Award No. 14462
Docket No. CL-14480

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David L. Kabaker, 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-5426) that:

(1) Carrier violated the Clerks' Agreement at New Orleans, Louisiana, when on October 1, 1962, it arbitrarily and unilaterally subdivided the Louisiana Division–Yazoo, Canton, McComb and G&SI (Mississippi Division) District Seniority Roster by transferring two clerical positions and seniority of the employes assigned thereto, i.e., M. L. Bunch and H. L. Weber, to the Louisiana Division, New Orleans Seniority District Roster, New Orleans, Louisiana, without agreement with the Organization. By virtue of such violation, the Carrier will now;

(2) Restore the work and seniority of employes Bunch and Weber to the Louisiana Division–Yazoo, Canton, McComb and G&SI (Mississippi Division) Districts Seniority Roster, and

(3) That Claimants M. L. Bunch and H. L. Weber and/or their successors in interest on the Louisiana Division–Yazoo, Canton, McComb and G&SI (Mississippi Division) District Seniority Roster, if any, be each compensated for an additional day's pay, at the rate of the positions to which assigned, for October 1, 1962, and each subsequent day until such time as the violation has been corrected by the return of the work, positions and seniority of claimants to the seniority district from which removed.

EMPLOYES' STATEMENT OF FACTS: There is employed in the Superintendent's office, New Orleans, Louisiana, a force of employes who perform the clerical work incidental to maintaining Engineering Department records etc., in the Division Engineer's office subject to the provisions of the Clerks' Agreement with the Carrier, effective June 23, 1922, as revised.

Prior to July 1, 1959, Carrier maintained a Superintendent's office at Jackson, Mississippi, in which a Division Engineer's office also was maintained. The Superintendent and Division Engineer had supervision over the Louisiana

The Agreement, effective June 23, 1922, as revised, is by reference made a part hereof.

OPINION OF BOARD: The basic facts are not in dispute. On October 1, 1962 the Claimants and their positions were transferred from the Louisiana Division–Yazoo, Canton, McComb and G&SI Seniority District to the New Orleans Seniority District. Notwithstanding the transfer, the Claimants duties and work locale remained as before.

The Employes contend that the transfer of the Claimants with their positions does, in fact, amount to a subdivision or consolidation of seniority district. It reasons, therefore, that Rule 4(c) has application to the instant situation.

It further contends that the Carrier is required by virtue of Rule 4(c) to obtain mutual agreement with the General Chairman before it can effectuate the transfer.

The Carrier's position is that Rule 4(c) is not controlling in this matter for the reason that the transfer of the Claimants is not a subdivision or a consolidation. It asserts that the transfer was made in accordance with the provisions of Rule 19 which does not require mutual agreement.

The issue involved in the dispute can be stated as follows: "Did the Carrier violate the Agreement when it unilaterally transferred the Claimants with their positions from one seniority district to another?"

One of the objections to the Claim 3, raised by the Carrier is based upon the following portion of the claim: "and/or their successors in interest." The Carrier asserts the claim for unnamed Claimants, is barred by Article V of the August 21, 1954 Agreement.

The Carrier's objection to the claim can not be sustained in light of the opinion in Award 14088, wherein the Board ruled that the claim lacked merit and stated:

> "The part of the claim on behalf of 'successors,' as referring to successors of the named claimants as the incumbents of certain positions, is not barred by Article V of the August 21, 1954 Agreement."

Turning to a consideration of the principal issue involved, it must be stated that same issue between the same parties has come before this Board in Awards 7420 (Referee Cluster), 11040 (Referee Boyd), 198 and 13853 (Referee House).

In the instant case the Parties have presented the same arguments that were presented in the above quoted awards. As a consequence the reasonings of the Parties will not be repeated herein but will be discussed as required.

As in the above awards the issue raises the following question: "Did the transfer of the claimants amount to a subdivision or a consolidation?" The answer to the question must be in the negative. This forces the conclusion that Rule 19 governs the situation in the instant dispute. It must be the further conclusion that Rule 4(c), which requires agreement, is not controlling in this situation.

Prior Awards 7420 and 11040 are most persuasive in their holding that Rule 19 is applicable in similar situations between the same parties. These awards support the further conclusion that Rule 19 relates to the transfer of the Claimant and their positions without requiring agreement to the transfer by the Parties.

Referee Cluster in Award 7420 in dealing with the question of agreement regarded it as an "agreement in advance" when he stated:

> "We think that Rule 19 represents an agreement between the parties . . . and an agreement in advance . . ."

While this Board reaches the same conclusion that no additional agreement is required by Rule 19, we feel however that the reasons can be stated in a somewhat different manner than that employed by Referee Cluster. We find that, when the Parties to the Rules Agreement concurred in the wording of Rule 19, they did by their concurrence, mutually agree that the Carrier was empowered to effect transfers. Having thus mutually agreed upon the Carrier's right to make transfers, no further agreement is necessary.

In Award 13853 (Referee House), a different conclusion is arrived at than in this instant case. Referee House determines that Rule 19 can not be applicable to the situation because "the identity of the determiner of the transfer is not found in the usual meanings of the words of Rule 19."

The conclusion herein made is not dependent upon identification of the determiner for the reason that the Parties have spelled out in Rule 19 that transfers can be made, which presupposes that the Carrier will make such transfers without additional agreement being required.

Although Award 13853 finds that the transfer in that case was, in effect, a subdivision or a consolidation, this Board is compelled to accept the reasoning of Referee Boyd in Award 11040 when he states:

> "The transfer of a single employe with his position may be a change in the respective rosters but it is not a subdivision or consolidation as contemplated by Rule 4(c)."

The evidence forces the conclusion that the transfer was proper and not violative of Rule 4(c) for the reason that the rule is not applicable to the instant situation.

One thing further must be added. In the instant case the Claimants and their positions were transferred to a different roster. Whether the roster was a larger or smaller one is immaterial and not necessary to consider. The Carrier's right to transfer is founded upon Rule 19 and is supported by the evidence.

It must therefore be the conclusion based upon the facts of record that the claims lack merit and should be 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 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1966.

LABOR MEMBER'S DISSENT TO AWARD 14462, DOCKET CL-14480

Award 14462, Docket CL-14480, is in error; unsupported by any Agreement language; illogical; directly contrary to the latest **well reasoned** award on the same issue between the same parties and other prior awards. It merely illustrates the Referee's feelings that Carrier should be permitted to arbitrarily strip employes of earned seniority rights and unilaterally transfer them, their seniority and their positions into other districts.

Obviously this Referee, as well as those in Awards 7420 and 11040, did not understand either the principle of seniority or the rigidity of seniority districts in the railway industry. If that is not the case then they arbitrarily decided to lessen the effects thereof on the Carrier and free Carrier from the requirement to bargain by interpreting the simple language of Rule 19 reading:

> "Employes transferred with their positions from one seniority district or roster to another shall retain their positions and continuous seniority. Employes transferring from one seniority district or roster to another shall rank from date of transfer on seniority district or roster to which transferred."

to mean that (1) Carrier may, without agreement, transfer positions from one seniority district to another and, having thus illegally added language to the rule, that (2) the parties have agreed in advance as to the rights of employes whose positions are transferred.

Now that is just not a true interpretation of the bare language of Rule 19. Clearly the language of Rule 19 deals with one subject only, i.e., the seniority **rights of employes** transferring under two given situations:

First—Where an employe transfers **with his position** his seniority continues; and,

Second — Where an employe transfers **without his position** his seniority is not transferred and he starts anew in the new district.

That and that alone is all Rule 19 deals with an it was never intended to and did not spell out either **all the rights of an employe** or the **rights of Carrier.** The Referees who read into that rule any rights of Carrier or restrictions on the Employes are simply and totally in error.

Moreover, in addition to being erroneous it is a most expensive reading of the bare language of Rule 19. Even the author of Award 7420 recognized that "The Board has stated many times, as in Award 2050 between these same parties, that positions or work may not arbitrarily be removed from the confines of one seniority district and placed in another." Yet, by resort to some mighty strained and peculiar reasoning he somehow decided that while that could not be done the "wrong" would be nullified if Carrier also transferred the Employe.

As stated in Award 6938 (Coffey):

"It is the Board's duty to give all possible credance and effect to both rules without doing violence to either, and to construe them in such manner as to carry out the mutual intent of the parties as we find the same expressed or clearly implied.

It has been difficult to follow the argument that the rules are not related. Greater difficulty has been posed by an expression of views within the Board, that restrictive language should have been written into the body of Rule 46, similar to that found in Rule 45, and making the transfer of work 'subject to negotiation between the parties signatory hereto,' if that were the intent of the parties.

Both arguments lose sight of how elaborate and complex are the rules of the Agreement on the subject of seniority alone. It would have been needless repetition to have written language into each separate rule to express the intent that any change bearing upon seniority is subject to negotiation. We can think of no better way of expressing the intent concisely and more forcefully in this case than by rule of general application.

Rule 28 and Rule 46, the same as many other rules found in the Agreement, are on the subject of seniority. Reference by Rule 28 to pages '58 to 61,' and examination of those pages, shows the rigidity with which the lines of seniority are drawn. Those lines are relaxed to the extent, and we believe only to the extent, that we can find a clear expression therefor in Rule 46. That rule admits of an equally valid interpretation that the subject matter is transfer of employes, and, in the absence of an express grant of right, the Carrier should not be heard to say, in our opinion, that despite Rule 28, Rule 46 serves as authority for the transfer of work or positions without mutual agreement between signatory parties.

Finally, it is held by some on the Board, that the language of Rule 28 does not admit of the construction that a majority of the Board places on it, since the effect of the Carrier's action in this case, according to one point of view, has not been to make a change in seniority districts.

The employe has a property right in the seniority that gives him a place on the seniority roster. That seniority attaches to the work, position, and roster in the seniority district where the employe has earned rights. Where the position or work is transferred to another roster in another seniority district, the employe who follows his work in accordance with Rule 46, is protected in his seniority, but at the expense of the one who has rights in the district to which the work or position is transferred. So on the one hand we have an employe with his feet in two puddles, and one the other hand, we have an employe whose rights otherwise would have been secure in his seniority district, except for the invasion of his territory by one from another seniority district. It seems to us that this amounts to a change in seniority districts.

The Employe Representative is charged with making Agreements collective in scope, and for the benefit of all employes covered thereby. Thus, its first duty is to all and not just a few, and while it may, as it has done by Rule 46, contract without discrimination on behalf of a smaller group similarly situated and to be treated alike at the expense of the whole, its action in doing so is subject to close scrutiny and rules like Rule 46 are to be strictly construed. Finding nothing in the express language of that rule as opposed to Rule 28 that would indicate the Employes collectively intended to give up all right to be consulted in the matter of transferring 'positions or work' from one seniority district to another, the collective and indiscriminate rights of all employes under the Agreement can best be preserved by allowing the Employe Representative to now exercise its inherent right to an equal voice in whether the work should be restored to the Indianapolis Division Roster or remain at its present location."

Clearly the Board did not fulfill its duty. Instead the Referee in Award 7420 said " * * * **We think** that Rule 19 represents an agreement between the parties that Carrier **may** effect transfers of positions from one seniority district to another and an agreement in advance as to the **rights** of employes whose positions are transferred; * * *." In other words he **guessed** and **his guess was wrong** for I am assured that the present Referee, and I would hazard the guess that the prior Referees, cannot say, from the bare language of Rule 19, what the Employes "rights" are if he chose not to transfer with his position or what the Employes "rights" are with respect to obtaining a position that was not being transferred, etc. The fact of the matter is that one cannot say what those "rights" are from the bare language of Rule 19 and the pity of it all is that seniority rights, the most valuable contract right one holds under the Agreement, simply should not be "guessed" at. Yet those Referees conclude that so long as the position and "its" employe are transferred without change no agreement as prescribed in Rule 4(c) is necessary. (Emphasis ours.)

Quite obviously such thinking ignores not only Rule 4 wherein seniority rights are confined to certain districts but many other seniority rules as well. Awards 7420, 11040 and 14462, entirely ignore the fact that an Employe's seniority is secured by contract between his Organization and the Carrier and that the Employe, through his Organization, has something to say about **his seniority rights.** Here the Agreement provides that if a change of hours occurs or if rest days are changed that the employe can secure, by exercise of **his** seniority on **his** district, a position of his choice. In other words, for whatever his seniority can "buy" him he can choose his hours, his rest days, his work location, etc., within his district.

Therefore, to hold, as here, that Carrier may arbitrarily transfer him, his seniority and his position, possibly all the way from New Orleans to Waterloo, and there is nothing he can do about it but go, if he wishes any seniority, is absurd. To take the general rule that an employe should be entitled to follow his position (or any other position or work transferred from his district) and attempt to "cure" that "wrong" by requiring him to follow such position or work if he wishes to retain his seniority is prescribing a "cure" that is worse than the affliction. To hold that one who has acquired seniority on a given district having defined geographical limits may unilaterally be deprived of those rights at anytime some Carrier officer wishes to transfer his then present position is to play a costly and dangerous game with the Employe's most valued contract right.

But this Referee committed other errors. In Award 10830 (Miller) it was stated:

> "While not bound to the doctrine of stare decisis, the Board has often recognized the need for consistency in its decisions; and it is generally agreed that a current precedential Award on the same property should not be regarded lightly."

(Other statements with respect to stare decisis appear in Awards 10715, 10911, 10915, 11306 and others.)

In the instant case we not only had a most recent and well reasoned Award involving the same factual situations and parties but we had a preponderance of Awards in our favor. For example, Award 21 of Special Board No. 170 and Award 2050 which the Referee didn't even comment on.

Awards 7420 and 11040 sustained the Carrier's position whereas Awards 21, 198, 2050 and 13853 sustained the Employes position.

Award 13853 was soundly reasoned and indistinguishable. The Referee there spent considerable time in construing the Agreement from its four corners. In overturning Awards 7420 and 11040 the details of the issues were thoroughly discussed and considered. Such is not the case here though as the present Referee completely ignored Rule 4(a) reading in part.

> "(a) Seniority rights of employes will be confined to the following seniority districts:"

Having such a right explicity granted in one section of the Agreement that right remains unless there is a stated exception providing otherwise. As stated in Award 13853:

> "Rule 4(a) confers a protection as well as a limitation in restricting seniority rights to specified seniority districts. Many other rules, as well, deal with definitions and application of seniority. It is an important part of an employe's rights to know his seniority status; the definitions in the agreement assure him of this knowledge and inform him of the circumstances under which his seniority status may be changed. If Carrier had the right unilaterally to transfer one or more positions from one seniority district or roster to another, the seniority rights and status granted the employes in the rules might well become ephemeral."

The truth of that last statement is confirmed by the shocking example in the instant case.

The Referee here considers it unimportant how many "job opportunities" are lost. However, I submit that it is most important. On the day prior to this unilateral transfer there were respectively 72 and 58 junior employes on Claimants district. Without conference or Agreement Claimants were, overnight, reduced to roster positions wherein there were but 14 and 13 employes junior to them.

Finding that Rule 19 confers on the Carrier a unilateral right to transfer positions is contra to the overwhelming weight of prior Awards, e.g., Award 6938 reading in part:

> " * * * Those lines are relaxed to the extent, and we believe only to the extent, that we can find a clear expression therefor in Rule 46. That rule admits of an equally valid interpretation that the subject matter is transfer of employes, and, in the absence of an express grant of right, the Carrier should not be heard to say, in our opinion, that despite Rule 28, Rule 46 serves as authority for the transfer of work or positions without mutual agreement between signatory parties . . .
>
> The employe has a property right in the seniority that gives him a place on the seniority roster. That seniority attaches to the work, position, and roster in the seniority district where the employe has earned rights. * * *."

Another issue ignored by the Referee is that Claimants several years of seniority on the former district was confiscated. Neither Rule 4 nor 19 contemplates that the employes can be forced to lose the seniority they have earned.

That said in Award 9419 (Bernstein) is particularly apropos here:

> " * * * To equate the lack of an express condition with an affirmative, important and far-reaching unilateral power for either party is to run the risk of seriously altering the agreement which the parties made. Such a reading would introduce a novel unilateral power and does not recommend itself to the Board."

An Award is only as sound as the logic behind it. Inasmuch as the Referee based his reasoning on previously overturned Awards, demonstrably erroneous, it is evident his Award is likewise erroneous.

The Referee in Award 13853 met each issue with a detailed explanation. He neither read into the Agreement additional language nor took from the Agreement what was already there. His Award merely said, in so many words, that the language added to Rule 19 by the Referees in Awards 7420 and 11040 was simply not there. That is entirely correct and should have prevailed.

In view of all the facts and evidence it is quite evident that the present Referee wanted to find a way to assist the Carrier by changing the Agreement by adding language not therein contained.

For that reason alone this Award 14462 can be termed palpably erroneous and I most vigorously dissent thereto.

D. E. Watkins
Labor Member
6-23-66

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