Award No. 14825
Docket No. CL-13589

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5205) that:

1. Carrier violated and continues to violate the rules of the Clerks' Agreement when, beginning March 27, 1961, it did, without conference, negotiation or agreement, arbitrarily and unilaterally remove work from St. Paul, Minnesota seniority district No. 29, and transfer same to Minneapolis, Minnesota seniority district No. 26, and place it at Minneapolis, Minnesota.

2. Carrier shall return the work transferred to Minneapolis Seniority District No. 26 to the positions and employes in St. Paul Seniority District No. 29.

3. Carrier shall compensate employe H. Dunbar, occupant of Check Clerk position, and Employe P. Lynch, Sr. occupant of Lift Operator position, for all loss of earnings suffered through abolishment of those positions; also all other employes, who suffer loss of earnings through displacement or otherwise as a result of the Carrier's action in disregarding their seniority rights and removing their work to another seniority district, be compensated for any and all loss or adverse effect retroactive to the date on which the violation occurred. Claim to continue until the agreement has been complied with.

EMPLOYES' STATEMENT OF FACTS: The handling of LCL freight consigned to industries at St. Paul, Minnesota is work which has always been assigned to employes in Seniority District No. 29 at St. Paul, Minnesota.

During the past few years Carrier has removed the LCL work in small amounts from positions and employes in Seniority District No. 29 and transferred it to the Minneapolis Freight House and assigned it to positions and employes in Seniority District No. 26. Verbal complaints were made by the Local Committee of the Brotherhood in connection with the piece-meal removal

Conference has been held thereon and no settlement reached.

Submitted as Employes' Exhibit B is copy of the General Chairman's letter to Mr. S. W. Amour, Assistant to Vice President dated January 4, 1962.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: The instant claim has not been properly handled by the Organization in accordance with the provisions of Article V of the Agreement of August 21, 1954 in that the instant claim was never presented in the first instance to Carrier's Agent at St. Paul, Minnesota, who is the Carrier Officer authorized to receive this claim in the first instance, therefore, the instant claim is barred.

Effective March 27, 1961 the Carrier rearranged its less carload freight merchandise schedules at St. Paul and Minneapolis, Minnesota to provide for more efficient, expeditious and satisfactory service for its patrons so as to continue on a competitive basis in the handling of LCL merchandise, said rearrangement being no different than hundreds of like rearrangements of LCL merchandise schedules the Carrier has, of necessity, made at various points on its property, inclusive of the Twin Cities area.

The "before and after" situation at both St. Paul and Minneapolis as well as the improperness and invalidity of the instant claim will be fully discussed in Carrier's Position.

There is attached hereto as Carrier's Exhibit A copy of letter written by Mr. S. W. Amour, Assistant to Vice President, to Mr. H. V. Gilligan, General Chairman, under date of November 1, 1961 and as Carrier's Exhibit B copy of letter written by Mr. Amour to Mr. Gilligan under date of May 4, 1962.

(Exhibits not reproduced.)

OPINION OF BOARD: Effective March 27, 1961, Carrier rearranged less carload freight merchandise schedules at St. Paul and Minneapolis, Minnesota. The Brotherhood maintains that Carrier arbitrarily and unilaterally removed work from St. Paul Seniority District 29 and transferred it to Minnesota Seniority District 26 in violation of the Clerks' Agreement. It contends that the work of handling LCL freight belongs to the employes in the Seniority District to which it is assigned and any transfer of work must be made through negotiation. It asserts that prior to March 27, 1961, LCL freight consigned to industries in St. Paul was unloaded by employes in Seniority District 29, but after that date all LCL merchandise was diverted to Minneapolis Freight House and handled by employes in Seniority District 26.

Carrier points out in its denial that prior to March 27, 1961, not only did employes in the St. Paul House, Seniority District 29, unload LCL freight for consignees in St. Paul, but employes in the Minneapolis Freight House, Seniority District 26, also unloaded LCL freight destined for St. Paul. After that date no LCL cars were billed to St. Paul, but instead all are billed to Minneapolis, and after unloading, the merchandise is either taken by Carrier's pick up and delivery contractor to the consignee at St. Paul, or picked up by the consignee at the freight house. This change, it maintains, cannot be considered a transfer of work from one district to another because employes in the Minneapolis House have always unloaded LCL freight for St. Paul. It eliminated duplicated work and did not require an increase in the forces at

Minneapolis. Moreover, Carrier emphasizes there was no change in Seniority Districts and that the Agreement does not restrict its right to rearrange its transportation service as it did.

The issue of transfer of work and arguments similar to those of the instant case were considered by this Referee in Award 13918. In that Award the Board reviewed Award 9193 and the decision of Federal District Court in West Virginia, Hanson v. Chesapeake & Ohio Railway Company, 263 Fed. Sup. 56 (1964) which set aside Award 9193. This Board in Award 13918 held, as in the Federal District Court decision, that since the Seniority Districts remained intact the diversion of work did not require negotiation with Brotherhood under the Agreement. We have not found any recent decision which has overturned this ruling. For these reasons we hold that the Agreement was not violated.

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 11th day of October 1966.

LABOR MEMBER'S DISSENT TO AWARD 14825, DOCKET CL-13589

Award 14825, Docket CL-13589, is in error and cannot be accepted as a proper interpretation of the Agreement rules.

In Award 14825, the Referee did not honor the case law as contained in Awards of this Board or Award 9633 on the involved Carrier. Instead he relied on his earlier Award 13918 as well as the decision of the Federal District Court in West Virginia which arose as a result of an action to enforce Award 9193 of this Division. The Court case was dated December 8, 1964 and is: "Hanson v. Chesapeake and Ohio Railway Company" reported in 263 Fed. Sup. 56 (1964). The brief opinion of the Referee in Award 14825 with respect to the Court case was that the Federal District Court "set aside Award 9193," which is obviously true, however, many very significant things have occurred since October 1965 when Award 13918 was adopted and October 1966 when the instant claim was presented to the Referee.

First, the Supreme Court of the United States in Gunther v. San Diego Arizona and Eastern, an action similar to Hanson v. Chesapeake and Ohio, held under date of December 8, 1965 (exactly one year subsequent to the District Court's decision in Hanson v. C&O) that:

"* * * After hearing the District Court, in its third opinion in the case, held the award erroneous and refused to enforce it. * * *

* * * * *

* * * The Court of Appeals affirmed, agreeing with the interpretation put upon the contract by the District Court, and thereby rejected the Board's interpretation of the contract and its decision on the merits of the dispute. 336 F. 2d 543. We granted certiorari because the holding of the two courts below seemed, in several respects, to run counter to the requirements of the Railway Labor Act as we have construed it. U. S. —

I.

Section 3 First (i) of the Railway Labor Act provides that 'disputes between an employe or group of employes and a Carrier or Carriers growing out of grievances or out of the interpretation or application of agreements' are to be handled by the Adjustment Board. In § 3 Congress has established an expert body to settle 'minor' grievances like petitioner's which arise from day-to-day in the railroad industry. The Railroad Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices. See Slocum v. Delaware L&W R. Co., 339 U. S. 239, 243-244. * * *. Paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employes for physical disability upon the good-faith finding of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement. As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field.

* * * The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information. * * *. This Court has said that the Railway Labor Act's 'provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field.' * * *

III.

Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is two-fold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot. This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railway Adjustment Board. In Brotherhood of Railroad Trainmen et al. v. Chicago River & Indiana R. Co., 353 U. S. 31, the Court gave a Board decision the same finality that a decision of arbitrators would have. In Union Pacific R. Co. v. Price, 360 U. S. 601, the Court discussed the legislative history of the Act at length and pointed out that it 'was designed for effective and final decision of grievances which arise daily' and that its 'statutory scheme cannot realistically be squared with the contention that Congress did not propose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . .' 360 U. S., at 616. Also in Locomotive Engineers v. Louisville & Nashville R. Co., 373 U. S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as 'compulsory arbitration in this limited field.' p. 40, 'the complete and final means for settling minor disputes,' p. 39, and 'a mandatory, exclusive, and comprehensive system for resolving grievance disputes.' P. 38.

The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award. The basic grievance here — that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health — has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court.

IV.

There remains the question of further proceedings in this case with respect to the money aspect of the Board's award. The Board did not determine the amount of back pay due petitioner on account of his wrongful removal from service. It merely sustained petitioner's claim for 'reinstatement with pay for all time lost from October 15, 1955.' Though the Board's finding on the merits of the wrongful discharge must be accepted by the District Court, it has power under the Act to determine the size of that money award. The distinction between court review of the merits of a grievance and the size of the money award was drawn in Locomotive Engineers v. Louisville &

Nashville R. Co., supra, at pp. 40-41, when it was said that the computation of a time-lost award is 'an issue wholly separable from the merits of the wrongful discharge issue.' On this separable issue the District Court may determine in this action how much time has been lost by reason of the wrongful removal of petitioner from active service, and any proper issues that can be raised with reference to the amount of money necessary to compensate for the time lost. * * *

The judgments of the courts below are reversed and the cause is remanded to the District Court for considerations not inconsistent with this opinion.

Reversed and remanded."

which plainly shows that the law of the land was that the District Courts, e.g., the Gunther and the Hanson cases, exceeded their "province." This should have caused the Referee to shun his earlier reliance on the District Court case — and revert to the "case law" of this Board which overwhelmingly supported such action. For example, this Board has repeatedly held that positions or work may not arbitrarily be removed from the confines of one seniority district and placed in another, as was done here. Awards 99, 198, 199, 610, 612, 752, 753, 973, 1403, 1440, 1611, 1612, 1685, 1711, 1808, 1892, 2050 3964 4534 4653 4667 4674 4987, 5091, 5100, 5195, 5240, 5311, 5396, 5413, 5437, 5441, 5541, 5731, 5895, 5995, 6016, 6021, 6024, 6036, 6309, 6357, 6420, 6453, 6938, 7816, 9193, 10982, 11582, 13853, and many others.

Secondly: The Federal Law with respect to Awards of the Adjustment Board was amended by the following:

"48 STAT. 1191. 45 USC 153.

Section 2. (a) The second sentence of section 3, First, (m), of the Railway Labor Act is amended by striking out, 'except insofar as they shall contain a money award.'

80 STAT. 209.

80 STAT. 210.

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: 'In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.'

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out 'shall be prima facie evidence of the facts therein stated' and inserting in lieu thereof 'shall be conclusive on the parties'."

Thus making the law read, with respect to Section 3, First, (m), (o) and (p) as follows:

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be

final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the Carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employe the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a Carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the Carrier, or through which the Carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Which makes the Awards "conclusive on the parties" and goes a little further in respect to the "money" and gets further away from the erroneous idea that the District Courts should be permitted to "second guess" the Referees.

Thirdly, the case of Hanson v. Chesapeake and Ohio was handled further and the Court of Appeals for the Fourth Circuit affirmed without opinion. (351 F2d 953.) On May 16, 1966, Supreme Court remanded case (16 L ed 2d 481):

"The petition for a writ of certiorari is granted. The judgment of the United States Court of Appeals for the Fourth Circuit is vacated and the case is remanded to that court for further consideration in light of Gunther v. San Diego & Arizona Eastern Railway Co., 382 U. S. 257."

Thus what the Referee was urged to do in Award 14825, i.e., ignore the Hanson case and revert to the case law as found in the many Awards of this

Board, obviously should have been done, and, having failed and refused to do so, Award 14825 must be considered as erroneous and not a proper interpretation of the Agreement rules.

Moreover, Carrier obviously recognized the fact that negotiations and agreement on such a transfer of work was necessary, (as in the case law of this Board), for Carrier did not raise the Court case but merely argued that:

> "Such a move as here made * * * 'cannot be considered a transfer of work * * *' and that '* * * it cannot be said that such work was transferred * * *' and '* * * there can be no proper contention that said work was 'transferred.' * * *
>
> 1. * * * The elimination of the handling at St. Paul did not transfer the work to Minneapolis * * *
>
> * * * A transfer of work or a change in the nature of the handling would have been reflected in the Minneapolis warehouse forces. * * *
>
> '* * * I am unable to agree with your contention regarding an alleged transfer of work * * *' and closing arguments in rebuttal brief was '* * * contrary to the employes' contention there was no transfer of work * * *' and 'we are not here involved with a transfer of work' and the '* * * Carrier reiterates that there was no transfer of work. * * *'
>
> I therefore dissent to Award 14825."

D. E. Watkins
Labor Member
11-7-66

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.