing Agreement, but is recognized, under an oral understanding, as a female position."

Rule 14 of the Agreement involved reads:

> "RULE 14. RATING POSITIONS. Positions (not employes) shall be rated and the transfer of rates from one position to another will not be permitted. Nor will positions be abolished and new ones created covering relatively the same class of service at less rates of pay. (And the wages for new positions will be the same as and in conformity with the wages for positions of similar kind or class.)"

The obvious purpose of the first sentence of the rule is to prevent favoritism among individual employes by giving higher rates of pay to some and lower rates of pay to others on a personal basis. It is the position which must carry the particular rates of pay, not the individual; and whoever is assigned to the position gets that rate. This principle may not be avoided by transferring rates from one position to another to favor a particular employe. This first sentence of the rule has no application to the claim here presented because clearly the positions (not employes) were rated, as the sentence requires, and there was no transfer of rates from one position to another within the meaning of the prohibitive portion of the sentence. The Gateman's position was simply abolished and in effect a combination job of Gateman-Relief Switchboard Operator was established.

Certainly the second sentence of Rule 14 was not violated, because the rate of pay was not decreased. The new combination position was assigned the same rate of pay as the old Gateman's position.

For the same reason, the third sentence of Rule 14 was not violated, because the new combination position was given a rate of pay equal to the

Gateman's rate, and that was higher than the regular Switchboard Operator's rate.

However, the Referee says he concludes there was a violation of Rule 14 above-quoted, because the Switchboard Operator's position was not specifically named in the Scope Rule but was recognized under an oral agreement as a female position. The Scope Rule divides all employes under the Agreement into two groups: Group One — employes performing clerical and office duties; and Group Two — laborers. Since both parties concede that Switchboard Operator's work was covered by the Agreement, it had to be in one of those seniority groups. The definition of Group One employes is broad and general; it does not purport to specifically name all positions within the group:

> **"Employes performing clerical work and office duties, including** information clerks, ticket sellers, bulletin clerks, check and countermen, foreman, assistant foreman, callers, gatemen, train announcers **and or employes performing similar work."**

The definition of Group Two employes is:

> "Employes engaged in the handling of mail or baggage, truck operators, maids or matrons, porters, janitors, **and all other labor . . ."**

Under those definitions, the only Group in which the Switchboard Operators could logically fall is Group One — the group which included Gatemen. Thus, Gateman and Switchboard Operator work could be combined in a single position unless there were some restrictions to the contrary.

The Referee finds that there was an oral agreement that the Switchboard Operator's position would be a female position. The Carrier denies that there was an understanding to that effect, and points out that male Red Cap Supervisor and Train Announcers were often regularly assigned to relieve Switchboard Operators. Such practice is not denied by the Organization. Whatever agreement, if any, there may have been regarding limiting regular, full-time Switchboard Operator positions to females, the agreement obviously did not prohibit using men to relieve those women operators on their rest and lunch periods, because men were regularly used for such relief work without any protest by the employes or Organization.

The Award is clearly erroneous.

The interpretation is even more so. The combination Gateman-Relief Switchboard Operator position was established by bulletin May 29, 1952. The Referee says in the Award that it was not proper to establish that position. But the position was abolished in its entirety June 30, 1952, after approximately one month. Thereafter the position, which Estes demanded in its earlier form, no longer existed. Certainly the abolishment of that position discontinued any further alleged violation of Rule 14. Whatever claim Gateman Estes (the claimant) had because of the establishment of the combination position, that claim ended when the entire position was abolished one month later.

When Estes refused to perform service on the combination job, he was advised in writing to exercise his seniority on another job for which he was qualified. The Record clearly shows that there were several positions which did not require any Switchboard relief work, and Estes well knew that he could have placed himself on either of those jobs in June, 1952. However, he refused to do so until September, 1953 — nearly 15 months later. Surely he should not be heard to claim rights to a job after it has ceased to exist, particularly when he spurned for 15 months a second trick position with duties exactly as he desired. Since any possible violation of Rule 14 ceased on June 30, 1952, with the abolition of the combination position, any loss of Estes after that date was of his own making.

In construing the Award to require that Estes be paid for approximately 15 months that he was out of work due to his own refusal to exercise his

seniority following the abolition of both first trick Gateman jobs, the Referee admits that his interpretation is based upon a self-serving letter written by the General Chairman dated December 1, 1953. **That letter was written more than one month after the Award was rendered.** How any self-serving declaration made after the Board rendered its Award can properly be considered in determining what the Board meant by its Award, is beyond our comprehension. In its request for an interpretation, the Carrier asked what the Referee meant by awarding Estes "all monetary losses sustained" — not what the General Chairman would have liked the Referee to mean. The General Chairman's letter of December 1, 1953, was certainly not a part of the evidence upon which Award No. 6388 was rendered. It wasn't even in existence. This Board has long recognized that in interpreting an award it may not enlarge upon or relitigate a claim upon the basis of new evidence not included in the record at the time the award was rendered. In Interpretation No. 1 to Award No. 4967 (Serial No. 105), Referee Carter ruled that:

> "The Carrier asserts that the record before us when the award was made does not reflect all the facts and in view of additional facts presented in the application for an interpretation the award arrives at an incorrect conclusion. Granting for the sake of argument that this is so, it cannot benefit the Carrier. The Award is necessarily based on the facts shown by the record. After the record is closed, new or additional evidence cannot properly be received. If this was not so, the award of the Division would have no finality. An interpretation of an award may not properly be treated as a rehearing or a new trial of the merits of the case. Its purpose is to explain and clarify the award, not to make a new one. We are obliged to say that the only evidence properly before us for consideration is that appearing in the record at the time the docket was closed, that the evidence appearing in the application for an interpretation is outside the record and, consequently, the position of the Organization is correct."

The Award was originally erroneous inasmuch as Estes refused to perform the work on the combination job or any other job during June 1952 and refused to perform work subsequent to June 1952 on other jobs he was qualified to hold. There is no sound basis whatever in an Award and Order to the effect that he should be paid anything during this entire period. In our **Award 6463,** we held and observed previous Awards holding that employes "must perform the work as directed and in case of contract violation, seek redress under the terms of the Agreement." It is absurd to say that a claimant shall be paid for the period in which he refused to work. The United States Court of Appeals (Fourth) closed its Opinion on February 9, 1954, in **Atlantic Coast Line R. Co. vs. Brotherhood of R. & S. Clerks, etc.,** with this language: "Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity."

However, even under the erroneous Award, the most that Estes should recover is the pay for the days he lost in June, 1952, while the first trick Gateman's job in question was in existence.

For the foregoing reasons, we dissent.

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ C. P. Dugan