Award No. 12251
Docket No. CL-14144

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

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

NEW YORK CENTRAL RAILROAD
(Southern District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5373) that:

(1) Carrier violated the Clerks' Agreement when it removed Mr. Eugene D. Belcher from his assigned position in the office of the Terminal Superintendent at Indianapolis, Indiana; arbitrarily terminated his established seniority; and refused to permit him to exercise displacement rights to positions held by junior employes.

(2) Mr. Belcher's established seniority date of September 11, 1958, shall be restored and he reinstated with all rights unimpaired.

(3) Mr. Belcher shall be compensated and made whole for any and all wage loss dating from January 8, 1962 and continuing until restored to service.

EMPLOYES' STATEMENT OF FACTS: Mr. Eugene D. Belcher was regularly assigned to Position No. 67 on September 11, 1958. Work week — Monday through Friday. Hours of Service — 8:00 A.M. to 5:00 P.M. (one hour for lunch). Rate of Pay — $19.018 per day. Rest Days — Saturday and Sunday.

On January 2, 1962, at approximately 8:15 A.M., claimant was notified by telephone that he was being relieved of his position. The telephone notification was not confirmed in writing, and under date of January 3, 1962, claimant wrote Mr. J. M. Page, Terminal Superintendent, requesting information relative to the Carrier's action in removing him from Position No. 67. (See Exhibit A.)

Claimant was unable to obtain any information from the Carrier for their action and on January 5, 1962, written notice was given to Mr. R. C. Marquis, District Superintendent, desiring to exercise his seniority on a Position No. 20, held by Miss Nancy Maas, a junior employe to Mr. Belcher. Mr. Marquis, under date of January 5, 1962, declined the request of Mr.

9:40 A. M. on September 17, Mr. Belcher, in telephone conversation with Mr. Horton's office, canceled the appointment and advised that he was not interested in the position.

The rate on this so-called "excepted" position was the equivalent of what claimant could have earned on an Agreement position, had he had displacement rights. His refusal to consider employment on this position is evidence that he has no sincere desire to work for the Carrier, but is merely attempting to collect payment without work, on the basis of an alleged violation of a schedule rule.

There is no rule in the Agreement which supports the claim that Carrier violated the Agreement. Your Board, in such circumstances, has denied claims, as evidenced by the following excerpts from the Opinion of Board in a few such recent awards:

AWARD No. 10994 — Referee Levi M. Hall

"This Board has no authority to supply rules where none exist * * *. Consequently, there being no rule, there could have been no violation of the same."

AWARD No. 10388 — Referee Frank J. Dugan

"In the absence of any contractual provision relied upon by the Organization in this particular dispute, the claim is denied."

CONCLUSION

It has been fully substantiated by facts and evidence heretofore presented that:

(1) Claimant did not, under a mutual interpretation of the Agreement, establish a seniority date on the roster of Agreement employes.

(2) He attempted to displace on jobs on which he had no rights, even if he had established seniority, and

(3) He refused Carrier's offer of employment on an "excepted" position commensurate with the Agreement positions he contends he should have been permitted to work.

(4) No rule of the Agreement was violated.

Claim must be considered as one without merit and be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Eugene D. Belcher was initially employed by the Carrier on September 11, 1958, as a Steno Clerk occupying a position which was designated as Position No. 67. The record contains Exhibits Q, R, S and T, which are bulletins inviting applicants to bid on Job No. 67 and which are offered by the Organization to show that the said Job No. 67 was covered by the Agreement. As such, seniority attached to the position just like it did to all other jobs covered by the Agreement.

On or about September 14, 1960, the Carrier placed Claimant on a monthly rate and advised him that his position would be excepted from the Agree-

ment. On January 2, 1962 Belcher was notified that he was being relieved of his Steno-Clerk Position No. 67. Claimant twice sought to exercise his seniority by displacing junior employes, but he was not allowed to do so and the Carrier took the position that:

> "* * * you have never worked on a position covered by the Clerks' Agreement and therefore you have no clerical seniority and no displacement rights."

There is a job known as Position No. 95, which was the only monthly position on the payroll and that position was fully excepted from any provisions of the Agreement. The Carrier seeks to justify its action by stating that it made an error when it applied the Bulletining, Overtime, Seniority and other rules to Position No. 67, but urges that when Claimant was placed on a monthly rate on or about September 14, 1960, this came about as the result of an oral agreement reached between it and a Mr. Keuper, who, at that time, was the Organization's General Chairman. Thus, it is claimed that the Agreement between the parties was changed by the oral agreement between Keuper and the Carrier. It is further stated that since Job No. 95 was admittedly excepted from the Agreement when some of its duties were assigned to Job No. 67, the exempt status of Job No. 95 attached to Job No. 67 and had the effect of taking Job No. 67 out from under the provisions of the Agreement. If this argument is accepted, the net result of these actions caused the Claimant to lose all the rights that previously inured to occupancy of Job No. 67, thus divesting him of clerical seniority and displacement rights.

In support of this argument, Carrier states that a written agreement can be changed orally, and such change took place as the result of the phone call had by former General Chairman Keuper with Terminal Superintendent J. N. Page. As proof of this contention Carrier points to a memorandum written by Page in his file noting the phone conversation with Keuper.

Petitioner states that when the Carrier, on or about September 14, 1960, served notice on Belcher that he would be placed on a monthly rate of pay and his position would be excepted from the Agreement, the said Carrier violated its Agreement. The position of Claimant just prior to notification of this change, had been under the Rules of the Agreement for over eighteen years with all Rules being applied to the position.

It would seem clear that Mr. Page had no authority to unilaterally remove this position from the coverage of the Agreement and assign it to an excepted status. It would seem equally clear that Mr. Keuper would not have taken it upon himself to agree to such a basic change by a mere telephone conversation. It is interesting to note in this connection that the basic Agreement of the parties consists of 43 pages. The total booklet contains 102 pages with the balance over 43 pages being made up of a series of amendments, addenda and interpretations, all of which are signed by Keuper for the employes and appropriate company officials for the Carrier. It would seem reasonable to expect that if it had been intended to change a basic term of the contract which had been in effect for 18 years that such a change would be evidenced by a memorandum signed by both parties, as had been their practice in the past.

If the Carrier's argument were to be projected to a logical conclusion, it would be possible to take some duties of an excepted job, transfer such duties to another position, and then claim that since the duties transferred came from an excepted job, the transferred duties thereby converted the job previously under the Agreement into an excepted job. This conclusion does violence to

the Agreement and has the effect of destroying sacred rights of seniority and displacement, and it is wholly illogical to believe that the parties intended such a radical change by a mere phone call.

It should also be noted that since the Carrier is relying on an alleged oral agreement to vary its written contract, it had the burden of proving said oral agreement. While it is true that a written agreement can be changed orally, in the event a dispute later arises, the problem of proving the oral agreement rests on the party who urges this contention. It would seem clear that a memorandum, written by the Carrier's representative to himself, is a self-serving declaration, and cannot by itself sustain the Carrier's burden of proof.

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 Agreement was violated.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1964.

DISSENT TO AWARD NO. 12251, DOCKET NO. CL-14144

Award 12251 is in palpable error.

The Scope Rule of the Agreement between the parties specifically excepts one position of stenographer in each Trainmaster's office. Petitioner stated that Position No. 95, held by Mrs. Callender, was the only excepted position of Stenographer to the Trainmaster at Indianapolis, and that, when she was transferred to the Superintendent's Office, her rate was transferred with her. However, it alleged that the work previously performed by Mrs. Callender was consolidated with the work of Position No. 67, held by Miss Mayjors. Carrier stated that Miss Mayjors was initially employed on August 1, 1942, and assigned to Position No. 30, which position she held until June 22, 1953; that, on this latter date, it established a new position, No. 67, as Stenographer to the Trainmaster at Indianapolis, to which Miss Mayjors was transferred, performing duties which previously had been performed by Mrs. Callender.

Petitioner's admission that Mrs. Callender's rate was transferred with her to the Superintendent's office lends credence to Carrier's contention that

it had established a new position, No. 67, comprising the duties previously assigned to Mrs. Callender. There is no proof in the record supporting Petitioner's contention that her work was consolidated with work of any other position, and the majority was in error in accepting Petitioner's unsupported assertions in this respect; mere assertions are not proof.

Miss Mayjors was succeeded on Position No. 67 by Mrs. Berauer, and the latter was succeeded thereon by claimant, Mr. Belcher, whom Carrier hired on September 11, 1958. Vice General Chairman Haynes, in letter dated February 26, 1962, admitted "Mr. Belcher was employed September 11, 1958 as Stenographer to the Trainmaster."

Question arose concerning the seniority established by Mrs. Berauer on Position No. 67, and, under date of January 22, 1960, Carrier wrote the then General Chairman Keuper for a ruling in her case. Under date of February 16, 1960, General Chairman Keuper called B. S. Schuck, Carrier's Supervisor of Wage Schedules, on the telephone and ruled that, inasmuch as Position No. 67 was excepted from the Agreement and all of Mrs. Berauer's service in the Transportation Department had been on that position, she consequently had established no seniority in that Department. Carrier concurred with General Chairman Keuper's ruling and, as a result, it removed from the seniority roster the names of both Mrs. Berauer and Claimant, the latter having succeeded Mrs. Berauer on Position No. 67. No issue was ever raised over Mrs. Berauer's name having been so eliminated from the seniority roster in conformity with the oral agreement between the parties. Furthermore, no issue was raised at the time on behalf of Claimant, nor until some two years later, when he requested to exercise displacement rights.

The conclusions reached by the majority for sustaining the claim herein are not based either on facts or issues of record. Neither party argued at any time that the oral agreement modified the existing agreement, nor did Petitioner dispute existence thereof. The position of the parties thereto was that the oral agreement was "in accordance with the agreement" and that it simply interpreted Rule 1 by identifying Position No. 67 as the position in the Trainmaster's Office at Indianapolis, which that Rule excepted from the Agreement. The former General Chairman, who was authorized to make same and a Committeeman of many years' experience, deemed that a telephone call would be sufficient. Carrier concurred. The majority obviously was confused in holding that this was a case of changing "a basic term of the contract which had been in effect for 18 years," and in likening this case for comparison with or to be included among the forty-three pages "of a series of amendments, addenda and interpretations" appearing in the Agreement between the parties.

Furthermore, the majority also was confused in inferring that existence of the oral agreement was disputed so requiring proof thereof by the Carrier. The record does not show that the present General Chairman disputed the existence of the oral agreement at any time. On the contrary, it shows that his efforts were directed at attempting to prove that his predecessor General Chairman's ruling was in error. But, right or wrong, it is properly before the Board, and binding on the parties.

Accordingly, the issue before this Division was not whether or not an oral agreement modified the existing agreement, basically or otherwise, or whether or not it actually existed. On the contrary, the issue before us was simply whether or not the oral agreement was binding on the parties under a change in general chairmen. Obviously, the change in general chairmen did not alter or cancel the oral agreement, and the Railway Labor Act makes no

provision for review or reversal of such settlements by this Board (Award 1023, Fourth Division). Also see Third Division Award 10248, in which this Division held that a change in representation did not alter or cancel agreements.

In addition, existence of the agreement not having been denied or disputed at any place in the record, it was not necessary for Carrier to prove same. The Memorandum signed by Carrier's Supervisor of Wage Schedules (Schuck), recording the telephone call he had received from former General Chairman Keuper, obviously is significant in such circumstances, notwithstanding that it also may have been self-serving. The majority's confusion concerning this transaction is further illustrated by its reference to "the phone call had by former General Chairman Keuper with Terminal Superintendent J. N. Page" and "to a memorandum written by Page in his file noting the phone conversation with Keuper."

It is clear from the record that this was not a case of depriving Claimant of "sacred rights of seniority and displacement," but it simply was a case of correcting an error by mutual agreement between the parties, thus precluding Claimant's displacing another employe who had properly established seniority rights under the Agreement, and to whom such rights are just as sacred as to Claimant. Award 12251 erroneously reverses this situation by restoring to Claimant seniority to which he was not entitled in the first place.

For the foregoing reasons we dissent.

W. H. Castle
D. S. Dugan
P. C. Carter
T. F. Strunck
G. C. White