

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Harr, Referee

PARTIES TO DISPUTE:

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

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5554) that:

1. That the Carrier violated the Memorandum Agreement of April 14, 1961, when it failed to give written notice to the Brotherhood of its desire to transfer work from the following positions in Seniority District No. 49 into Seniority District No. 19:

Position	Incumbent	Location
Clerk to Assistant Trainmaster-Roadmaster	H. H. Miller	Weller Yard, Va.
Cashier and Clerk to Roadmaster	J. C. Hall, Jr.	St. Paul, Va.
Clerk-Warehouseman	J. P. Cook, Sr.	Cleveland, Va.
Clerk	J. H. Price	Norton, Va.
Chief Clerk to Freight Agent	J. Cox	Bluefield, W. Va.
Ticket-Baggage Clerk	W. R. Wood	Bluefield, W. Va.
Relief Ticket-Baggage Clerk	H. L. Graham	Bluefield, W. Va.
Clerk to Road Foreman of Engines	H. H. Smith	Bluefield, W. Va.
Clerk to Chief Dispatcher	W. E. Evans	Bluefield, W. Va.
Steno-Clerk to Car Distributor	Eva A. Counts	Bluefield, W. Va.
Yard Timekeeper-Clerk	W. D. Hamlin, Jr.	Bluefield, W. Va.
Relief Yard Timekeeper- Clerk	C. E. Bourne	Bluefield, W. Va.

2. The Carrier shall now furnish notices on the above positions as required under the provisions of the Memorandum Agreement of April 14, 1961.

EMPLOYES' STATEMENT OF FACTS: Under date of April 14, 1961, the Employees and the Carrier executed a Memorandum Agreement (Employees' Exhibit A), the purpose of such Agreement being:

- "1. To permit the Carrier to transfer positions and/or work from all other seniority districts into the office of Comptroller Department Seniority District No. 19.
2. To protect and to provide certain benefits for the employees involved both from and to where the positions and/or work are being transferred.
3. To adjust the rates of pay of positions resulting from the transfer and also of the rebuilt or existing positions from where the positions and/or work was transferred, where such adjustments are warranted and
4. To provide any other benefits as provided herein." (Employees' Exhibit A, page 1.)

This Memorandum Agreement further provides that:

"The Carrier shall give at least ninety (90) calendar days' written notice to the Organization whenever it desires to transfer positions and/or work from other seniority districts into Seniority District No. 19." (Employees' Exhibit A, page 2.)

On and after July 1, 1961, the Carrier transferred certain timekeeping and related work from the positions listed in the "Statement of Claim" into Seniority District No. 19, and failed and refused to furnish the Organization notice of such transfer as required by Section 1 of the April 14, 1961 Memorandum Agreement.

Formal written request that such notices be furnished was duly filed by the Local Chairman under date of August 30, 1961, and, being declined, was appealed through regular channels up to Mr. H. C. Wyatt, Senior Vice President, the Carrier's highest officer designated to receive and consider such appeals, on February 12, 1962. (Employees' Exhibit B.)

Mr. Wyatt declined the appeal under date of April 5, 1962. (Employees' Exhibit C.)

On April 11, 1962, the General Chairman acknowledged receipt of Mr. Wyatt's letter of April 5, 1962, and advised that he did not concur in the position taken by the Carrier, and requested conference for discussion. (Employees' Exhibit D.)

Conferences were held on October 22, 1962, June 18, August 7, September 16, 1963, and March 5 and 18, 1964.

By mutual agreement between the parties the time limit in this particular case was extended until Midnight, July 31, 1964. (Employees' Exhibit E.)

sion, Roanoke Terminals, Shenandoah Division, Radford Division, New River Division, or Scioto Division or any other of the offices or departments in which the same changes were made. Thus, by their own actions or failing to make a similar request on behalf of the employees similarly situated on the other Divisions and Terminals or in the other offices or departments, the Employees recognized and interpreted that notice as prescribed in the April 14, 1961 Agreement was not required to be served on the basis of the conditions extant in this case.

The same changes experienced by the Claimants in this case likewise applied to the employees required to perform similar work on the other Divisions and Terminals and in the other offices or departments and no material distinction exists as far as the Claimants are concerned. Therefore, to accord Claimants the notice they now seek and its resultant coverage by the April 14, 1961 Agreement would establish unjustifiable discrimination between the Claimants and those employees of the other Divisions, Terminals, Offices and Departments subject to the same conditions.

The Carrier repeats that no transfer of work can be shown to have occurred in this case, to say nothing of a transfer of work requiring the serving of notice as contended for, and it asserts that the discriminatory situation that would result from a sustaining award cannot possibly be justified. The claim is in complete lack of merit, and denial of the claim in its entirety is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim consists of two parts, and we shall dispose of them separately.

(1) The only question to be decided here is whether work was or was not transferred as alleged by the Organization. The Organization contends that work was transferred, and the Carrier contends that it was not. If a showing has been made that work was transferred, then the notice required by the Memorandum of Agreement of April 14, 1961 should have been given by the Carrier.

We feel that it is apparent from the record that some work was transferred from the employees into Seniority District No. 19. The amount of work may have been inconsequential, but it is not the prerogative of this Board to deny a claim because of the amount involved or its relative importance.

Part one of the claim is sustained.

(2) The Organization asks that the Carrier now give notice as required by the Memorandum of Agreement of April 14, 1961. They do not ask for a nunc pro tunc order nor do they seek damages on behalf of any employee. The fact that this claim was not brought on behalf of an employee was not raised on the property by the Carrier and will not be considered by this Board. The Organization has had actual notice of the transfer of work for over four years. We will not, at this time, require the Carrier to furnish a futile notice. This is not to be considered in any way an attempt by the Board to alter the Memorandum of Agreement of April 14, 1961, nor as a decision that the Agreement has not been violated.

Part two of the claim is denied.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Memorandum of Agreement of April 14, 1961 has been violated as indicated in the Opinion.

AWARD

Part one of the claim is sustained and part two 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 1966.

LABOR MEMBER'S DISSENT TO AWARD 14119, DOCKET CL-14971

The Referee in Award 14119, Docket CL-14971, failed to do that which it was his solemn obligation to do. The claim should have been sustained in its entirety for the remedy requested was strictly confined to that required by the Agreement.

Under part (1) of the Opinion the Referee states:

" * * * If a showing has been made that work was transferred then the notice required by the Memorandum of Agreement of April 14, 1961 should have been given by the Carrier." (Emphasis mine.)

That, of course, is precisely what the Employees were contending and, as will be noted from Item 2 of the claim, is exactly what they were asking for. Moreover, the Carrier, in describing the claim, stated:

"The case involves no question of rule or agreement interpretation. Instead, it involves only a factual dispute — whether work was or was not transferred as alleged by the Employees. The Employees contend that work was transferred as alleged, and Carrier contends that it was not. The case is just that simple and there is nothing else that needs to be decided. If a showing can be made the work was transferred as alleged, the notice sought herein is merited, otherwise not." (Emphasis mine.)

In part (2) of the Opinion some lip service is paid to the fact that issues not raised on the property will not be considered by the Board. However, one "issue" not raised on the property caused the Referee to deny part 2 of the claim. The Referee was obviously sufficiently confused by Carrier Members' argument asserting that the Board could not require Carrier to furnish the notices so that, even without being able to prove by reference to the Railway Labor Act or the Procedures before this Board, he decided to avoid the issue by presumptuously calling the notice "futile", rather than also reject that issue as improperly before the Board. In other words, as I suspect many neophyte Referees do, this new Referee obviously decided that if it were questionable and there was a possibility of error he should err on the "safe" side, i.e., deny the claim.

That simply was not the issue he was properly called upon to resolve. His consideration and "evasion" of it resulted in the Employes being denied the only remedy they had requested. I therefore dissent to the Referee's erroneous decision of denying part 2.

D. E. Watkins
Labor Member
2-3-66