Award Number 17337
Docket Number CL-17465

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David H. Brown, Referee

PARTIES TO DISPUTE:

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

NEW YORK CENTRAL RAILROAD (Southern District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6372) that:

(1) Carrier violated the Rules of the current Clerks' Agreement when it failed and refused to bulletin a vacancy known to be of more than thirty (30) days' duration which occurred upon the death of Mr. E. L. Brown on May 26, 1966, incumbent of Crew Caller, Position No. 14.

(2) Carrier also violated the Memorandum of Agreement made effective October 15, 1962, when it assigned work formerly performed by Position No. 14, a Group 2 position, to employees not within the Scope Rule of the current Agreement.

(3) Claimant S. M. McNabb shall be allowed payment at the rate of $21.003 per day (plus all general subsequent increases) for Tuesday, August 2, 1966 and the same for each and every succeeding day, Tuesday through Saturday, until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective July 22, 1922, as amended, and reprinted with revisions January 5, 1951, covering clerical, other office and station employees between the Carrier and this Brotherhood which the Carrier has filed with the National Railroad Adjustment Board. This Rules Agreement will be considered as a part of this Statement of Facts. Various Rules thereof may be referred to herein without quoting in full.

There is also in effect a Memorandum of Agreement dated September 27, 1962, effective October 15, 1962, in which the parties to this dispute agreed that all work in connection with calling crews would be done by employees covered by the current Rules and Working Conditions Agreement. (See Employee's Exhibit "M".)

The Carrier has throughout the life of the 1922 Rules Agreement complied with Rule 2, paragraph four, and Rule 5, paragraph three, where vacancies on a regular position occur. In every instance where a vacancy such as we have here did occur the Carrier either bulletined the position as

Brown, and that Mr. S. M. McNabb, an extra Mechanical Department clerk, would have bid on and stood for the job on the basis of his seniority.

(Exhibits not reproduced)

OPINION OF BOARD: This claim has two parts. The first is based upon the failure of Carrier to bulletin a vacancy known to be of more than 30 days' duration.

Employes assert a violation of Rule 5, paragraph 3, of the Agreement. Such rule provides "Positions or vacancies known to be of more than thirty (30) days duration will be bulletined and filled in accordance with these rules . . ." The burden of Employes' argument on this point is that Rule 5 is effective to perpetuate positions. For us to so hold would amount to our writing a new rule stripping Carrier of its inherent prerogative to manage its affairs in a manner consistent with economy. In the absence of some specific rule which perpetuates a position we will not support a circumscription of such managerial prerogative. Rule 5, we apprehend, was designed simply to delineate the manner of filling positions or vacancies when the filling of such positions or vacancies was necessary. "Positions or vacancies . . . will be bulletined. . ." does not mean "Positions must be perpetuated" or "Vacancies must be filled" in the absence of other rule support.

Petitioner's second point is that Carrier violated the Memorandum of Agreement effective October 15, 1962 when it assigned work formerly performed by the crew caller to persons outside the Scope Rule of the Agreement. Said memorandum provides "All work of calling crews shall be done by employees covered by the current Rules and Working Conditions Agreement."

It was claimed on the property that the crew calling work in controversy was assigned to "Group I Crew Dispatchers, both Train and Engine Departments, employees of the Y. M. C. A. and others . . ." Since our Award 9657 it has been settled that in the absence of a specific rule to the contrary, crew calling may be delegated to crew dispatchers.

But we believe that the assigning of crew calling to YMCA employees comes squarely within the prohibition of the agreement of the parties as reflected by Memorandum of Agreement effective October 15, 1962 and heretofore cited. Prior to such agreement Carrier had farmed out its crew calling to a taxicab company and to YMCA clerks. The memorandum specifically states that "All work of calling crews shall be done by employees" covered by the Clerks' Agreement. In assigning crew calling chores to YMCA personnel Carrier has violated the Memorandum of Agreement.

Having found that the Agreement was violated, we next turn to the issue of whether or not we can sustain the claim as presented. The claim is for a day's pay for one man during the period of the violation, such claim being bottomed on the Organization's contention (which we have rejected) that Carrier could not blank the position. It would obviously not be fair to penalize Carrier a day's pay for a violation consisting of the mishandling of what is admittedly a small portion of the work done by the occupant of the position prior to the change. We therefore have two alternatives:

1. We can pick a figure out of the air (since the Organization has not furnished us with any proof whatsoever as to the quantity of the work mis-

appropriated) and take that amount from Carrier and give it to Claimant McNabb. This we shall not do, for we can not speculate our way to a just award. It is the duty of Petitioners, on the property, to develope a record from which this Board can write an award which can be easily and readily translated to money.

2. We can sustain the claim in principle and send it back to the property for implementation. But here again the record is utterly devoid of even guidelines by which we might dictate a settlement. We could say to the parties, "Go back and ascertain how much time it would take to make the calls which were assigned outside the Agreement and pay Mr. McNabb for the time he would have spent in making such calls." And who can doubt but that from that would develope a further dispute of equal rank with this one which the law charges us with the duty of resolving. If Carrier is still violating the Memorandum of Agreement, let Petitioners come forward with a new claim supported by evidence as to how much of their work has been illegally taken from them. Then this Board can grant relief. Pending that, no just award can be made.

Both sides have urged matters on this Board which matters were not covered on the property. We ignore these matters, and our authority for so doing is so well established that no Awards to such effect are cited.

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, but the record is too vague to support sustention of the claim.

A W A R D

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 July 1969.

LABOR MEMBER'S DISSENT TO AWARD 17337, DOCKET CL-17465

This "Award" is overflowing with palpably erroneous conclusions. I quote below the entire Opinion of Board with emphasis supplied upon which I will then comment:

> **"This claim has two parts. The first is based upon the failure of** Carrier to bulletin a **vacancy known to be of more than 30 days' duration.**

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It was claimed on the property that the crew calling work in controversy was assigned to 'Group I Crew Dispatchers, both Train and Engine Departments, employees of the Y. M. C. A. and others . . .' Since our Award 9657 it has been settled that in the absence of a specific rule to the contrary, crew calling may be delegated to crew dispatchers.

But we believe that the **assigning of crew calling to YMCA employees comes squarely within the prohibition of the agreement** of the parties as reflected by Memorandum of Agreement effective October 15, 1962 and heretofore cited. Prior to such agreement Carrier had farmed out its crew calling to a taxicab company and to YMCA clerks. The memorandum specifically states that 'all work of calling crews shall be done by employees' covered by the Clerks' Agreement. **In assigning crew calling chores to YMCA personnel Carrier has violated the Memorandum of Agreement.**

Having found that the Agreement was violated, we next turn to the issue of whether or not we can sustain the claim as presented. **The claim is for a day's pay for one man during the period of the violation,** such claim being bottomed on the Organization's contention (which we have rejected) that Carrier could not blank the position. **It would obviously not be fair to penalize Carrier a day's pay for a violation consisting of the mishandling of what is admittedly a small portion of the work** done by the occupant of the position prior to the change. We therefore have two alternatives:

1. **We can pick a figure out of the air** (since the Organization has not furnished us with any proof whatsoever as to the quantity of the work misappropriated) and take that amount from Carrier and give it to Claimant McNabb. **This we shall not do, for we can not speculate our way to a just award.** It is the duty of Petitioners, on the property, to develope a record from which this Board can write an award which can be easily and readily translated to money.

2. We can sustain the claim in principle and send it back to the property for implementation. But here again the record is utterly devoid of even guidelines by which we might dictate a settlement. We could say to the parties, 'Go back and ascertain how much time it would take to make the calls which were assigned outside the Agreement and pay Mr. McNabb for the time he would have spent in making such calls.' And who can doubt but that from that would develope a further dispute of equal rank with this one which the law charges us with the duty of resolving. If Carrier is still violating the Memorandum of Agreement, let Petitioners come forward with a new claim supported by evidence as to how much of their work has been illegally taken from them. Then this Board can grant relief. Pending that, no just award can be made.

Both sides have urged matters on this Board which matters were not covered on the property. We ignore these matters, and our authority for so doing is so well established that no Awards to such effect are cited."

Rule 5 requires the prompt bulletining of positions the duties of which exist and are required by Carrier to be performed. If such work thereof has decreased to a point where the position is not needed, then Carrier, having established the position by bulletin, must abolish it by bulletin. The Referee's statement that the "Employes' argument on this point" (that the position was to have been bulletined and filled per Rule 5) "is that Rule 5 is effective to perpetuate positions" is next to ridiculous in light of the clear facts of record that the duties of that position still exist and have been doled out piece-meal to several recipients, delineated in small amounts, in violation of the entire Agreement. The duties of this position have been performed well beyond a 30-day period.

The Referee acknowledges that some of the Crew Caller's duties were assigned to crew dispatchers and some were given to YMCA employes. He then opines that "In assigning crew calling chores to YMCA personnel Carrier has violated the Memorandum of Agreement."

He then decides that "Having found that the Agreement was violated, we next turn to the issue of whether or not we can sustain the claim as presented. The claim is for a day's pay for one man during the period of the violation, * * *. It would obviously not be fair to penalize Carrier a day's pay for a violation consisting of the mishandling of what is admittedly a small portion of the work done by the occupant of the position prior to the change. * * *."

Let us set the record straight: The amount of work complained of by the Employes was NOT "ADMITTEDLY A SMALL PORTION". The Referee, himself, admitted there is evidence of record that crew dispatchers were assigned to perform some of the work and that YMCA employes were assigned to perform some of the work. He conveniently omitted any reference to the fact that some of this work is, according to the Employes' complaint, being performed by employes of a cab company. Lastly, sympathetically, he holds it would "not be fair to penalize Carrier.", thereby reversing this Board's firmly-established principle that it will not act as a Board of equity, but will apply the agreement as written.

With regard to the "consistent with economy" statement injected by the Referee, we wish to point out that "economy" is not recognized by this

Board as justification for Carrier's violation of a collectively bargained Agreement. Awards 11072, 13834, 13956, 14591.

The Referee then reaches a conclusion that this Board has two unsound alternatives, i.e., (1) speculation as to monetary loss and (2) remanding it to the parties to ascertain how much time the outsiders devote to crew calling. The first alternative was flatly rejected, with which this writer has no strenuous objection since there was no necessity for speculation. The claim was made and progressed on the property for 8 hours for each day this work is performed while the Crew Caller position is not filled and not abolished. We do not have to look beyond present surroundings to discover a day's pay for less than a day's work. There is nothing in the rules of the Agreement permitting a "call" or any other fraction of a day's work on a continuing basis. There is a rule in the Agreement (Rule 15) that "eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work." That is a measure of time, not a measure of effort. There is further provision (Rule 16) that "The expressions 'positions' and 'work' refer to service, duties, or operations necessary to be performed the specified number of days per week." Thus, the claim for 8 hours for each day is in complete accord with the rules provisions and there was no need for "speculation" as to the proper payment to be made after the Referee found that a violation did exist.

The second alternative was rejected because "**from that would develope a further dispute of equal rank with this one which the law charges us with the duty of resolving.**" The writer certainly agrees with one thing: This Board is charged by law with the duty of resolving disputes. The Employes are scorned because they contend that their Agreement clearly provides that a position is either needed and filled or it is abolished, in either event, by bulletin.

That, according to the learned Referee, is "perpetuating" a position. He, on the other hand, presumes a "**further dispute of equal rank**" if he finds against Carrier's violative action and sets down a formula whereby the parties can settle the issue. Thus, the Referee "perpetuates" the violation by the Findings: "That the Agreement was violated" and the Award: "Claim denied."

There is but one statement in the Award with which, taken from context, I agree, i.e.: "We ignore these matters."

I dissent to this most erroneous Award.

/s/ C. E. Keif
C. E. Keif, Labor Member
August 19, 1969

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