Award No. 9976
Docket No. CL-12304

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Webster, Referee

PARTIES TO DISPUTE:

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

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4853) that:

1. The Carrier violated the current Clerk's Agreement when it arbitrarily and capriciously denied Mr. Ray D. McKenzie the right to work Vacation Relief assignments as an unassigned employe on June 11, 12, 13, 14, 15, 29, and July 2, 3, 4, 5, 6, 9, 10, 11, 12, 23, 24, 25, 26, and 27 and also November 4 thru the 22nd, 1959, for Caller-Clerks at Evansville, Indiana Roundhouse after he had filed written application as per Article IV, Section 2 of the August 21, 1954 National Agreement.

2. That Mr. McKenzie be allowed the existing rate of pay of the Caller-Clerk positions involved that he was denied the right to work for the time specified.

EMPLOYES' STATEMENT OF CLAIM: Mr. Ray D. McKenzie was originally employed by the Carrier at Evansville, Indiana on February 4, 1957, in Seniority District No. 32 which covers the Wansford Yard Clerks, Callers and Yardmaster Clerks and thereafter transferred to Seniority District No. 37 on September 9, 1957, and thereby held seniority rights in those two Districts under the provisions of the current Agreement.

Mr. McKinzie was found to be afflicted with pituitary tumor and was operated on March 17, 1958 and also operated on for the second time in late 1958 and was released by the operating surgeon and his personal physician to return to work on January 5, 1959. Copies of the releases as Employes' Exhibits 1(a) and 1(b).

Claimant contacted his immediate superior, Mr. A. R. Upton, Agent, shortly thereafter and advised him that he had been released by his doctors as able to return to work and he was advised that it would be necessary to submit a report direct to Carrier's Chief Surgeon from each of his doctors. Copy of this letter as Employes' Exhibit 1(c).

In the letters of appeal (Carrier's Exhibits "A" and "C") the general chairman makes reference to claimant having filed a written application advising the "supervision" at Evansville he was available for service. A copy of the written application was not offered for the carrier's examination, however, the Mechanical Department supervisors who have the responsibility for filling vacancies in Seniority District No. 14 at Evansville state positively and emphatically that a written request to be considered for service in the Mechanical Department was never received from Mr. McKenzie.

While the issue was not raised on the property, it is noted that in the statement of claim as submitted to the Board petitioner cites Article IV, Section 2, of the August 21, 1954 agreement. The record here is absent of any evidence that application was filed pursuant to the requirements of said Article IV of the National Agreement of August 21, 1954, however, it is pertinent to point out that the right of furloughed employes for assignment to extra and relief work in seniority order can only apply where seniority rights do in fact exist. If despite the evidence to the contrary it is found claimant did in fact file a written request with the proper officer in the Mechanical Department at Evansville, since he holds no seniority in Seniority District No. 14, the request would be of no force and effect. In order to exert seniority, one must first acquire seniority rights. Not having acquired seniority in Seniority District No. 14, claimant cannot claim seniority rights to extra work in that district.

Claimant was not physically competent to perform all the duties of caller-clerk position in the roundhouse, nor did he have the necessary fitness and ability for this position. The proper officers in the Mechanical Department deny that claimant had filed request to be considered for extra work in District No. 14, and the record is lacking of any evidence that such a request had been filed. Claimant did not have seniority in Seniority District No. 14, and even if a request to be considered for extra work had been filed with the proper officer in the Mechanical Department, such a request would not have entitled claimant to assignment on a seniority basis to positions in that district, nor under any circumstances would it entitle him to assignment to positions for which he was physically disqualified and for which he did not possess the required fitness and ability.

The facts of record applied to the agreement rules here controlling require a denial award.

All data contained herein have been handled with the representatives of the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This was a companion case to CL-12141. In light of the award in that case the Board feels that arguments and contentions of the party in this case are premature and that award 9975 of necessity determines the issues here.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 this dispute be remanded

AWARD

Case remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June, 1961.

DISSENT TO AWARD NUMBER 9976, DOCKET NUMBER CL-12304

For the reasons expressed in dissent to Award 9975, and for others apparent in the record, we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENTS TO AWARDS NOS. 9975 and 9976, DOCKET NOS. CL-12141 and CL-12304

The Dissenters are here engaged in what Referee Carter termed "super-technicalities" in Award 3256. In Award 5330, Referee Robertson rejected a similar contention by stating in part, here pertinent, that:

> "* * * Full opportunity for conference on the alleged Agreement violation resulting from the protested assignments was had by both parties and they were discussed at more than one conference in the last step in the grievance procedure. * * * In this respect the comment of Referee Carter in Award 3256 is pertinent:
>
> > '* * * it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes. * * *.'"

The records in Dockets CL-12141 and CL-12304 clearly show that Rule 63 was placed in issue by the Organization and conferences were had thereon. Consequently, Rule 63 was properly before the Division when it disposed of the two disputes by the adoption of Awards 9975 and 9976. It is interesting to note that the Dissenters have here taken the opposite view to that taken by them in their "Reply to Labor Member's Dissent to Award 9189, Docket CL-8708", wherein they took the position that all rules of an agreement

were properly before the Board for consideration, even though such rules were not pertinent to the issues raised by the parties on the property.

Rule 63 was placed in issue on the property and thereby became a part of the two disputes to be determined by the Board. In fact, the claim in Docket CL-12304 was predicated solely on Rule 63, and being a companion case to Docket CL-12141, i.e., the circumstances involved therein arising from the same alleged violation of the agreement, it was proper for the Board to dispose of both claims by joining them together.

Apparently, the Dissenters are of the opinion that the Board may decrease its jurisdiction by the promulgation of "Rules of Procedure" (see Circular No. 1), and thereby evade the jurisdiction placed upon the Board by the Railway Labor Act, as amended. Section 3 First (h) of the Act provides, in part:

> "Third Division: To have jurisdiction over disputes involving station, * * *, clerical employees, freight handlers, express, station, and store employees * * *."

It will be noted that the Act confers jurisdiction in the Board over "disputes" and not over "claims" as the Dissenters would have us believe. Furthermore, Rule 63 is not "foreign to the current Agreement between the parties". It is one of the Rules of the Agreement that Petitioners alleged were violated. Rule 63 was placed in issue on the property and it was proper for the Board to consider such Rule in its determination of the dispute. Pleas based on "super-technicalities" will not change that fact.

It should also be noted that the issues raised by the Dissenters in their Dissents was at no time raised by the Carrier on the property, or in its submission to the Board. It was first raised by a Carrier Member in panel argument before the Referee. Consequently, it was inadmissible at that late date and the Dissenters have so recognized in their Dissents to Awards 8299 and 9988, regardless of whether their contentions were meritorious under the circumstances presented therein.

/s/ J. B. Haines
J. B. Haines
Labor Member