Award No. 8226
Docket No. CL-7627

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, 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) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-1 and 2-A-2, and Items 5 and 6 of the Group 1 Rate Agreement, effective August 1, 1951, and similar previous agreements, by failure to promptly furnish a questionnaire time study form for clerical position, Symbol F-2625, located in the office of the Passenger Agent, 30th Street Station, Philadelphia, Pa., Philadelphia Terminal Division, subsequent to February 2, 1949.

(b) John F. Donohue, Clerk, should be allowed eight hours pay a day for ninety days prior to October 13, 1952, and all dates to January 14, 1953, as a penalty. (Docket E-894.)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

There is also in effect a Group 1 Rate Agreement, effective August 1, 1951. It provides the rates of pay and methods of determining rates of pay applying to Group 1 (Clerical) positions under the jurisdiction of General Managers and Works Manager. We will not quote this entire Agreement as we believe that only Items 5 and 6 are pertinent to the instant case:

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 interpretations 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 Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement 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 the instant claim has not been handled in accordance with the provisions of Rule 7-B-1 of the applicable Agreement; the Carrier has also shown that the Employes' Statement of Claim, as set forth in their letter of March 7, 1955, differs from that discussed on the property; finally the Carrier has shown that the Agreement has not been violated and that the Claimant is not entitled to the compensation claimed.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

All data contained herein have been presented to the employe involved or to his duly authorized representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is that the Carrier violated the Rules Agreement, and "particularly Rules 2-A-1 and 2-A-2, and Items 5 and 6 of the Group 1 Rate Agreement, effective August 1, 1951, and similar previous agreements, by failure to promptly furnish a questionnaire time study form for clerical position, Symbol F-2625, * * * subsequent to February 2, 1949," and that "John F. Donohue, Clerk, should be allowed eight hours pay a day for ninety days prior to October 13, 1952, and all dates to January 14, 1953, as a penalty."

The procedure required by Rule 7-B-1 is to present claims to Claimant's "immediate supervisor", in this instance the Passenger Agent, and upon its denial to appeal, first to the Superintendent and finally to the General Manager.

The Claim presented to the Passenger Agent related to "position F-26 and F-25", both of which were established positions. The claim was denied by the Passenger Agent on October 22, 1952, for the reason that the "positions were advertised in accordance with the Agreement and your claim is denied."

On appeal to the Superintendent the Claim was amended to refer to Position F-2625. On November 26, 1952, the Superintendent denied the Claim because as presented to him on appeal it had not first been presented to Claimant's immediate predecessor as required by Rule 7-B-1(a), and therefore was invalid. He said:

> "Claim was originally filed with W. P. Fogle, Agent, 30th St. Ticket Office, on October 13, 1952, alleging Management violated the Agreement when they failed to advertise Position F-26 and F-25 on a permanent basis within the time limit specified when Agreement was in effect. This allocation is not supported by the record as Position F-26 and F-25, under the supervision of the Passenger Trainmaster, were advertised on a permanent basis and awarded in conformity with the provisions of Rule 2-A-2.
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> * * * * *

"Claim for an alleged violation on the part of Management failing to advertise position F-2625 permanently has not been filed in conformity with the provisions of 7-B-1 (a); therefore, not a valid claim."

On Claimant's behalf it is argued that the Carrier was not misled by nor prejudiced by the change of the claim on appeal. There is nothing in the record to sustain that contention.

But the objection was waived by the action of the General Manager in abandoning it and disposing of the case on the merits.

Throughout its handling on the properties the claim was for monetary loss sustained because Carrier "failed to advertise" the position "on a permanent basis," while the claim presented here is for a penalty for "failure to promptly furnish a questionnaire time study form * * * subsequent to February 2, 1949." But it will be unnecessary to determine whether in those respects the claim presented here is substantially the same as presented on the property.

The facts are that a new Group 1 position was established, and on February 2, 1949, was advertised as temporary, subject to adjustment. Rita Laurer was awarded the position, effective February 12, 1949, and immediately assumed it.

No questionnaire was supplied the incumbent of the temporary position until some time in September, 1952. Apparently thereafter it was completed and processed, for on January 8, 1953, the General Manager informed the General Chairman that the basic rate had been determined and that the position would now be advertised and filled on a permanent basis. Upon such advertisement it was awarded to W. R. Burns, effective January 26, 1953.

The temporary incumbent, Rita Laurer, was paid the difference between the new rate and the minimum rate received by her, for the entire period during which she held the position. Thus the Carrier did not profit from the delay, which apparently was caused by oversight.

Meantime, on October 13, 1952, the claim had been filed on behalf of John F. Donohue for all time lost, but on determination of the basic rate in January, 1953, the correct rate was found to be $45.00 per month less than his position as Ticket Clerk, so that he submitted no bid, although senior to W. R. Burns. Thus he sustained no monetary loss, and was entitled to nothing under the claim as filed and processed on the property.

Articles 2-A-1 and 2-A-2 of the Rules Agreement are those pertaining in general to the bulletining of positions and their assignment according to seniority.

Items 5 and 6 of the Group 1 Rate Agreement are as follows:

"Item 5. When a new Group 1 position, the rate of which is subject to be established by the questionnaire time study method, is established (represented over thirty days), the incumbent will be promptly furnished with the proper questionnaire forms for the insertion of the information necessary to the time study.

"Item 6. Each new position, subject to the provisions of Rule 2-A-1, shall be advertised as a 'Temporary position pending establishment of rate of questionnaire time study. Rate when established will be retroactive to date of establishment of position. Position will then be re-advertised with permanent rate as permanent position'. This note will be placed on bulletins advertising such positions. Rate of temporary position will be the minimum rate as provided in Item 1. Retroactive adjustment in pay, if any, will be made to the

employe filling the position while under the advertisement as 'Temporary'."

Item 9 of the Rate Agreement provides for various questionnaire forms with items to be agreed upon by the General Manager, Works Manager, and the General Chairman.

But the Group 1 Rate Agreement was not effective until August 1, 1951, and was thus not in existence on February 2, 1949, when Position F-2625 was established. At that time the agreement on the matter consisted of two letters between the General Managers and the Acting Regional Chairman of the Clerks' Association, the Brotherhood's predecessor representing the Clerks, dated March 3, 1930 and March 10, 1930, respectively, as shown in the record.

It prescribed the advertising of new clerical positions as temporary, "pending the preparation of Basic Rate Committee's questionnaire data and determination of rate of pay" and provided further that—

> "Basic Rate Committee's questionnaire data will be prepared for all newly created clerical positions by the individual assigned to the position, covering a month's survey of the work performed, and after the questionnaire data has been certified to by the supervisor in charge, and approved by the Local Chairman and Superintendent or General Superintendent, as the case may be, a rate of pay will be fixed by the Management and the position advertised as a permanent one. * * *"

However, it did not place upon Carrier the obligation of furnishing the questionnaire form, promptly, or otherwise, and any initiative the Carrier took in that regard prior to August 1, 1951, is not shown to have been pursuant to any contractual obligation. Practice does not alter the rules.

Despite the fact that the 1930 Agreement did not impose on Carrier the primary duty of furnishing a questionnaire, the Carrier's Ex Parte Submission stated that the 1951 Agreement "provided for substantially the same manner of handling newly established positions." On behalf of the Brotherhood it is argued that the latter statement constituted at least a waiver of the defense that in 1949 the existing Agreement did not require it to furnish a questionnaire.

But the Carrier's Ex Parte Submission went on to state:

> "Before discussing the provisions of Items 5 and 6 of the Rate Agreement of August 1, 1951, which are advanced by the the Employes in support of their claim, the Carrier wishes to point out that at the time the position involved in the instant claim was established in February 1949, the Agreement of March 3, 1930, Carrier's Exhibit 'A', was in effect and governed the situation. The attention of your Honorable Board is invited to the Agreement of March 3, 1930, particularly to paragraphs number 1 and 2 thereof. It will be noted that nothing therein sets forth how the time study was to be initiated, nor sets a time limit for completing the questionnaire time study, or for advertising the position as a permanent one. The Carrier asserts that it fully complied with the expressed provisions of this Agreement in the instant case.
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> "* * *
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> "In addition, it must also be emphasized again that at the time position symbol F-2625 was established the provisions of the Agreement of March 3, 1930 were controlling and such Agreement contained no provision that the questionnaire form would be promptly furnished the employe assigned to the position."

The Carrier did not, therefore, waive, or fail to make the defense that in 1949 "the provisions of the Agreement of March 3, 1930 were controlling and such Agreement contained no provision that the questionnaire form would be promptly furnished the employes assigned to the position."

In their Rebuttal Brief the Employes did not answer that contention.

In the Carrier's brief on oral argument it again pointed out "that at the time the position involved was established in February, 1949, the Agreement of March 3, 1930, Carrier's Exhibit 'A', was in effect and governed the situation and that the Agreement of August 1, 1951 had not been consummated," and "the Carrier again wishes to point out that Item 5 of the Agreement of August 1, 1951, was not in being at the time this position was established and the Agreement of March 3, 1930, was controlling and the latter Agreement contained no provision that the questionnaire form would be promptly furnished the incumbent of the position."

In the Employes' Sur-Rebuttal they admit that in 1949 the Agreement of March 3, 1930, was in effect, that it was superseded by the Agreement of August 1, 1951, and that the Agreement of March 3, 1930, did not specify that questionnaire forms would be furnished promptly.

None of the other rules mentioned in connection with this claim made such a requirement concerning the questionnaire forms.

Position F-2625 having been established in February, 1949, and its temporary status apparently overlooked by both parties, the Agreement of August 1, 1951, referring to new positions, did not apply to it, so as to place on the Carrier the blame for delay in presenting the questionnaire, or for the consequent delay in advertising the position on a permanent basis. The new Agreement included no provision, express or otherwise, for retroactive effect in that regard.

How the oversight was discovered in September, 1952, after the lapse of another year and month, does not appear in the record. In any event, this Board cannot find that the Carrier violated an agreement not in existence on February 2, 1949, either by failing "to promptly furnish a questionnaire" (as claimed before this Board), or by failing "to advertise" the position "on a permanent basis" (as claimed on the property).

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January, 1958.