Award No. 9811
Docket No. CL-8644

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph E. Fleming, 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 provisions of the Clerks' Rules Agreement when it abolished Position No. 68, Yard Caller, Muskego Yard, Milwaukee, Wisconsin effective March 14, 1955 and denied the occupant of that position the right to displace a junior employe until April 12, 1955.

2. Carrier shall compensate employe V. McCarthy for eight (8) hours at the pro rata rate of Position No. 10 for each regularly assigned work day of the position from March 14, 1955 to April 12, 1955.

3. Carrier shall compensate V. McCarthy for an additional four (4) hours at the pro rata rate of Position No. 68 for each Sunday and Monday subsequent to March 15, 1955 that she was held on Position No. 68.

4. Carrier shall compensate employe V. McCarthy for eight (8) hours at the overtime rate of Position No. 10 for each Tuesday and Wednesday subsequent to March 15, 1955 that she was not permitted to work on Position No. 10.

EMPLOYES' STATEMENT OF FACTS: Prior to March 15, 1955, Carrier maintained three yard caller positions identified as Position Nos. 68, 69 and 70, one Relief Yard Caller Position, three train caller positions, identified as Position Nos. 78, 80 and 82, and one Relief Train Caller position at Muskego Yard, Milwaukee.

Employe Virginia McCarthy was the regularly assigned occupant of yard caller Position No. 68. Position No. 68 was assigned to work from 7:00 A. M. to 3:00 P. M. Thursday through Monday with rest days of Tuesday and Wednesday.

10. Under no circumstances could she have worked both positions on the same day.

This claim was declined by Mr. C. P. Downing, who is the highest designated officer of the Carrier, on July 21, 1955. Therefore, if the claim was to be further progressed the employes were obligated to file their ex parte submission with your Honorable Board on or before April 21, 1956. It is the Carrier's position that unless their ex parte submission was filed with your Board on or before April 21, 1956, this claim is barred under the provisions of Article V of the Agreement of August 21, 1954.

The Carrier respectfully requests that the claim be denied.

All data contained herein has been presented to the employes.

OPINION OF BOARD: Under date of March 14, 15, and 16, 1955 Carrier abolished three Yard Caller, three Train Caller positions and one Relief Train Caller position and at the same time created one Chief Caller and three Road and Yard Caller positions in lieu thereof, effective March 16, 1955.

Claimant occupied position of Yard Caller #68, which position was abolished at 3:00 P. M. March 14, 1955.

On March 10, 1955 Claimant notified the Carrier, in writing, of her desire to displace Gene Prescott, Position #10, effective March 15, 1955, which she had a right to do and under ordinary circumstances she would have been permitted and allowed to do.

However, no one bid on the new positions and on March 11, 1955 Carrier issued the following notice:

"Yard Callers

Train Callers:

Arrange to stay on your present assignments until relieved.

J. J. Dombrowski
Supt. Terminals"

As a result of this notice she was not allowed to take over Position #10 until April 12, 1955, and, as instructed by the Superintendent, remained on Position #68. It is to be noted that Carrier did not rescind the abolishment of Position #68 but instructed the employe to "stay on present assignment", thereby depriving and preventing Claimant of the opportunity to take over on Position #10.

Carrier contends that Claimant lost nothing because Position #68 was a higher rated position than Position #10, but this is not a claim for work lost but a claim for violation of the Agreement. When Carrier kept Claimant on Position #68 and denied her the right to displace on Position #10 it violated the Agreement. Employes who have lost work should be made whole, but where Agreement is breached claim is primarily to enforce the scope of the Agreement and not for work performed (6063). Carrier also maintains that the appeal herein was not made within the proper time limit. The claim was declined by Mr. C. P. Downing, the highest designated officer of the Carrier on July 21, 1955. The Organization's notice was received by this Board on April 16, 1956

and ex parte submission on May 14, 1956. This has been held sufficient by this Board in many Awards. 9203.

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 Carrier violated the Agreement.

AWARD

Claim allowed at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of February, 1961.

DISSENT TO AWARD NO. 9811, DOCKET NO. CL-8644

Award 9811 is erroneous for the following reasons:

Claimant was not actually affected until Position No. 68 was discontinued on April 11, 1955.

Even if Poitison No. 68 had actually been abolished effective March 15, 1955, no rule in the applicable Agreement required that Claimant be immediately transferred to Position No. 10. The record shows that the Carrier was confronted with exigencies which prevented such immediate transfer, and its action could not be considered arbitrary or capricious. (Award 2174.)

The Award grants punitive damages not provided for in the Agreement. The record shows that Claimant earned $302.62 for 155 hours' work during the period March 15 through April 11, 1955, on Position No. 68, which is a greater amount than she would have earned had she worked Position No. 10 during that period—$285.92 for 160 hours' work. Clearly the Claimant suffered no monetary loss during the claim period. The authority of the Division is limited by law to interpreting rules of agreements as the parties have written them. The Division is without authority to grant bonuses to employes who suffer no loss or to grant any payment not specifically provided for in the Agreement. As stated in Award No. 5306, Referee Wyckoff:

> "The usual award is for the difference in the rates of pay between the position held by the Claimant and the position wrongfully denied him (Awards 2143, 2815, 3419, 3380, 4183, 4431, 4438, 4940, 4541). There was no such loss here because the basic rates of pay for the two positions were identical."

For these, and other reasons, we dissent.

/s/ P. C. Carter
/s/ R. A. Carroll
/s/ W. H. Castle
/s/ D. S. Dugan
/s/ J. F. Mullen

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9811, DOCKET NO. CL-8644

The record conclusively shows that claimant was affected by the abolishment of her position at 3:00 P. M. on March 14, 1955. The abolishment notice was not cancelled. Therefore, she was entitled to make a displacement effective March 15, 1955. However, she was not allowed to do so in violation of her seniority. The "exigencies" referred to by the Dissenters were of carrier's own making.

The Award does not grant punitive damages, it merely gives claimant the wages she would have earned had she not been withheld from her regular assignment in addition to the amount earned on the position that she was required to fill, at the pro rata rate. This is in accord with a long line of Awards of this Division covering comparable situations. See Awards 2823, 2859, 3416, 3873, 3913, 4352, 4499, 4500, 4646, 4692, 5105, 5578, 5834, 5979, 6015, 6732, 9582. Therefore, there is no merit to the Dissenters' contention that claimant was awarded a "bonus". On the authority of this Board to Award damages for violations of agreements, which Carrier Members argue are "bonuses, penalties or fines", see "Labor Member's Answer To Carrier Members' Reply to Labor Member's Answer to Carrier Members' Dissent to Award No. 9546, Docket No. CL-9218."

Award 5306 covered an entirely different situation where a janitor claimed 30 minutes overtime per day account Carrier's refusal to recognize his seniority rights to a position vacated by another janitor. The instant dispute involved claimant's rights to work a position to which she had made a proper displacement. The dispute confronting the Board here is on all fours with Award 4082. Referee Carter sustained the claim and ruled:

> "It is clear in the present case that Claimant was entitled to occupy the position of Yard Checker on and after August 25, 1946. **His claim to the position was grounded on a displacement right which became operative** only when Carrier changed the hours he was working on his relief position. **It was not a position awarded him under bulletin. Nor was a penalty prescribed for failure to place him on the new position as was the case in Award 3551.** Consequently, neither Rule 11 (d) nor Award 3551 control the decision of the case.
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> **We think the rule has been established in case of this kind that if the Carrier holds an employe off a position he is entitled to under the rules, that he shall be paid for the time so wrongfully held off at the pro rata of the position.** Awards 2346, 2823, 3416, 3913. This penalty is grounded on the theory that by wrongfully holding Claimant on the relief position, the necessity of calling the occupants of the seven day positions to work their rest days at the time and one-half rate was eliminated in violation of Rule 39 (a). Consequently, Claimant is entitled to compensation at the pro rata rate for the four days of his

weekly assignment that he was not permitted to work." (Emphasis ours)

Award 4082 clearly distinguishes between those type of cases involved in Award 5306 where the Claimant's rights of promotion to a vacancy or new position and those where, as here, an employe is held off a position after making a proper displacement thereon.

It is, therefore, clear that there is no merit to the Dissenters' contentions.

Award 9811 properly determined the relevant issue in accordance with previous precedents of this Division.

/s/ J. B. Haines

J. B. Haines
Labor Member