Award No. 18416
Docket No. CL-18659

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6727) that:

1. The Carrier violated the rules of the Agreement extant between the parties when it permitted Sales Representative, Wallace Logan, to perform routine Western Division clerical work at Lodi, California prior to the re-establishment of the position of Car Clerk at that point effective September 3, 1968 and following the abolishment effective September 27, 1968.

2. Mr. B. N. Gage shall be allowed payment for August 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 and October 1, 2, 3, 4, 7, 8, 1968.

EMPLOYES' STATEMENT OF FACTS: A seasonal position (Car Order Clerk) was created at Lodi, California to commence September 3, 1968, for the purpose of handling increased grape business. (Employes' Exhibit No. 1.)

Prior to the effective date of this assignment the work necessary for its establishment existed. An employe of the Carrier who was not in Seniority District 18 performed this work before the date of September 3, 1968 and after it was abolished on September 27, 1968. A claim was filed for each of these days and is identified as "Employes' Exhibit No. 2".

On November 12, 1968, the claim was denied by the Timekeeper. (Employes' Exhibit No. 3.) The dispute was then handled by the General Chairman for appeal to the Superintendent which he declined on January 29, 1969. (Employes' Exhibits No. 4 and No. 5.)

Appeal was then made to the Manager of Personnel, the highest officer on the property authorized for handling, on March 19, 1968. (Employes' Exhibit No. 6.)

Conference was held on April 15, 1969, and on May 12, 1969. Mr. Tussey denied the claim. (Employes' Exhibit No. 7.) The position was abolished effective September 27, 1968. (Employes' Exhibit No. 8.)

(Exhibits not reproduced.)

OPINION OF BOARD: On August 23, 1968, Carrier bulletined a seasonal Car Order Clerk position at Lodi, California, commencing September 3, 1968 and expected to last about 45 to 60 days.

The Organization files this claim on the basis that an employe outside of Seniority District 18 performed the duties of the position in question prior to the establishment of said position on September 3, 1968 in violation of the Agreement, and further, that the season had not ended when said position in question was abolished; the Organization's position being that the work involved, namely ordering in empty cars, arranging for cars to be iced for prospective loading, making icing reports and other work in connection with loads and empties at Lodi, Calif. was work that was performed by the position of Car Clerk, an employe from the Western Division, during the period September 3 through September 27, 1968, which work was also performed by the occupant of that position, Claimant herein, during the 1967 season; that Rule 28 of the Agreement was violated when an employe outside the Western Division Seniority District was permitted to perform the duties of said Car Clerk position prior to and following its abolishment in 1968.

First, Carrier attacks the jurisdiction of this Board to hear this dispute, alleging that the parties hereto handling disputes of the nature involved in this claim have provided the machinery to be followed in Article VII of the February 7, 1965 Agreement, wherein such disputes are to be referred to a Disputes Committee.

The Organization argues that since this contention was not raised on the property, it cannot be now considered herein. However, it has been held by this Board that a question of the Board's jurisdiction may be raised at any time.

In regard to the application of the provisions of Article VII of said February 7, 1965 Agreement, examination of the provisions thereof clearly shows that it is not mandatory for the parties to submit a grievance to the Disputes Committee. This is seen by the use of the words in Section 1 of said Article VII, namely: "* * * may be referred by either party * * *." Thus a showing of permissiveness rather than a mandatory requirement is provided for in said Article VII in the reference of disputes to a Disputes Committee. Thus, Carrier's contention in regard to said jurisdictional defect is without merit and is therefore denied.

In regard to the merits, Carrier contends that the work here in question has never been reserved exclusively to employes represented by the petitioning Organization or to one seniority district; that inasmuch as the Organization relies on Rule 28 of the Agreement, then it is incumbent upon the Organization to prove conclusively that the work here in dispute is reserved exclusively to positions in Western Seniority District 18, which the Organization cannot do; that Rule 28 merely lists seniority districts and does not describe the work performed in the various seniority districts; that Carrier has shown in the record that employes in the Marketing Division handle orders from shippers; that without prejudice to Carrier's contention that the Agreement was not violated, Claimant was not deprived of employment nor did he suffer any monetary loss.

The fact that some of the work involved herein has been performed at times by petitioners herein, does not give "exclusive" right to the petitioners to perform said work in question. Close examination of the Agreement does

not disclose any prohibition that would prevent Carrier from assigning said work to others than the petitioning craft herein.

As was said by this Board in Award No. 13490:

"We find no provision in the Agreement which prohibited Carrier from assigning the work to the Storekeeper. Therefore, whether or not the Storekeeper had been assigned such work in the past is immaterial."

Thus, finding no violation of the Agreement, we will 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 26th day of February 1971.

STATEMENT OF CARRIER MEMBERS — AWARD 18416, DOCKET CL-18659 (Referee Dugan)

For the reasons stated in the memorandum which a Carrier Member submitted to the Referee during the panel discussion of this claim, Carrier Members are convinced that the Board had no jurisdiction to adjudicate the claim. The matter should have been submitted to the disputes committee provided for in Article VII of the Agreement of February 7, 1965. See especially Award 18028 (Dugan).

The Referee's conclusions drawn from the mere fact that the word "may" is used in the arbitration provision of the agreement are contrary to many sound and consistent rulings of the Federal courts as well as many decisions of this Board. While it is true that in using the word "may" the parties intended to give claimants alternatives, the alternatives were not to follow the agreement procedure or come to this Board; but rather, to follow the agreement procedure or abandon the claim.

The Referee's attempt to distinguish the decision of the Federal court in Parsons v. N&W Ry. Co., 74 LRRM 2493, leaves us cold. As we read the Parsons' case, no question of presenting that particular case to this Board was ever involved or discussed by the court. The issue before the court in that case and the ruling made by the court are clearly revealed by the following extracts from the decision.

> "Besides a general denial of plaintiff's complaint, the defendant sets up in its answer certain affirmative defenses to the action. One of these is that this Court should dismiss the action because the plaintiff has not exhausted his remedies under the contract he sues upon, i.e., **he has not submitted or attempted to submit his claim to the arbitration procedure provided for in the Merger Agreement. . . .**
>
> * * * * *
>
> And in Republic Steel Corporation v. Maddox, 379 U. S. 650, 652, 85 S.Ct. 614, 616, 3 L.Ed.2d 580, 58 LRRM 2193, 2194 (1965), it was stated:
>
> > 'As a general rule in cases to which federal law applies, **federal labor policy requires that individual employes wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.'**
>
> * * * * *
>
> Moreover, we are of the opinion that **where a collective bargaining agreement is negotiated between equal parties and a grievance procedure is provided, that the meaning of 'may be submitted to arbitration' is correctly interpreted by the Eighth Circuit** in Bonnot v. Congress of Independent Unions, Local No. 14, 331 F.2d 355, 359, 56 LRRM 2114, 2117 (9 Cir., 1964), to mean:
>
> > **'The obvious purpose of the "may" language is to give an aggrieved party the choice between arbitration or the abandonment of its claim.'**
>
> * * * * *
>
> Therefore, finding as we do that the action must be dismissed for failure of the plaintiff to exhaust remedies available to him **under the contract** to which he is a beneficiary and that such failure precludes him from relief in this action, we do not reach the other issues in the case." (Emphasis ours.)

G. L. Naylor
R. E. Black
H. F. M. Braidwood
P. C. Carter
W. B. Jones

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