Award No. 11983
Docket No. CL-11608

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jim A. Rinehart, Referee

PARTIES TO DISPUTE:

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

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY

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

(a) That the Carrier violated the provisions of the Clerks' Agreement at Minneapolis, Minnesota on January 6, 1958, when it abolished position of Claim Investigator No. 3 and assigned the work thereof to other positions which were partially excepted from the Agreement; and,

(b) That Miss Elsie Nelson shall now be paid eight (8) hours pay at the pro rata rate of her position beginning on January 6, 1958, for each and every work day up to the time the position was rebulletined and assigned to the senior employe.

EMPLOYES' STATEMENT OF FACTS: Effective January 6, 1958, the position of Claim Investigator No. 3 in the office of Freight Claim Agent in the Revenue Accounting Department of the Minneapolis and St. Louis Railway Company was abolished.

The duties and responsibilities of the position were assigned to other positions in that office which were not fully covered by the Agreement.

Claimant Elsie Nelson was forced to the furloughed list because of lack of sufficient seniority to keep her in active employment.

Claim was filed and progressed in the regular manner, but was not composed. Copies of all correspondence are attached as Employes' Exhibits 1 through 10.

POSITION OF EMPLOYES: There is in evidence, an agreement effective February 1, 1955, covering rules and working conditions of the clerical employes on the Minneapolis and St. Louis Railway Company.

to her and for which she was qualified or could reasonably be expected to qualify, effectively barred or stopped any possible claim liability which might have existed. (Carrier denies that there was or is any such claim liability.) Miss Nelson had ample opportunity and was given all assistance possible to place herself on a position of her own selection from a number of positions available to her. She chose, however, to go on furlough and, of her own volition, declined to exercise her seniority as she could have done and was encouraged to do.

Further, during the time Miss Nelson has been on furlough she has had a number of opportunities to bid on vacancies advertised by bulletin for which she is qualified or could reasonably be expected to qualify. Miss Nelson, being a furloughed employe, retains an employment relationship with the Carrier and continues to enjoy the right to bid on any bulletin vacancy and to be assigned thereto in accordance with her seniority under the provisions of the Clerk's Agreement.

Carrier respectfully points out that the conversion of the position of Investigator No. 2 from its partially excepted status to that of full coverage is not an admission of error nor of the validity of this claim. Carrier has a right and an obligation to protect itself against a continuing claim liability in an unresolved dispute regardless of how groundless such liability may be or may appear to be. In so doing the Carrier did not weaken the strength of its position nor concede that the claim has merit or validity. Further, the removal of this position from PADB status resulted from findings that such status was no longer necessary to the Carrier's operation.

CONCLUSION

Carrier respectfully submits that it has shown by abundant evidence in this Submission and in the Exhibits appended hereto that this claim is without merit and is not supported by any provisions of agreement. Without waiver of its contention that the claim has no merit or validity, Carrier further submits that any liability however arrived at cannot extend beyond the date of April 29, 1958 which was the date of conversion of the position of Investigator No. 2 from partially excepted status to full coverage status. Carrier respectfull requests an award denying this claim.

Carrier affirmatively asserts that all material in support of its position has been presented to employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier unilaterally abolished the position of Claim Investigator No. 3 and assigned the work to two other positions partially excepted from the agreement. The occupant of the abolished position was fully covered by the agreement and the Clerk's Organization says the agreement was violated.

The Carrier says that the excepted positions were covered by the scope of the agreement and were excepted on PADB, (promotion, assignment, displacement and bulletin) positions only. That the work thus never left the scope of the agreement at all by the abolishment of the position and assignment of work to positions under the scope.

The position abolished and the excepted positions were different in, (1) rates of pay, (2) only men are accepted by Carrier to fill the positions, (3) seniority does not control filling vacancies, (4) positions are not bulletined, (5) occupant of excepted position cannot be displaced by senior employe.

The early Awards 751, 3504, 3396, 3191, 2506, and 1254, held outright that a position might not be abolished and the work appertaining thereto be assigned to another employe whose position was excepted from the agreement.

However, in Award 3563 and the interpretation thereof by National Railroad Adjustment Board, the very contrary was held. That award virtually overruled the early awards. Interpretation of Award 3563 is called by the Carriers, "a landmark case", and a number of awards involving disputes over the Clerk's agreements have followed it. See Award 4235 - Carter, 7821 - Smith, 9925 - Bailer.

The distinction between the landmark Award 3563 as interpreted by National Railroad Adjustment Board, Third Division, and the present case is found in the fact the agreement there prohibited removal of positions only, whereas here, removal of positions "or work", either or both, were prohibited. We quote from Award 3563 - Carter, the rule there under consideration:

> "Positions referred to in this agreement belong to the employes covered thereby and no position shall be removed from this agreement except by agreement."

Now let us compare the rule here:

> "Rule 1 SCOPE: These rules shall govern the hours of service and working conditions of the following classes of employes that come within and under the craft or class of clerical, office, station, and storehouse employes, subject to the exceptions as herein provided:
>
> * * * * *
>
> "Nothing in this agreement shall be construed to permit the removal of positions or work covered by this agreement from the application of these rules, except by agreement between the parties signatory hereto."

When the agreeing parties included the words "or work", was it their intention to prevent its being transferred to excepted positions? We think that is exactly what was intended. The purpose of adding the words, "or work" was to prevent the perpetuating of the excepted positions at the expense of the positions fully covered by the agreement, as to rights of seniority, promotion, assignment, displacement and bulletin rules. It was to prevent the destruction of those rights to the work, in behalf of the excepted positions. Therefore, we are dealing with different rules than those in the landmark case.

The question now is, does the effective agreement give the Carrier the right to retain appointive positions and deprive the employe of the right to perform work fully covered by all the rules of the agreement which such employe formerly was entitled to perform, in accordance with his seniority, fitness and ability?

To permit Carrier to transfer the work of Claim Investigator Number 3 to an excepted position results in the former occupant of the position being unassigned and unemployed although retaining seniority rights to the work in question.

This Board has held that positions or work once within collective agreements cannot be removed therefrom, arbitrarily and the work assigned to persons excepted from the agreement. Award 754 - Swacker; 751, 1254, 3504, and 3396. It was recently held in Award No. 11072 - Dorsey:

> "A collective bargaining contract which, absent expressed or implied exception, does not vest the right to the work, when required, in the employes within the collective bargaining unit would have form without substance. The work is the catalyst which gives substance to the Rules pertaining to rates of pay, hours of work, seniority, working conditions, etc. If the Carrier remained free to assign, unilaterally, the work to whosoever it chooses, crossing craft and class lines, the over twenty (20) Rules in the Agreement, here being interpreted and applied, would be for naught in that they would have meaning only at the whim of Carrier."

We hold that those awards apply here and are controlling.

The agreement was violated when the Carrier removed both the position and the work from the promotion, assignment, displacement and bulletin rules without negotiating with the employes.

As to part (b) of the claim, we hold that its continuing feature ended with the agreement April 29, 1958 between the General Chairman and the Carrier for reclassification of Position No. 2 under full coverage of the current schedule and order that occupant of position of claim investigator No. 3 be paid by the Carrier such wages as she would have earned absent the violation, less such wages, if any, she did earn during the period from January 6, 1958 to April 29, 1958.

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 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 violated the Agreement.

AWARD

Claim sustained as to (a).

Claim sustained as to (b).

Monetary award to be computed as prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11983
DOCKET CL-11608

In view of this Board's consistent and explicit rulings that work of an abolished Clerk's position which is assigned to a partially excepted position "still remains within the scope of the Agreement", it is manifestly absurd for the Referee, without any supporting data, to conclude that it was the specific intention of the parties to prohibit the assignment of the remaining work of an abolished position to a partially excepted position when they adopted a rule which merely purports to restrict Carrier from removing work from the application of the rules of the Agreement. As was stated in Award 3563, Interpretation No. 1:

> "We are of the opinion that the remaining work of an abolished position which was within the Clerks' Agreement may properly be assigned to any position within the scope rule of that Agreement. This is so whether or not such position to which it was assigned is excepted from some of the rules of the Agreement. **It is argued that as the abolished position was placed under all the rules of the Agreement by negotiation that the remaining work could not be assigned to a partially excepted position except by negotiation. The answer to this contention is that the occupant of the position and not the work is excepted from the specified rules.** The parties have already agreed in Rule 7 (c) that certain rules do not apply to the position to which this remaining work was assigned. But **the work still remains within the scope of the Agreement** and its assignment to the Chief Rate Clerk is in accordance with the contract made." (Emphasis ours.)

To the same effect, see Awards 3866, 3867 (Douglass); 3878 (Yeager); 4235 (Carter); 7821 (Smith); 9925 (Bailer). In the absence of evidence to the contrary, we must conclude the parties understood that work assigned to a partially excepted position "still remains within the scope of the agreement." The Referee committed palpable error in concluding that they had a different understanding.

The Awards cited in the Award are not in point, and those mentioned in the fourth paragraph were not even cited by the employes at any time in the handling of this case. Furthermore, Award 11072 (Dorsey) from which the Referee quotes (involving a transfer of work entirely outside the scope of the applicable agreement) indicates that we are governed by rules of contract

law in interpreting these labor Agreements. Had the Referee followed contract law in this case, he would necessarily have denied the claim.

We dissent.

G. L. Naylor
W. M. Roberts
R. E. Black
W. F. Euker
R. A. DeRossett

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 11983, DOCKET CL-11608

The Referee clearly distinguished and twice answered (once in panel discussion and once in re-argument) the contentions raised in the dissent. Award 11983 is correct. It weighs the facts against the controlling Agreement rules and upsets nothing but the Dissenters, whose wailing does not detract one iota from the soundness of the Award.

D. E. Watkins [1-15-64]