Award No. 13150
Docket No. CL-13216

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5120) that:

(a) Carrier violated rules of the Clerks' Agreement at the Freight Agency, Memphis, Tennessee, when on March 8, 1961, it failed and refused to assign E. A. Butler to position No. 333, a Messenger's position, and withheld him from the position until June 17, 1961.

(b) E. A. Butler be compensated a day's pay at the pro rata rate of $16.78 per day in addition to any other pay received between March 10, 1961 and June 17, 1961 as a penalty for violation of the Agreement between the parties.

EMPLOYES' STATEMENT OF FACTS: There is employed at the Local Freight Office, Memphis, Tennessee, a force of employes who perform the work necessary to the operation of the Freight Office coming within the scope of the Clerks' Agreement with the Carrier that governs the working conditions of the employes, effective June 23, 1922, as revised.

February 23, 1961, the Carrier issued Bulletin No. 11 advertising a vacancy on position No. 333, Messenger, hours 11:59 P. M. to 7:59 A. M. See Employes' Exhibit No. 1.

March 8, 1961, Carrier's Agent E. F. Mueller issued Bulletin No. 11-A Supplement, assigning Walter Brauer to position No. 333 effective March 10, 1961, (see Employes' Exhibit No. 2).

Employes E. A. Butler and Walter Brauer hold seniority rights on the Memphis Freight Station — Office of Agent, Clerks' Seniority Roster No. 1. Two seniority date columns appear thereon, one identifying the seniority dates of clerks, and one identifying the seniority dates of messengers. This distinction is made in compliance with the roster separation appearing in Rule 4 of the Agreement which reads as follows:

AWARD 5080

"This claim is frankly one for a penalty. Penalties are not awarded under a contract unless it clearly so provides. The contract does not expressly so provide. . . ."

The Carrier has conclusively shown that in the absence of a rule to support the request of the Employes for penalty payment, their request must be denied. The Claimant in this dispute actually earned in excess of the amount he would have made had he been assigned to the messenger position on March 8, 1961. Since he has suffered no monetary loss, and there is no contract provision providing for a penalty for any possible technical violation of the rule in this case, the Board should deny the claim. The Claimant is not entitled to the compensation claimed.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier advertised a position of Messenger in its Bulletin 11 at Memphis, Tennessee on February 23, 1961, in response to which two applications were received. One such application was received from Clerk Walter Brauer with clerical seniority date of December 3, 1956; the other was filed by Claimant E. A. Butler with a clerical seniority date of April 29, 1957. The vacancy as advertised was awarded to Clerk Brauer on March 8, 1961. A claim was filed on behalf of E. A. Butler contending that his messenger seniority on the consolidated roster (clerks and messengers) which became effective December 19, 1960, entitled him to the Messenger position in preference to Clerk Brauer who had never performed service as a messenger. The respective seniority dates of Clerks Brauer and Butler on the consolidated seniority roster dated January 1, 1961, were as follows:

CLERKS' SENIORITY ROSTER NO. 1

January 1, 1961

Rank	Name	Position Title	Date of Seniority	Messenger Seniority
87	W. F. Brauer	Clerk	December 3, 1956	
92	E. A. Butler	Clerk	April 29, 1957	September 17, 1956

The Carrier by letter dated May 16, 1961, advised the Organization that an error had been made in not assigning E. A. Butler to the position in question and offered to dispose of the claim by placing him in the Messenger position and allowing him the difference between what he made and what he would have made had he been assigned to the position. This was declined, but an Agreement was later made to place the Claimant in the position effective June 17, 1961, displacing Clerk Brauer who then reverted to the extra Board. The Petitioner however is requesting a day's pay at the pro rata rate of $16.78 per day (messenger position) in addition to any other pay received between March 10, 1961 and June 17, 1961 as a penalty for violation of the collective bargaining Agreement between the parties. The Claimant was employed by the Carrier during the entire period for which this claim is submitted.

We are therefore confronted with an admitted violation of the Agreement by the Carrier on the one hand, and a demand for a penalty on the other by the Organization for such violation. The Carrier has presented evidence with its original submission showing that the Claimant had re-

ceived more money per day for the period in question than he would have received had he been given the Messenger position. The Petitioner objects to this evidence on the grounds that it was not presented on the property and contends that the Board is thereby precluded from considering it. We take cognizance of this objection but do not consider it essential to the final determination of this case to rule on this precise point. The Petitioner has the obligation to show wherein he has been damaged by a violation of the bargaining Agreement. We find this record to be lacking in probative evidence to demonstrate such damages. Furthermore, we are bound by the terms of the contract itself, and after thoroughly examining it, we cannot find any provision that would authorize this Board to impose a penalty where none is provided in the basic Agreement. There are numerous awards emanating from this Division to substantiate this position. It is undeniable that the principle has been well established that this Board will not impose a penalty where the specific provisions of the contract do not so provide. In the interest of "stare decisis", we must adhere to this principle. This is sound doctrine and we must accordingly deny the 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 (a) sustained.

Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.

LABOR MEMBER'S DISSENT TO AWARD 13150, DOCKET CL-13216

In this case we had an admitted violation of the Agreement; however, the Referee chose to follow what he terms "stare decisis" and deny the claim on the basis that "this Board will not impose a penalty when the specific provisions of the contract do not so provide."

Insofar as "stare decisis" is concerned, a study of the Railway Labor Act will show that this Board was created by Congress for the purpose of

removing causes of stress. The Referee's refusal to order redress for violations of written agreements, which are required under the Act, especially when it is Carrier's duty to properly apply same, works at cross purposes to the very reason for which this Board was created. Moreover, the soundness of the doctrine is quite questionable; and the vast majority of decisions emanating from this Board does not indicate any reluctance, nor recognize any prohibition, against imposing a penalty for violation of an agreement.

In Award 1524, Referee Richards said:

> "* * * In Third Division Award 292, * * * the Board recognized and stated that the **purpose of such a public agency as this Board is to remove causes of stress,** * * *. The general principle stated in Award 292 rests on no unstable foundation. For it is a fact recognized by this Board that collective bargaining agreements have a distinct attribute that is not incident to contracts entered into in the ordinary walks of life, in that, in the Railway Labor Act as amended, such agreements were provided for and intended by Congress as important instrumentalities for accomplishment of the purposes of the Act. So it was logical that in Award 292, instead of proceeding to make a decision as if Rule 27 had been an agreement between two ordinary business men, the Board paused for reflection upon the purpose for which the Act created the Board, namely the removing of causes of stress, and for reflection upon results that would follow strict application of the rule, namely, the making of the rule unworkable and improperly defeating redress for violations. And, in the Opinion of the Board, the adoption of the middle ground in Award 292 reflected a consciousness that an instrumentality such as a collective bargaining agreement cannot be rightly evaluated apart from the purposes for which it was favored by Congress, and exists, and should not be implimented for thwarting those purposes. * * *." (Emphasis ours.)

Many other Awards followed, including 4082, 9811, 10033, 10635, 11937, 12114 and 12227.

Relieving Carriers of any consequences for an established violation of an agreement cannot remove "causes of stress" inasmuch as the burden is upon the Carrier to police and properly apply the agreement in the first instance. Awards 3590, 4468, 5057, 5266, 5269, 6267. The Organizations' only recourse is to file claims because of the violations. Awards 4461, 6324.

In Award 4461, Referee Carter ruled:

> "The Organization has the authority to police the Agreement. It is authorized to correct violations and to see that the Agreement is carried out in accordance with its terms. In so doing, it acts on behalf of all the employes who are Members of the Organization. Individual Members are not permitted to contract with the Carrier contrary to the provisions of the collective agreement and thereby make the collective agreement nugatory. Neither can such a result be secured by indirect action. The Carrier will not be permitted to protect itself against its own violations of the Agreement by securing waivers, disclaimers, releases, or other formal documents having the effect of excusing its contract violations. Such methods, carried to the extreme, would ultimely result in the destruction of the collective Agreement. * * *

*** * * Unless penalties and wage losses can be asserted by the Organization, its primary method of compelling enforcement of the agreement is gone."** (Emphasis ours.)

If this were not true, Carrier could be relieved of its obligation to make reparations for violations of the Agreement by prevailing upon the individual employe, who had the preferred right to the work, to refrain from making claim therefor, or waive the amount due after claim was asserted by the Organization. The same end result obtains when a Referee adopts the position that this Board will not impose a penalty.

Experience has shown that if rules are to be effective there must be adequate penalties for violations.

Much more could here be written and many, many more Awards imposing "penalties" could be cited. However, and although it was probably not known to the Referee, it is interesting to note that while this very dispute was being considered, the Carrier here involved was seeking a rule similar to what the Referee seeks to give them by way of interpretation, to wit: in counter notice under Section 6 of the Railway Labor Act, during the month of October, 1964, the Carrier here involved served upon the Organization here involved a proposed change in their Agreement which reads as follows:

> "**Establish a new rule** to provide that if there is a claim for an alleged violation under this Agreement, no penalty shall be attached to such violation, if sustained, other than to make named employes in whose behalf claim is filed whole for wages lost, unless a penalty is specifically provided in a rule." (Emphasis ours.)

It is a certainty that one or the other methods of seeking changes in Agreements is a waste of time. It is also a certainty that Carrier was quite unaware that this Board had adopted what is termed by the Referee to be sound doctrine. This Board is not endowed with the authority to change rules. Rules are hammered out at the bargaining table.

For all the above and other reasons, I most vigorously dissent.

D. E. Watkins

Labor Member
1-5-65