Award No. 18071
Docket No. TE-18252

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

NORFOLK AND WESTERN RAILWAY COMPANY (Lake Region)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC on the Norfolk & Western Railway Company (NYC&StL), that:

1. Carrier violated the Agreement between the parties when, on or about October 24, 1967, without conference or agreement, it transferred employes assigned at "FO" Office, Fort Wayne, Indiana to a new location outside the city limits of Fort Wayne and in excess of five (5) miles, without proper notice of abolishment of their positions and before the newly established positions were advertised and assigned by bulletin.

2. Carrier shall, therefore, compensate the following named employes each a day's pay (8 hours) for each date violation continues, beginning October 24, 1967, plus any expenses incurred, and any benefits due under the March 21, 1966 Agreement:

A. P. Hubert
J. L. Treece
R. E. Peck
R. L. Bibler
B. A. Carnahan
R. R. Jaurigue
K. Waltemath
V. L. Winebrenner

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

An Agreement between the Norfolk & Western Railway Company (formerly the New York, Chicago and St. Louis Railroad Company) effective January 1, 1959, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

Copies of Circulars Nos. 21-67 are attached and identified as Carrier's Exhibits C and D. At the same time Circulars Nos. 21-67 were issued, Circulars Nos. 22-67 were also issued, advertising "FO" office positions, together with other vacancies on the two respective seniority districts, in compliance with Rules 8, 11 and 38. Copies of Circulars Nos. 22-67 are attached and identified as Carrier's Exhibits E and F.

The Notice of October 26, 1967 and Circulars Nos. 21-67 dated November 1, 1967, were erroneously issued by the local forces at Fort Wayne in a misinterpretation of Rule 38. This error was corrected by Chief Train Dispatcher Bulletin No. 23-67 dated November 4, 1967 and was posted on the Lake Erie Division (former Fort Wayne Division) and on the Fort Wayne Division (former Chicago Division), reading as follows:

> "Circular 21-67 of November 1, 1967, regarding the abolishments of positions at 'FO' Office effective November 1, 1967, was issued in error, and should be considered of no force or effect.
>
> The Bulletin of Positions in 'FO' Office as contained in Fort Wayne Division Circular 22-67 of November 1, 1967 is to carry out provisions of Rule 38 due to FO Office being moved in excess of five miles."

On November 14, 1967, Bulletin No. 24-67 was posted on the former Chicago Division, and on November 15, 1967, Bulletin No. 24-67 was posted on the former Fort Wayne Division, advising therein the successful applicants to the positions in "FO" office, as well as other positions advertised in Circulars Nos. 22-67. Copies of these bulletins are attached as Carrier's Exhibits I and J, respectively.

The claim here in dispute was initiated by the General Chairman in a letter dated November 16, 1967, copy of which is attached hereto and identified as Carrier's Exhibit K. The subsequent handling of the claim on the property was as follows:

CARRIER'S EXHIBIT L – January 12, 1968 – Denial of Claim, Superintendent to General Chairman

CARRIER'S EXHIBIT M – January 22, 1968 – Appeal, General Chairman to Manager Labor Relations

CARRIER'S EXHIBIT N – March 22, 1968 – Denial of Appeal, Manager Labor Relations to General Chairman

CARRIER'S EXHIBIT O – October 3, 1968 – Confirmation of conference and rejection of denial, General Chairman to Manager Labor Relations

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier attacks the jurisdiction of this Board to decide this dispute on the grounds that any dispute involving the application of the March 21, 1966 Memorandum Agreement is subject to the provisions of Section 13 (b) of said Agreement, which provides the procedure to be followed in resolving a dispute as is involved herein. However, close

perusal of said Section 13 (b) shows that the word "may" is used, thus making it voluntary rather than mandatory for a party to use the grievance machinery so provided for in said section. Carrier's member of this Board cited a U. S. District Court case of the Southern District of West Virginia, Parsons v. Norfolk & Western Railway Company, in support of Carrier's position that this Board lacks jurisdiction to decide this claim. However, said Court decision can be distinguished from the jurisdictional dispute facing this Board in that in the Parsons case the Court held that the petitioner was compelled under the provisions of the Railway Labor Act, first (i) to submit his claim to the appropriate Division of the Railroad Adjustment Board rather than to the Courts. Here, the Organization, under the permissive provisions of said Section 13 (b) of the March 21, 1966 Agreement, elected not to have an Arbitration Committee settle this dispute, but selected this Board to adjudicate this controversy, and, therefore, we have jurisdiction to hear the claim.

The Organization's position in regard to Rule 38 is that said rule contemplates the abolishment of positions when new positions are established to replace them at another location more than five (5) miles distant; that a 90 day advance notice was not given in accordance with the March 21, 1966 Agreement, particularly Section 5 (d) thereof.

Carrier's defenses to the claim are: (a) Rule 38, as relied upon by the Organization, does not state that the assignment covering positions of an office moved a distance in excess of five miles shall be abolished by notice or bulletin, nor does said rule specify any time limits; (b) that one isolated case in 1951 involving the relocation of the yard office ("Q" Telegraph Office) from West Wayne, Indiana to East Wayne, Indiana cannot be considered as establishing a practice under Rule 38; (c) that the March 21, 1966 Agreement supersedes Rule 38, and that said Agreement does not require any notice of any kind for transfer of work and employes within the general locality; (d) that the Organization failed to cite any rules of the Agreement in support of its demand for a penalty of a day's pay (8 hours) for each date violation continues, or for expenses and benefits demanded.

It is undisputed that the "FO" office in downtown Fort Wayne, Indiana was moved to a new location at the East Wayne Yard, 5.52 miles distant. Carrier initially advised all telegraphers "FO" office and all dispatchers, Dispatcher's Office, Fort Wayne, Indiana, that the "FO" office and Dispatcher's Office were to be moved and relocated in East Wayne Yard Office Building and Superintendent's Office Building, East Wayne, effective Tuesday, October 24, 1967. On October 26, 1967, Carrier notified all operators, "FO" telegraph office, Fort Wayne, Indiana, that all positions at "FO" telegraph office are abolished by reason of relocation of the "FO" telegraph office. On November 4, 1967, Carrier advised the office of Chief Train Dispatcher, Fort Wayne Division, that its Circular No. 21-67 of November 1, 1967, regarding the abolishment of positions at the "FO" office effective November 1, 1967 was issued in error and should be considered of no force or effect.

First, considering the Organization's contention that the Carrier violated Section 5 (d) of the Memorandum of Agreement of March 21, 1966, it is seen that said section provides as follows:

> "(d) The Carrier shall give the General Chairman and the employe involved a written 90 day advance notice of any intended per-

manent abolishment of a position, except as provided in Section 1 (d) and 2 (b) of this agreement. Prior to the expiration of the 90 day period the General Chairman shall, upon request, be given a conference with representatives of the Carrier for a joint discussion of all phases of the questions raised by the 90 day notice, including the wisdom and necessity of such position abolishment and the manner in which and the extent to which employes may be affected by the change involved, with a view to avoiding grievances and minimizing adverse effects on employes involved and to facilitate the application of this agreement."

However, this Section 5 (d) cannot be read alone, as the Organization would have us believe we should. We must consider said section in the light of and in connection with the other sections of the Agreement. Section 5 (b) of said Agreement requires a 90 day advance notice of intended transfer of work and employes from one general locality to another, and Section 5 (c) defines "general locality" as an area 25 miles from an employe's point of employment. Therefore, taking Section 5 as a whole, as it deals with transfer of work out of the general area and permanent abolishment of jobs, we do not construe Section 5 (d) to require the Carrier to give 90 day notice to the abolishment of the jobs where the equivalent jobs were immediately available at the new office 5.52 miles from the closed office. Therefore, Carrier was not in this instance required to give the alleged 90 day notice as provided for in said Section 5 (d) of said Agreement.

While Carrier moved the "FO" office to the East Wayne yard without bulletining the positions as required by Rule 38, later, and on November 1, 1968, Carrier conformed to said Rule 38 when it bulletined said positions.

For the foregoing reasons, we must deny the claim.

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 September 1970.

DISSENT TO AWARD 18071, DOCKET TE-18252

We consider this Award to be in serious error insofar as it relates to the requirements of Section 5(d) of the Memorandum Agreement of March 21, 1966.

Section 5, as a whole, relates to two subjects: (1) Transfer of Work, and (2) Job Abolishments. Paragraphs (b) and (c) deal solely with notices concerning the transfer of work from one general locality to another. Paragraph (d) deals solely with notice requirements when a position is to be permanently abolished.

The peculiar provision of Rule 38 of the Schedule Agreement made it mandatory that the positions involved be abolished permanently. Thus, in this case we were considering two things: (1) a transfer of work within a "general locality", which did not, perhaps, require notice under paragraphs (b) and (c) of the Memorandum Agreement; and (2) an unavoidable permanent abolishment of the positions which formerly constituted the work that was transferred to another location. Paragraph (d) plainly requires a ninety-day notice when any position is to be permanently abolished, regardless of the circumstances.

The action of the majority in treating these two separate things as one, and holding that paragraph (d) must be read with paragraphs (b) and (c) amounts to a modification of the agreement. If the parties had intended an exception to paragraph (d) with respect to positions abolished by operation of Rule 38 of the Schedule Agreement, they could easily have so indicated. Instead, they limited the exceptions to those provided by "Section 1(d) and 2(b)".

The majority has attempted to impose a further exception, which is contrary to the well known rule that where one or more exceptions are stated no other or further exception will be implied.

The Award is thus rendered erroneous, requiring this dissent.

C. E. Kief
Labor Member

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