Award No. 14430
Docket No. CL-12767

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

G. Dan Rambo, Referee

PARTIES TO DISPUTE:

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

ILLINOIS TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4691) that:

(1) The Carrier violated the current Clerks' Agreement, effective June 21, 1955 on or about January 1, 1960 when it arbitrarily and unilaterally transferred work from the Accounting Department to the IBM Machine Bureau without complying with the provisions of the Agreement, particularly Section 8, Addendum 8;

(2) The work which was transferred to the IBM Machine Bureau shall now be returned to the Accounting Department and assigned to employes therein; and

(3) Employe Madeline Gervig and/or her successors shall be paid eight hours' pay, at the straight time hourly rate, of Position 285 for each work day retroactive to April 18, 1960 and thereafter until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to January 1, 1960, Position No. 285, titled "Price Clerk" was one of several in the Accounting Department performing manual work. The principal duties of this position were:

Pricing all tickets, requisitions and inventories.

Pricing and posting all material invoices, material statements and joint facilities statements.

Separation of tickets by accounts and obtaining total of each group at the end of the month.

Preparing recap of Federal Stores issues.

Handling of all requisitions and all Federal Stock issues.

performed by position 285 which are still required by the Company, have been reduced to less than 4 hours daily and could be absorbed by other positions."

It is significant to note that General Auditor admits the fact that all duties of position No. 285 have not disappeared and that all such duties are still required by the company; but what General Auditor failed to state is the fact that the duties have decreased because the work on that position was transferred to the IBM Machine Bureau. (Employes' Exhibit No. 4.)

Carrier agreed to our request for a joint check (Employes' Exhibit No. 5) which was conducted on April 19, 1960 with Carrier and employes' representatives. Although the joint check developed that work had been transferred as alleged by employes Carrier refused to sign joint statement to that effect.

This was called to the attention of President and General Manager, Mr. F. L. Dennis, the highest officer to whom appeals could be made, in our letter of April 17, 1960. (Employes' Exhibit No. 6.)

Carrier for the third time admitted, in letter of August 19, 1960, that:

"Some time shortly after the first of the year, some of the work of position No. 285, Price Clerk, was transferred to the Machine Bureau. Through oversight, we did not confer with you prior to the transfer of this work to the Bureau." (Employes' Exhibit No. 7.)

We attach hereto and make a part hereof copies of records identified as employes' exhibits No. 1 to employes' exhibit No. 7 inclusive.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: There is in effect an agreement between the Carrier and the Organization effective February 1, 1959 with supplements and addenda thereto. Copies of this agreement are enclosed. Such agreement is controlling where it may be applicable and is made a part of the record in this case by reference.

Correspondence relative to the claim is attached and is designated as Carrier's Exhibits 1 to 20, inclusive.

The position of Price Clerk in the Carrier's Accounting Department at St. Louis, Missouri, occupied by Miss Madeline Gervig was abolished by Accounting Department's bulletin No. 925, effective 4:55 P. M., April 15th, 1960, and the remaining duties were transferred to the position of Material Clerk, a higher-rated position. (Copy of Bulletin No. 925 is attached as Carrier's Exhibit No. 21.)

(Exhibits not reproduced.)

OPINION OF BOARD: The parties hereto were functioning under a valid agreement which requires that:

"In the event the Carrier desires to further expand the Machine Bureau to include other phases of work now being performed manually by the Carrier, it is understood that it can only be by agreement with the Organization."

While there has been some contention by the Carrier that said Agreement did not require agreement by the Organization to transfer Accounting Department work into the Machine Bureau since the Machine Bureau is already an integral part of the Accounting Department, there is no such limitation in the Agreement. Furthermore, the evidence adduced by the Carrier is not persuasive on this point. Accordingly, the Carrier should have conferred with and sought the Organization's concurrence if it in fact expanded the Machine Bureau to include other work "now being performed manually."

It seems undeniable that some work was so transferred, although the significance of the amount so transferred is questioned. Nevertheless, the Agreement is concerned with the fact of work being transferred and not with the amount. Therefore, this Board finds that the Agreement has been violated in this respect and Claim (1) will be sustained.

Claim (2) seeks return of the work to the Accounting Department and assignment thereof to employes therein. Unfortunately for Claimant's cause this Board lacks the authority to order the restoration of work or the restoration of a position. Awards 12336 (Engelstein), 11489 (Hall), 11586 (Dorsey), 10867 (Kramer), and 9416 (Bernstein). Thus Claim (2) will be dismissed.

Claim (3) seeks for employe Madeline Gervig and/or her successors eight hours' pay at the straight time hourly rate of Position 285 for each work day retroactive to April 18, 1960, and until the violation is corrected. Since Claim (2) has been denied and there has in fact been no successor and the record reveals no attempted successor to Claimant Gervig in Position 285, Claim (3) must be considered in light only of damages which have accrued to Claimant Gervig.

Carrier cites Rule 28(b) of the Agreement:

> "(b) Employes whose positions are abolished or who may be displaced shall exercise their seniority rights within a period of five (5) days and be assigned within five (5) days."

and points out that Claimant failed to exercise her seniority, which incidentally was No. 1 in the district, and thus voluntarily surrendered any claim of damages she might have had as a result of the abolishment of Position 285.

In support of the assertion of voluntary surrender of rights by Claimant, Carrier offers as exhibits submitted with its rebuttal statement, copies of Form No. G-88c of the Railroad Retirement Board titled "Notice of Termination of Service" and RRB Form No. RL-5a(1-59) titled "Notice to Employer of Annuity Award." Form No. G-88c advises Carrier that Claimant Gervig has "relinquished rights to return to your (Carrier's service)" on April 15, 1960, such relinquishment being a condition precedent to qualifying for retirement benefits in the form of annuity under the Railroad Retirement Act. Form No. RL-5a advises Carrier that Claimant Gervig's annuity under the Railroad Retirement Act began May 10, 1960.

The Organization protests the introduction of these documents, arguing that they are new evidence not offered for consideration on the property and as such excluded under the provisions of Circular 1 of the National Railway Adjustment Board.

It is not necessary to resolve here the admissability of the questioned exhibits since the benefits of any sustaining award rendered by this Board would naturally terminate at that point in time at which Claimant took action terminating her continued employment status.

Claimant is entitled to be made whole in respect to any damage she may have sustained as a result of the violation of the Agreement in Claim (1). Any award, however, must be made keeping in mind that her seniority and good standing was not impaired by the abolition of Position 285.

Therefore, Claimant is awarded damages in the amount of the difference per day between what she would have earned in Position 285 and the highest rate of pay which she could have earned in any other position which her seniority, fitness and ability would permit her to hold, said award to commence on April 18, 1960 and continue until such time as she voluntarily relinquished her employment status.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

Claim (1) — That the Agreement was violated.

Claim (2) — That this Board is without authority to order the relief sought.

Claim (3) — That an Award is sustained as set out above.

AWARD

Claim is sustained as set out above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of May 1966.

LABOR MEMBER'S DISSENT TO AWARD 14430, DOCKET CL-12767

Award 14430, Docket CL-12767, is in error due to various reasons, some of which will be set forth herein, and I dissent thereto.

The Opinion of Board in the first sentence is grammatically correct and, with proper emphasis, can be made factually correct. Emphasis thereof should be as follows:

"The parties hereto were functioning under a valid agreement * * *."

Following the above the quite clear and unambiguous language from that agreement is correctly quoted as:

> "In the event the Carrier desires to further expand the Machine Bureau to include other phases of work now being performed manually by the Carrier, it is understood that it can only be by agreement with the Organization." (Emphasis ours.)

Emphasis above was supplied because it is quite evident that the meaning of that agreement seems to have escaped the Majority. Obviously what the Carrier here did, i.e., further expand the Machine Bureau, without agreement, was in error and could only properly be done by agreement with the Organization. That is quite clear and therefore, in holding that:

> "* * * Accordingly, the Carrier should have conferred with and sought the Organization's concurrence if it in fact expanded the Machine Bureau to include other work 'now being performed manually.'"

the Majority has amended and/or diluted the force and effect of the parties agreement. Such fact is true for the reason that the record clearly shows, and it was in fact admitted by Carrier, that the Machine Bureau was expanded to include work "now being performed manually."

Obviously the true force and effect of the agreement language, paraphrasing Award 11590 (Dorsey), is that agreement with the Organization was indispensible and a condition precedent to the Carrier proceeding to further expand the Machine Bureau.

If Agreements are made to be kept (Award 2277) then it follows that the remedy, when one finds, as in this case, that the Agreement was violated, should be commensurate with the violation and designed to accomplish the desired results, i.e., compliance with the Agreement.

The remedy here, in my opinion, falls short and indicates too much reluctance on the part of the Majority to even recognize their obligation to adjust disputes on the basis of the rules, facts and circumstances properly before them. The Referee happened to feel that the Board lacked authority to do that which was required and properly requested in item (2) of the claim. As stated in the Award:

> "Claim (2) seeks return of the work to the Accounting Department and assignment thereof to employes therein. * * *."

Of course, that is precisely what the Employes sought and, if the Agreement is not to be rendered nugatory and further ignored, that, with respect to the work improperly removed from the Employes, was the proper remedy. Clearly, the remedy requested was no more extensive than the proven violation. In view thereof, to purport to speak for the Board and hold, as have others, that this Board lacks authority to order restoration of work wrongfully removed is to say that the Board is powerless to adjust such grievances and, in effect, delete "Adjustment" from the title of this Board thereby making it

the "National Railroad Board." Of course, I could not argue too much with that title for, so long as Carriers can enter Agreements and then come to this Board and be relieved of their obligations of conforming to them, the short "title" is quite apropos.

The fact is that any number of Awards, including 12422, 12822, 12959 and 12960, do include the quite proper remedy of ordering restoration of wrongfully removed work but here the Referee happened to agree with Carrier representatives argument reading:

> "* * * Unfortunately for Claimant's cause this Board lacks the authority to order the restoration of work or the restoration of a position. Awards 12336 (Engelstein), 11489 (Hall), 11586 (Dorsey), 10867 (Kramer), and 9416 (Bernstein). * * *."

All of which clearly indicates that the important matter of this Board's authority is subject to the whim of the Referees and that some party is either lax or derelict in not clearly informing the Referees as to what duties, obligations, authority and responsibilities they assume when appointed. Such important matters should not be left to the whim of Referees. Referees have exceeded their authority when they attempt to limit the powers of this Board. I'm sure Congress never intended that the final arbiters in minor disputes could not fashion proper remedies.

Such thoughts as expressed in Award 12336 and others stem from earlier Awards wherein Referees held, in so many words, that they would not order restoration of a position **because it may be possible for the Carrier to comply with the Agreement without the restoration of the position by having employes properly entitled thereto perform the work.** They generally added, however, that Carrier was "free to adopt any arrangement, within the rules of the Agreement, which will remove that violation." See for example Award 1125 cited in Award 11489. Many others have held the same way **but still required compliance with the Agreements.** Some Referees have simply "ran away" with that earlier reasoning and expanded it to where they think they should not or cannot order work to be returned. Such expansion is, in my opinion, entirely erroneous.

The Majority indicates that the Organization protested introduction of evidence not offered for consideration on the property. That is quite true and, in fact, quite necessary as can be illustrated by the fact that, contrary to Carrier representatives assertion that:

> "* * * Claimant relinquished her seniority rights on April 15, 1960 * * *."

upon proper inquiry we found that Claimant filed an application for an annuity on May 10, 1961 and was awarded an annuity retroactively as far as the law permits.

Of course we object to the raising of new issues and the consideration of matters not properly before the Board and not properly presented on the property where the parties involved would have the opportunity to consider them fully and refute them if incorrect. We shall continue to do so for to consider such matters is totally unfair. For example, see Award 14125, Docket CL-14874, and Labor Member's Dissent thereto and Carrier Members' Answer,

all of which, by way of illustration, is by reference thereto made a part of this dissent.

In Award 14125, claim in behalf of one B. C. Bell, regularly assigned occupant of Yard Clerk position 5764 at Sioux City, Iowa was made account improper ending time starting August 5, 1963. The assumption that there was but a single shift Yard Clerk assignment at Sioux City resulted in an Award directly contrary to Award 9246 on the same property. I dissented thereto because the Award was based primarily if not exclusively on an assumption that there was but a single shift assignment at Sioux City. Carrier Member, who used that basic argument to "distinguish" Award 9246, promptly responded asserting that the claim placed "* * * in issue Carrier's right, where it is necessary to meet the requirements of the service, to create a single assignment that has an ending time between midnight and 5 A. M. without first obtaining the consent of the General Chairman. * * *" and "* * * We are dealing with a single shift assignment, not three consecutive shifts * * *." **Nowhere in that record did Carrier contend there was but a single shift involved.**

Later, as further disputes were progressed, Docket CL-15137 was assigned to List 66. It involves a claim for one B. C. Bell, regular occupant of Position No. 5764, Yard Clerk at Sioux City account an alleged Scope Rule violation. The facts therein clearly show that at Sioux City, Iowa, the Carrier maintains three Yard Clerk positions, i.e., 5763, 5764 and 5765, all of which were in existence on August 5, 1963, the first date of claim in Award 14125.

Clearly, without exception, matters not properly brought before the Board should neither be relied on or considered as they prejudice either the Employes or the Carriers and invariably result in improper decisions.

As a minimum remedy Claimant in Award 14430 must be "made whole" for any wages lost as the result of the violation from April 18, 1960 forward until such time as she voluntarily relinquished her seniority rights to that work wrongfully transferred. Moreover, the work wrongfully transferred should have been returned from whence it came and the parties required to reach Agreement before further expanding the Machine Bureau as required by the applicable agreement language. That is when the violation would have been corrected.

I feel that the manner in which this claim was sustained and the reluctance to fashion a proper remedy was due to consideration of matters not brought in issue on the property and incomplete evidence not properly before the Board, all of which should not have been considered.

I therefore dissent to this Award.

D. E. Watkins

Labor Member
6-9-66

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