Award No. 12974
Docket No. CL-12597

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

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

PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4918) that:

(a) The Carrier violated the Agreement when, between April 14, 1960 and April 19, 1960, it suspended clerical employes* from their positions, claiming to "abolish" their positions, but such positions not being abolished in fact.

(b) The employes* adversely affected shall now be paid for loss of compensation.

*Claimants and amounts claimed are as follows:

Fisher, J. G.	1 day	April 17, 1960
Todora, J.	1 day	April 18, 1960
Sawaska, J. P.	1 day	April 18, 1960
Kline, J. J.	2 days	April 16 and 17, 1960
Dorney, R. R.	2 days	April 16 and 17, 1960
Thatcher, R. W.	2 days	April 16 and 17, 1960
Ryan, T. P.	2 days	April 15 and 18, 1960
Searfass, D. J.	2 days	April 15 and 18, 1960
Reed, E. H.	3 days	April 16, 17 and 18, 1960
Christof, E. V.	3 days	April 16, 17 and 18, 1960

EMPLOYES' STATEMENT OF FACTS:

1. Under date of April 11, 1960 the Carrier issued Clerical Bulletin Number 706 addressed to Outside Clerical Forces announcing that, effective April 14, 1960, the listed positions would be temporarily suspended, but might work as shown and further announcing that, effective April 18, 1960 at 7 A.M.,

Both the Local Chairman and General Chairman also charge a violation of Rule 12:

"RULE 12. CHANGE IN DUTIES

(a) When there is a sufficient change in the regularly assigned duties and responsibilities of a position, or in the character of the service required, the compensation for that position shall be subject to adjustment by agreement between the Company and the Local Chairman, but established positions shall not be discontinued and new ones created under the same or different titles covering relatively the same class or grade of work, which shall have the effect of reducing the rate of pay or evading the application of these Rules.

(b) When positions are abolished, any remaining duties shall be re-assigned through conference in accordance with paragraph (a) of this Rule."

A mere reading of the Rule shows its inapplicability here.

Finally, the Local Chairman charges a violation of "various sections of Rule 15 – Seniority, without specifying them; and the General Chairman goes no further than to say of the April 12, 1960 bulletin abolishing the outside clerks' jobs: "This does not appear to be 'at least three days advance notice' as required by Rule 15 (L)." As the Carrier pointed out in its statement of facts, the past practice in the application of Rule 15 (l) from the time of the first agreement effective January 1, 1947, has been to count the day the notice is posted and the day it becomes effective each as one of the three days' notice required by the Rule, and under that practice the notice was sufficient. If that practice can be regarded as violative of the Rule, however, then the responsibility for any lack of timeliness should fall on the Brotherhood and not the Carrier. For, in this instance, the Carrier would have posted the notice of abolishment one day earlier, except that the Acting Local Chairman agreed that day to a temporary suspension of jobs, and it was his action in reversing himself on that arrangement the next day that caused the notice to be issued when it was.

In general with regard to the Seniority Rule, the basic purpose of that Rule is to give employes the right to work according to seniority. Here the claim of the Brotherhood is on behalf of the 10 junior-most outside clerks whose assignments were abolished. It is, of course, obvious from the lack of claims on behalf of the senior clerks that they worked as much time as they would have worked had their assignments not been abolished, demonstrating how effectively the Carrier divided the reduced amount of work among the senior employes. This certainly meets the purpose of the Seniority Rule, and, the Carrier submits, is not inconsistent with any of the provisions of the Rule.

For all the reasons stated, it is the Carrier's position that the Brotherhood's claim is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: A proposed award was submitted by the referee in this case. The Carrier requested that it be allowed to reargue the claim. Such request was granted. After hearing the reargument of both parties and reviewing the facts and the cases cited, it is the opinion of this Board,

that to amplify the proposed award would materially assist in best supporting the sound conclusions reached therein. It is therefore the decision of this Board that the original proposed award be, and the same is hereby withdrawn, and further that the award presented herein be the award adopted in this claim.

This claim involves the abolition of all regularly scheduled clerk positions on "industrial holidays." Rule 7 of the Agreement enumerates the holidays contemplated by the Agreement. It does not include industrial holidays. Since certain holidays are listed, and others are excluded, we hold the ones enumerated in Rule 7 to be exclusive of all others. Rule 7 is involved at this point merely to indicate that the parties did not intend to include the so called "industrial holidays" in the list of those holidays to be observed. It is not singularly determinative of the issues involved in the claim.

There is no question but that when the Steel Company observes an industrial holiday, the work load of this Carrier is somewhat diminished. For many years it was the practice of this Carrier and the organization to agree on a method of procedure whereby positions would be suspended during industrial holidays. This procedural Agreement is described by the Carrier as being a time and money saving device. It is looked upon by the organization as a method of protecting seniority rights. Something happened prior to the submission of these claims which caused the organization to no longer agree as to the procedure previously used. The Carrier then asserted that it has the inherent right to abolish positions and that the lack of the procedural Agreement merely meant that it would have to fully comply with the technical requirements of abolishing positions, and then rebulletining them after the observance of the industrial holiday.

The employes allege that the so called abolition of the positions was in fact only a way to avoid payment to the employes on these days. They contend it is not an abolishment at all. They further allege that such action is a violation of the guarantee rule. The Carrier states that its obligations under the guarantee rule have been relieved in this type of claim by a Memorandum Letter. We are of the opinion that this Memorandum establishes the procedural method by which the Carrier and the employes could agree to handle industrial holidays, if they so desired. In fact this was the method used for many years as indicated above. But we are not of the opinion that this Memorandum abrogated the basic rights of the guarantee rule, absent mutual consent.

It is to their credit that the employes and the Carrier could resolve their problems on the property in the past, but this does not say that this Board will enforce unilateral decisions made as the result of failure of acquiescence or Agreement.

The record does not indicate that the employes ever consented to the observance of industrial holidays in the manner prescribed in this case. They agreed only to the procedural aspects as mentioned above. If in fact there was a bona fide abolition of positions in this case, the question before us would be whether or not the abolition of these positions was within the prerogative of the Carrier, or if such right has been limited by the terms of the Agreement. It is considered basic that the Carrier may abolish positions. In this case however, there was no bona fide abolition of a position. The record of the Carrier is clear. In clerical bulletin 706 it plainly stated that, "all employes affected by this Bulletin shall return to their duties, or assignments and schedules, as in effect as of date of this Bulletin." When the employes

failed to agree to this, Carrier then cancelled the Bulletin and simply announced that all clerks positions had been abolished, for the period covering the industrial holiday. After the holiday they rebulletined the positions and put the men back to work. This was a clear subterfuge. It was an apparent attempt to do indirectly what it could not do directly.

Rule 12 provides:

"RULE 12. CHANGE IN DUTIES

(a) When there is a sufficient change in the regularly assigned duties and responsibilities of a position, or in the character of the service reqiured, the compensation for that position shall be subject to adjustment by agreement between the Company and the Local Chairman, but established positions shall not be discontinued and new ones created under the same or different titles covering relatively the same class or grade of work, which shall have the effect of reducing the rate of pay or evading the application of these Rules.

(b) When positions are abolished, any remaining duties shall be re-assigned through conference in accordance with paragraph (a) of this Rule."

This rule clearly indicates that the abolition and subsequent reestablishment of the same position is improper when the intent of the so called abolition is merely to avoid the payment of wages due under the Agreement.

Employes urge that the alleged violation of the guarantee rule comes within the clause in Rule 12, "evading the application of these rules." After hearing the reargument, we are inclined to agree with this position. The memorandum appears merely to apply where there is Agreement as to the method and procedure to be used upon the observance of an agreed to industrial holiday.

We are even more persuaded that those Claimants who lost wages during this time, suffered a reduction in the rate of their pay. During the industrial holiday certain work was carried on by the Carrier. They used clerks, based on seniority, for this work. Those clerks who worked, apparently have not filed claims because they suffered no loss of wages. The ones who would have been employed but for the so called abolishment, were adversely affected and their rate of pay was reduced. There can be no other conclusion in terms of dollars and cents.

This case seems to be very clear. The Carrier attempted to execute a technical abolishment of all clerks positions, to avoid paying the employes for the industrial holiday. We are of the opinion that this problem should be resolved at the collective bargaining table, and that the Carrier should not attempt to use this Board to force the observance of industrial holidays not contemplated by the Agreement.

It is significant to note that Carrier has already labeled this award as a palpable error. This phrase has been used in so many cases before this Board that it has come to lose nearly all significance. It should be obvious to all that when a person listens to arguments, reviews records, examines cases and makes an honest effort to arrive at a fair and just decision, his judgment cannot be considered as palpably in error, within the context of the meaning usually given to that word. To really have palpable error, you

would nearly have to have fraud or malice in your opinion. Those elements are not present in this opinion, despite the inferences that the Board has not been open-minded about this claim.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12974, DOCKET CL-12597

Referee Hamilton

The decision in this case (Docket CL-12597) has been adopted in four companion cases (**Award 12975**, Docket CL-12677; **Award 12976**, Docket CL-12871; **Award 12977**, Docket CL-13039; and **Award 12978**, Docket CL-13077). The five cases involve claims by the Organization for an aggregate of 159 days' pay for the junior-most operating-transportation clerks (weighers, yard clerks and interchange clerks) whose jobs were temporarily annulled by the Carrier for periods varying from 4 to 11 days because of so-called "industrial holiday" shutdowns during 1960 by Bethlehem Steel Company, the Carrier's chief customer, each of which resulted in a loss of traffic for the Carrier ranging from 40% to 50%. The cut in the clerical work force made by the Carrier during these partial shutdowns by the Steel Company was commensurate with the Carrier's reduction in traffic, and was matched by like reductions in force in its train and engine force and in other non-operating groups directly affected. Furthermore, the reduction in the clerical force was made after the requisite contractual advance notice, and the jobs were restored, upon resumption of full operations by the Steel Company, in accordance with the applicable bulletining and seniority rules. The Organization, nevertheless, in each case, argues that the Carrier violated the Agreement, principally the Guarantee Rule and Rule 12, because "it suspended clerical employes from

their positions, claiming to 'abolish' their positions, but such positions not being abolished in fact"; and claims 159 days' pay for the junior clerical employes who were laid off when there was no work for them to do.

Because there are so many critical mistakes and erroneous assertions present in this decision, it will only be necessary to deal with the most flagrant in order to impeach the award.

The Referee advises that Rule 12:

> "* * * clearly indicates that the abolition and subsequent re-establishment of the same position is improper when the intent of the so called abolition is merely to avoid the payment of wages due under the Agreement."

This statement is entirely incorrect. The Referee was advised of the basic purpose of this rule, prohibiting the abolishment of higher rated jobs and the assignment of their work to lower rated positions; that it was a National rule existing in most Clerks' agreements; that no similar interpretation has ever been rendered by this Board, and what is equally important, this interpretation is even at odds with the arguments advanced by the Petitioner in this case. Petitioner never once contended that the "subsequent re-establishment of the same position" following the temporary abolishment, is contrary to the rules. Indeed, the Labor Member tried to convince the Referee that it was the establishmentof the Clerks' positions during the **interim period,** i.e., over the industrial holidays that was "in effect" the re-establishment of positions prohibited by the rule. The Referee refused to accept the bait and extended the argument even beyond absurdity. He holds that where there is any intent to abolish positions coupled with an intent to re-establish them at some future time when the work reappears, this "is improper because it is done to avoid the payment of wages due under the Agreement."

On what basis can the Referee logically hold there are wages due any employe when there is and was no work to be performed? The Referee candidly admits that "when the Steel Company observes an industrial holiday, the work load of this Carrier is somewhat diminished." This is indeed a euphemistic way of telling the reader there was a 50% drop in business. The business that remained was performed by the senior Clerks. This, moreover, was in accordance with the suggestion made by the Local Chairman pursuant to Rule 12. It is thus established by the record — not open to challenge — (1) there was a substantial reduction in business, (2) the work that remained was performed by the senior Clerks in accordance with the Local Chairman's request.

This decision purports to award Claimants compensation for performing no service and for which there was no service to perform. The contract — particularly Rule 12 — does not require the retention or payment of any employe when no services are expected to be performed. To say as this Referee has, that wages are due under such circumstances, is an insult to the dignity of the contract and the intelligence of the contracting parties.

The Referee concedes the Carrier has the right to abolish positions, but then corrupts the exercise of that right by holding that the abolishment of any position is not bonafide if it is contemplated a job may again be re-established in the future. In short, according to the Referee, unless a job is permanently abolished, the abolishment cannot be considered bonafide. This is not only repugnant to all concepts of sound, efficient and economic manage-

ment, but is squarely contradicted by the parties' Memorandum Agreement, particularly paragraph (b) dealing with the Guarantee Rule which expressly contemplates the existence of temporary abolishments. Paragraph (b) reads:

> "(b) when a regular assignment is temporarily abolished the Employe holding such assignment may be used to fill an extra assignment and, providing he has not exercised seniority rights, shall be permitted to return to it when it is restored to service;"

It cannot be denied this Memorandum Agreement does explicitly contemplate temporary abolishments. It is the only matter discussed under paragraph (b). It cannot be denied this Memorandum Agreement protects the Carrier against penalties under the Guarantee Rule. That was its intent and purpose. Furthermore, contrary to the Referee's holding here, these temporary abolishments are not subject to reaching a prior agreement with the Organization. We find no such condition precedent attached to the Memorandum and the Majority can point to none.

In anticipation of the fact the Referee would not be willing to accept the clear language of the Memorandum at its face value, or would not for undisclosed reasons, be willing to accept the well-established principle that management retains all prerogatives not bargained away, the Carrier went even further with its proof in this case. The Carrier introduced a statement made by the present General Chairman, a co-signer of the contract, which had been submitted in an earlier case filed with the Board. There, the General Chairman said:

> "* * * the intent of the Understanding is that when a regular assignment is temporarily discontinued or abolished, . . . This Memorandum merely protects the Carrier from the application of 'Rule 10 – Guarantee' . . ."

Here, we have a clear unequivocal statement coming mind you, not from the Carrier, but from the General Chairman, supporting Carrier's position in this case. Yet, the Referee callously disregards it and states:

> "* * * But we are not of the opinion that this Memorandum abrogated the basic rights of the guarantee rule, absent mutual consent."

and

> "* * * The memorandum appears merely to apply where these is Agreement as to the method and procedure to be used upon the observance of an agreed to industrial holiday."

If the Memorandum of Understanding only applied after an agreement was made with the Organization, there would have been no need for the Memorandum. The Memorandum is self-executing. Its purpose was clearly stated by the General Chairman. The Referee adamantly refused to accept the interpretation placed on the Memorandum by the contracting parties. He has offered no reason for his refusal. Under the circumstances, the Majority's award is a nullity.

Totally apart and in addition to the clear language of the Memorandum, the Referee's attention was directed to **Awards 10133, 10006, 9853, 9308, 6943, 6099 and 5042.** The reader will note the Referee does not discuss these cases,

notwithstanding the fact that each dealt with a comparable factual situation where the Guarantee Rule was allegedly violated, and in each case, the Board held the Guarantee Rule did not apply when the positions were abolished.

The Referee's contentions relating to Rule 7, are hardly deserving of comment. Whether the cessation of work coming to the Carrier is caused by "industrial holidays" observed by the Steel Company — **not the Carrier** — or whether it results from a host of other causes such as strikes, breakdowns, industry vacations, etc., the fact remains that over a temporary period of time, the Carrier has no work for Claimants to perform. The Carrier cannot be expected to retain employes in service when there is no work for them to perform. That was the essence of the Organization's claim and the basic reason for Carrier's strenuous resistance.

Parenthetically we might point out that each of the Claimants did receive his holiday pay for the holidays that occurred during the periods in question. This forecloses any question that what was done here was to avoid holiday pay. In any event, we have repeatedly confirmed Carrier's right to reduce operations over a holiday period by abolishing positions, even where it resulted in employes losing a day's pay. **Third Division Awards 10505, 10502, 10287, 10284, 10245, 10175 and 9308**, to name just a few. The fact that Claimants suffered no loss of compensation on the holiday here, only improves Carriers' position.

The Referee says the Carrier did indirectly what it could not do directly. He categorizes this as a clear subterfuge. Needless to say, this statement did not originate with the Referee. It was one of a number of loose, unsupported allegations offered by the Petitioner — which the Referee quickly embraced. In response, the Carrier emphasized in the strongest possible language, that when the Organization aborted the oral agreement originally made with the Local Chairman pursuant to Rule 12, the Carrier had only one recourse and that was to comply with the Bulletining and Seniority Rules. In short, the Carrier complied with the "Bidding and Bumping Rules" after the General Chairman refused to concur in the Local Chairman's arrangement to suspend those rules as they had in the past. Now by some type of devious reasoning, the Referee ostensibly believes that compliance with the rules to avoid violating the rules, constitutes a subterfuge justifying an exaction of a penalty.

Following this line of reasoning, the Carrier is stripped of all management prerogatives — for it could never act even in compliance with the rules unless it first had agreement with the Organization. The Organization with the Referee's assistance, would reserve unto itself, the naked power of veto over all management's decisions. That is exactly what the Referee has accorded the Petitioner in this case contrary to **Awards 6610, 8224, 2491, 1101** and many others.

Finally, we must offer a comment on the concluding paragraph of the award. As a general observation, we would say it sets the tone and the quality for the decision. The Referee says:

> "* * * **To really have palpable error, you would nearly have to** have fraud or malice in your opinion. * * *"

We wonder how the Referee could reach such a conclusion. To simply say the statement is wrong or grossly incorrect, is a mild expression of our

opinion. Any impartial reader who seriously studies this remark, will at once adduce the extent of error committed throughout this decision and more important, the reasons why those errors were made. If it needs to be said, palpable error has nothing to do with fraud or malice, indeed, palpable error could be committed by the purest of hearts — and minds — when those minds either fail to give sufficient study to the problem or are unable to understand the arguments. As the Referee states, it is entirely possible, of course, "to have fraud or malice" which would so color a person's judgment that he could make palpable error. However, no one could possibly know that except the author of the Opinion.

For the reasons stated hereinabove, and others, we dissent.

W. F. Euker
R. A. DeRossett
C. H. Manoogian
G. L. Naylor
W. M. Roberts

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 12974, DOCKET CL-12597

Carrier Members' Dissent was, without doubt, authored by the Carrier Member handling the case. In many respects, it is in the same vein as the "show" put on for benefit of the Referee, the Labor Member, and anyone else in the building during the reargument. Despite the histrionics and dramatic gestures of the Carrier Member, the Referee was not convinced that Carrier was acting purely within its rights in doing what it did, which was, as the Carrier stated: "* * * the same as we have proposed to you, lacking of course, the desirable 'mutual agreement' feature."

It is to the Referee's credit (he needs no defense) that, after witnessing such a fine performance, he could still hold to the facts of rcord in the case and call the action by its correct name, i.e.: a subterfuge.

The fact of the matter is, in all cases governed by this decision, that positions suposedly abolished were, in fact, continued during the so-called "industrial holidays". The Carrier never attempted to resort to such a subterfuge subsequent to the "industrial holidays" involved in these cases, but evidently waited to see if their advocate here could "sell" their ideas to a Referee. Such action is a poor substitute for collective bargaining.

It is argued that something like a 40% to 50% reduction in business took place during these "industrial holidays"; but it is important to again point out that Carrier purportedly "abolished" 100% of its forces. It did not in fact do so, and therein lies the basis for the unimpeachable finding that Carrier's action was clearly a subterfuge.

Moreover, in purportedly "abolishing" all positions, any attempt to displace a junior employe (a right accorded in the Agreement) was thwarted by Carrier; hence, assertions that Carrier complied with the "Bidding and Bumping Rules" are in error for Carrier completely evaded them by nominally "abolishing" all positions while the work thereof continued.

The remedy in this case was, unlike some erroneous ones in other cases, fashioned within the confines of the applicable Agreement, which is the Referee's duty to perform.

As for the concluding paragraph of the "Opinion" in the Award, it was obviously included therein by the Referee after the reargument, for it was correctly anticipated by him that many of the remarks shouted by the Carrier Member during the "reargument" would find their way into print via a dissent.

The Award is correct in every respect, including the Referee's uncommonly accurate anticipation of Carrier Member's "wailing" being put into print, and the dissent does not detract one iota therefrom.

D. E. Watkins
Labor Member