Award No. 9507

Docket No. CL-9241

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

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

1. Carrier violated the rules of the current Clerks' Agreement when it unilaterally established four (4) new positions titled General Clerk, Positions #84 and #85 at Division Street and Positions #88 and #89 at Jefferson Street, and established a rate of $15.0160 on Positions #84 and #85 and $14.6560 on Positions #88 and #89.

2. Carrier shall now compensate all employes assigned to the newly created Positions #88 and #89 the difference between what they were paid and $15.0160.

EMPLOYES' STATEMENT OF FACTS: On August 15, 1946 Carrier issued Bulletin #224 advertising Positions #88 at Division Street with the following duties: "Check industry tracks. Must be good typist. Should be familiar with abstracting interline switching bills and accounting for same."

On September 22, 1947 Carrier issued Bulletin No. 165 advertising Position #89 titled General Clerk and Stenographer, showing the duties as: "Stenographer-Division St. Office. Expense bills prepaid forwarded. Make out various reports, tonnage, weights, etc."

On September 1, 1955 Mr. B. M. Smith, Agent at Union Street, Chicago, issued Bulletins #144, #145, #148 and #149 creating four new clerical positions.

Bulletin #144 created new Position #89 at Jefferson Street, Chicago; titled General Clerk; rate $14.6560; principal duties; "Assist various positions in the office including miscellaneous billing. Must be typist."

Bulletin #145 created Position #88 at Jefferson Street, Chicago; titled General Clerk; rate $14.6560; principal duties: "Assistant Notice Clerk and various records and reports. Must be typist."

A study of the duties of the positions at Jefferson Street, as outlined in the Carrier's Statement of Facts, will disclose the fact that the duties of the positions at Jefferson Street were practically the same as the duties of the positions at Division Street and the changes were in the directions of lesser rated work being assigned to the positions at Jefferson Street.

The employes have cited the last paragrapt of Rule 1 (e), Rule 9 (b), Rule 16, Rule 18 and 19. Surely there can be no real basis for the contention that there has been a violation of those rules.

The two positions has been classified as General Clerk at Division Street for many except to eliminate the stenographic requirements in the case of Position 89, there can be no justifiable contention that there has been any violation of the last paragraph of Rule 1 (e).

As to Rule 9(b), it is the Carrier's position the positions were properly bulletined and there has been no violation of the provisions of that rule.

Rule 16 provides that rates will not be transferred from one position to another and in this case there was no transfer of rates, in fact, the rates remained attached to the positions without change and it would seem Rule 16 would surely support the Carrier's position in this case.

As to Rule 18, there were similar positions in the seniority district when Positions 88 and 89 were reestablished at or transferred to Jefferson Street, in fact, the very same positions with the very same rates were in existence at Division Street up to the exact time they were reestablished at Jefferson Street.

We fail to understand how there could be any proper contention with regard to Rule 19 because there was no position discontinued and a new one created under a different title covering relatively the same class of work having the effect of reducing the rate of pay. To the contrary, the positions reestablished at Jefferson Street had the same title, covered relatively the same class of work and there was no change whatsoever in the rate of the positions.

There is no basis for the request for change in rates which is embodied in the claim covered by this dispute and the Carrier respectfully requests that the claim be denied.

All data contained herein has been presented to the employes.

OPINION OF BOARD: The ultimate issue in this case, as the case was actually processed by the Parties, concerns the question whether the Carrier properly rated Positions 88 and 89 at Carrier's Jefferson Street Agency in Chicago, Illinois While one of the Carrier's contentions is that these positions were merely transferred from its Division Street Agency, the Record clearly established that Positions 88 and 89 at Division Street were abolished and that Positions 88 and 89 at Jefferson Street were created as new positions. In this general regard see Third Division Awards 9308, 3555; compare, Award 8749. Accordingly, the proper rate for Jefferson Street Positions 88 and 89 is to be determined on the basis of the requirements of Rule 18 of the applicable Agreement, which Rule provides:

> "The rates for new positions will be in conformity with rates for positions of similar kind or class in the seniority district where created. In the absence of a similar position in the district, the rate of

pay for the new position will be established by agreemene between the Carrier and the General Chairman."

In several respects the Record is inadequate for a final determination of the merits of this case. A material discrepancy exists, for instance, in the Carrier's submissions. At pages 2 and 3 of its Oral Presentation the Carrier states that Positions 84 and 85 were abolished at Division Street and re-established at Jefferson Street; however, Bulletins No. 148 and 149 (Carrier Exhibits "I" and "G") indicate that these positions were reestablished at Division Street rather than at Jefferson Street. The Record is inadequate in still another serious respect. While the Carrier provided this Board with a specific enumeration of the duties of Positions 88 and 89 at Jefferson Street (page 3 of Carrier's Ex Parte Submission), it did not provide the Board, for comparison purposes, with any similar enumeration of the duties of Positions 88 and 89 at Division Street, nor of the duties of Positions 84 and 85 either before or after they were abolished and reestablished, nor of the duties of any other positions in the seniority district with which Jefferson Street Positions 88 and 89 might be compared for purposes of determining whether the requirements of Rule 18 were reasonably met. Without such information it is not possible for this Board to resolve the ultimate issue, as defined hereinabove, at this time. The various bulletins, quoted in the Record, of positions discussed or mentioned in this case do not provide adequate detail as to the nature and duties of the positions to sufficiently inform the Board for the necessary comparison purposes. Nor does the Carrier's enumeration of Jefferson Street Position 88 and 89 duties reveal a sufficient similarity to the duties of Division Street Positions 88 and 89 as stated in Bulletins 103 and 109 (Carrier Exhibits "A" and "B") to enable the Board to resolve the dispute without further evidence.

The Carrier is not alone in its failure to provide adequate information in this case. The insufficiency of information can be traced to the failure of both Parties to fulfill their obligation to provide relevant evidence to the full extent possible. In meeting their general obligation under the Railway Labor Act both Parties to a dispute covered by that Act and that is of the type within the jurisdiction of this Board have a duty to make reasonable effort to provide all data and information relevant to the dispute and to negotiate for a resolution of the dispute in the light of that complete evidence; under that obligation the Parties also have a duty in coming before this Board to provide it with relevant evidence to the full extent reasonably possible. Both Parties in the present case have relied too much upon general assertions and not enough upon specific data and information. The Carrier obviously possesses full information regarding the true nature and content of all positions in the seniority district; and if the Organization, in turn, actually had no more information than it provided this Board, it should have endeavored to obtain additional information —if it did attempt, and failed to obtain more information, it did not so state in the Record.

In view of the inadequacy of the Record herein as a result of the failure of both Parties as noted above, the case shall be remanded to the property for full development of the facts and for further negotiations by the Parties in the light thereof. In remanding the case, the Board does so without prejudice to the right of either party to resubmit it, with due diligence, to this Board for consideration in the light of the further developed facts if those facts and the Parties' negotiations in the light thereof have still failed to resolve the dispute.

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 case should be remanded to the property for further development of the facts and further negotiations by the Parties in the light thereof.

AWARD

Claim disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July, 1960.

DISSENT TO AWARD NO. 9507, DOCKET NO. CL-9241

The Opinion of Board clearly labels this case as one in which Petitioner failed to meet the burden of proof that Carrier violated the rules as claimed; consequently, Award 9507 should have denied the claim as this Division did in Award 9222, or should have dismissed it the same as it did in Award 8135, in which we held as follows:

> "Which Party is correct? Neither Party submitted any evidence sufficient to support its allegations. * * * There simply is no adequate evidence of Record available to the Board for determining the actual facts. There are conflicting assertions only.
>
> "* * *
>
> "This Board may be justified in leaving some things to assumption in some cases, but it would not be justified in leaving so many things to assumption as would be necessary for the resolution of the present case on the merits. Here the submissions of both Parties leave too much to be assumed, presumed or guessed. The Present Claim must be dismissed."

The Executive Secretary's letter to the parties, dated February 11, 1957, stated, in part:

> "* * * the Third Division is not disposed to admit known evidence at an oral hearing which has not theretofore been presented for consideration * * *."

and his letter to the parties, dated April 3, 1957, stated:

"As this will leave nothing to which the parties may make reply, we are closing the file in this docket as of this date and the case is ready for consideration by the Division.

According to the Rules of Procedure of this Division and its quoted stipulations conforming therewith, the door was closed to further evidence. Consequently, in reopening the door for consideration of new evidence, Award 9507 is in conflict with the Rules of Procedure and stipulations of this Division.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp

ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9507, DOCKET NO. CL-9241

It is obvious from the Dissenters argument that their only concern is the disposal of disputes by a denial or dismissal award, regardless of merits. It is their belief that the Board was established by Congress to be used as an instrument by which a carrier could evade its obligation under the Railway Labor Act, as amended. This is absurd and clearly not compatable with the intent and purpose of Congress when it placed mutual obligations upon both parties to exert every reasonable effort to make and maintain agreements.

The Board did not find that "Petitioners failed to meet the burden of proof" all alleged. What the Board did find, however, was that: "The insufficiency of information can be traced to the failure of both parties to fulfill their obligation to provide relevant evidence to the full extent possible" under the Railway Labor Act and that: "The Carrier obviously possesses full information regarding the true nature and content of all positions in the Seniority District; * * *."

In Award 1010 (Mills) Carrier objected to the Board's rendering an award on the basis that claim was indefinite and that employes failed to submit facts sufficient to support their allegations. This Division said:

> "The Railway Labor Act did not design that proceedings before the several divisions of the Adjustment Board should be technical, and if such a contention as the carrier has made in this case could be approved, the rules embodied in the definite agreement, effective December 1, 1936, where the minds of the carrier and the Brotherhood are presumed to have met, would afford little or no protection; if the carrier may disregard knowledge within its control, then the rule could be violated with impunity. The carrier not only knows what men worked, what men were upon its supervisory payrolls, but its records show exactly the days they worked. So far as the carrier is concerned, there need be no conjecture. * * *
>
> Even in technical legal pleading no such particularity would be required.
>
> In United States v. A. Bentley and Sons Company, 293 Fed. 229 at 247, the Court said:

'If the facts to be alleged are peculiarly known or presumed to be known to the opposite party, then less certainty and particularity are required than in ordinary cases.' "

The doctrine of the "burden of proof", relied upon by Carrier Members here, was reviewed by Referee Coffey in Award 7350, and he said:

"* * * On the theory that the one affirmatively charging a violation is the moving party, and, therefore, should be in possession of the essential facts to support the charge before making it, this Division of the Board is committed to the so-called 'burden of proof' doctrine. See Awards 3469, 5345, 5962, 6829, 6839.

The foregoing doctrine at times has been much abused and maligned account failure to recognize a first duty of the parties to decide in conferences, if possible, all disputes between them growing out of the interpretation and application of their Agreement; and, before coming to the Board, it is expected that each will submit to the other that data relied upon to support its position, and, on doing so, the Board expects them to agree on controlling facts without regard to whether the submission is joint or ex parte. See Section 2, Second, Railway Labor Act, supra, and the Board's Rules of Procedure.

Moreover, the 'burden of proof' doctrine and supporting Awards are under constant attack by lay forces that must come to this Board for settlement of disputes. It is argued, with more than a little justification, that, this Board, while a creature of law, is not a court of record and Congress never intended it as such; that if the rules of evidence, pleadings, and other legal precepts were to govern in these disputes, the courts provide a proper forum and no need for this agency existed. * * *."

In a companion case, Referee Coffey ruled in Award 7351:

"The facts concerning the transfer of work we find to be in dispute, and, here again, the Carrier has refused to lend its assistance to either its Employes or the Board to marshall facts decisive of the issue. Therefore, we must presume the facts to be as petitioner states them and sustain the claim in part. See Award 7350."

The instant record shows that Respondent Carrier failed to reveal relevant facts, coming under its exclusive control, during the handling of the dispute on the property. Consequently, it was proper to remand the controversy back to the property for further handling in the light of such circumstances. This is not an unusual procedure as this Division has remanded a total of 232 cases since its creation.

The Award is proper under the involved circumstances.

J. B. Haines
Labor Member