Award No. 10315

Docket No. CL-9916

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY PERE MARQUETTE DISTRICT

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated Rule 15 (a) when they abolished the position of Clerk No. 1, at Marlette, Michigan, effective June 15, 1956. That Rule 57 was violated when Carrier failed to use proper form as required by the Agreement.

That the Carrier shall pay for this violation by compensating Darlene D. Seddon, for wage loss sustained from June 18, 1956 to August 23, 1956 inclusive, at the rate of $14.60 per day for each work day that she did not work.

EMPLOYES' STATEMENT OF FACTS: On August 15, 1956 formal claim was filed by the Organization on behalf of Clerk Darlene Seddon, that the Carrier failed to comply with the rules of the Agreement, and Clerk Seddon did not receive proper notice of the abolition of her position.

In its reply to the claim as filed the Carrier advised that it admits that proper bulletin be posted, however, they contend that the rules do not apply, and that the employe did receive proper notification that her position was reduced.

This claim was handled on the property in regular order of succession up to and including Mr. B. B. Bryant, Assistant Vice President — Labor Relations. Employes Exhibit A and B.

POSITION OF EMPLOYES: There is in evidence an agreement between the parties from which the following rules are quoted in whole or in part for ready reference.

Rule 12 — Furnishing Bulletins

> Copies of all bulletins, assignments and changes will be furnished to the Local Chairman, Division Chairman and General Chairman.

Rule 15 — Reducing Forces

> (a) Regularly asigned employes whose positions are abolished in the reduction of forces shall be notified at least forty-eight (48) hours in advance of the effective date reduction is to be made.

Carrier submits that award by your Board of a penalty such as here sought would be equivalent to writing a new and different rule which has not been negotiated by parties to this dispute, a prerogative your Board has held it does not possess in many consistent awards, a few of which are: 794, 871, 1230, 1248, 2029, 2343, 2612, 2622, 3407, 4480, 4653 and 5079.

The awards above referred to, as well as the many others which are of the same reasoning are quite in keeping with court decisions, such as in Republic Steel v. Labor Board, 311 U.S. 7, wherein the Supreme Court said:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' "

Carrier finally submits that should your Board be inclined to award damages in this case, your Board has previously held in Award 7309, for example, "The measure of compensation used in similar cases in awards of this Division of the Board, under rules as here before us, has been on the theory of making the injured employe whole and as this has been done we conclude (b) of the claim must be denied." In Award 4739 your Board again held "The measure of damages for the breach of such agreements has consistently been held to be the amount which would have been earned under the contract, less any money earned in other employment." Carrier submits that insofar as this company is concerned, claimant would not have worked or earned any more than she has worked and earned had the bulletin covering abolishment of her position been posted at the time of or in advance of the notice actually given to her. It follows the portion of claim asking penalty or damages should be denied.

All data presented herewith have been placed before the employes in handling this case on the property.

OPINION OF BOARD: The Claimant herein was a regularly assigned clerk in Saginaw, Michigan. This position was allegedly abolished on June 15, 1956. The Claimant was orally notified that the position would be abolished on June 12, 1956. The Claimant had sufficient seniority so that she could have displaced another employe in the same seniority district. However, she did not see fit to exercise her seniority.

On August 15, 1956 the Local Chairman wrote to the trainmaster claiming that there had been a violation of the Agreement in that Rules 12, 15, 48 had been violated in that there had been a failure to post a bulletin as to the abolishment of the position. These rules provide:

> "Rule 12 — Furnishing Bulletins
>
> Copies of all bulletins, assignments and changes will be furnished to the Local Chairman, Division Chairman and General Chairman.

Rule 15 — Reducing Forces

(a) Regularly assigned employes whose positions are abolished in the reduction of forces shall be notified at least forty-eight (48) hours in advance of the effective date reduction is to be made.

Rule 48—Posting Notices

At points or in departments where employes covered by this agreement are employed, suitable provisions will be made for posting notices of interest to the employes."

The Carrier, on the other hand, contends that the contract does not provide that the notice has to be posted at any particular period in time and that they were in substantial compliance with the Agreement.

Before proceeding to the merits of the controversy, it is necessary to consider a procedural point first raised by the Carrier member on the Board. This contention is that this claim is barred by Article V 1(a) of the National Agreement.

Article V 1(a) provides:

"(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

The Organization member contends that this is new matter not raised on the premises and therefore cannot be raised at this time. The Carrier member on the other hand has presented awards of this Division which have treated Article V 1(a) as jurisdictional and therefore capable of being raised at any time.

Those awards of this Division which have held that Article V(1)(a) is jurisdictional seemed to have confused the question of jurisdiction which is always before this Board and procedure which may be waived expressly or by failure to assert procedural rights bargained for under the Agreement. The failure of the Carrier to raise any objection to the possible untimeliness of the claim operated as a waiver of that right. See Award 10075. This being so it cannot be raised here for the first time.

In regards to the merits of the case at hand, the record shows that the Claimant was notified orally of the abolishment of her position on June 12, 1956. We also note that this was considerably more time than the Agreement required. While is is true that there was no posting of the bulletin until after the claim was filed, it is also true that such failure to post in no way jeopardized the employes or the Organization.

In Award 10033 this Division held under a contract provision which required written notice that where oral notice had been given that it was impos-

sible to see how the failure to bulletin the position had jeopardized certain of the Claimants. It seems equally clear here that where the person whose position was abolished did not exercise her seniority rights, there is no person whose position was jeopardized by the failure to post the bulletin. Further, as contrasted to other agreements which require advance posting or the posting of the bulletin promptly the language does not establish any time limit. This plus the fact that there was no one adversely affected by the fact the bulletin was not posted leads to the conclusion that there has been no violation of the Agreement.

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 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 the Agreement was not violated.

AWARD

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of January 1962.