Award No. 18632

Docket No. CL-18839

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE 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-6785) that:

1) Carrier violated the Clerks' Rules Agreement at East Moline, Illinois when it abolished positions at that location under the emergency provisions of the Agreement, the work of which remained to be performed, and required or permitted persons or employes outside the scope and application of the Clerks' Agreement to perform the work of the abolished positions.

2) Carrier further violated the Clerks' Rules Agreement when it abolished Cashier Position No. 20860 without benefit of bulletin of abolishment.

3) Carrier shall compensate employes J. McCaw for eight (8) hours at the straight time rate of Cashier Position 20860; and employe A. R. DeKezel for eight (8) hours at the straight time rate of Car Clerk Position 20890 for each of the following dates:

April 22, 23, 24, 25, 28, 29, 30, May 1 and 2, 1969.

EMPLOYES' STATEMENT OF FACTS: Employe J. C. McCaw is the regularly assigned occupant of Cashier Position 20860 at East Moline, Illinois with assigned hours and days of 8 A. M. to 5 P. M., Monday through Friday, with Saturday and Sunday rest days.

The duties assigned to and regularly performed on Position No. 20860 are as follows:

Demurrage
Rating Bills
Billing outbound car loads
Separating bills

Position	Position No.	Location	Date of Abolishment	Abolishment Time of
Rate Clerk	20870	East Moline	4/21/69	3:00 P. M.
Car Clerk	20890	East Moline	4/21/69	12:00 Midnight
Car Clerk	20880	East Moline	4/21/69	3:00 P. M."

In other words, three of the four clerical positions at East Moline were abolished, leaving only Cashier Position 20860 in existence at that point.

On April 21, 1969 employe L. L. Thode, who regularly occupied Car Clerk Position 20880 and whose position was scheduled for abolishment on said date as indicated above (Carrier's Exhibit "A") exercised her seniority rights under the provisions of Rule 12(a) and displaced claimant J. C. McCaw, the regularly assigned occupant of Cashier Position 20860, the only remaining position at East Moline. Employe Thode began work on this position effective April 22, 1969 and worked said position on all of the dates listed in the claim, i.e., April 22, 23 24, 25, 28, 29, 30, May 1 and 2, 1969.

Claimant J. C. McCaw, whose position (Cashier Position 20860) was not among those scheduled for abolishment effective April 21, 1969 due to emergency flood conditions, was nevertheless displaced therefrom by senior employe L. L. Thode effective April 22, 1969 in accordance with the provisions of Rule 12(a) and, therefore, he himself had the opportunity to exercise his seniority within Seniority District No. 32 but elected not to do so, consequently of his own volition he performed no service on the dates of the instant claim.

Claimant A. R. DeKezel, who regularly occupied Car Clerk Position 20890 (3:00 P. M. to 12 Midnight) and whose position was scheduled for abolishment at the ending hour of her assignment on April 21, 1969, had the same rights under the provisions of Rule 12(a) as did employe L. L. Thode (who took advantage of such rights) and the same as did Claimant McCaw (who elected not to avail himself of such rights) did not exercise her seniority, consequently of her own volition she performed no service on any of the dates listed in the instant claim.

As a matter of record, there is no claim before your Board and/or progressed on this property in behalf of employe R. A. Casper who was regularly assigned to Rate Clerk Position 20870 and whose position was also abolished effective April 21, 1969 account emergency flood conditions.

Inasmuch as the Yardmaster on the DRI&NW Railroad at East Moline is involved in the instant dispute it is pointed out that his assigned hours are and/or were 7:30 A. M. to 4:30 P. M. Monday through Friday.

Attached hereto as Carrier's Exhibit "B" is copy of letter written by Mr. L. W. Harrington, Vice President—Labor Relations, to Mr. H. C. Hopper, General Chairman, under date of August 20, 1969. (Exhibits not reproduced.)

OPINION OF BOARD: On April 18, 1969, the Carrier's Superintendent issued Bulletin No. 16 abolishing a number of clerical positions in District No. 32 "Account emergency flood conditions," which included the following positions at East Moline:

Rate Clerk — Position 20870
Car Clerk — Position 20890
Car Clerk — Position 20880

The Petitioner contends that effective with the abolishment of the above positions, the occupant of Position 20880, E. L. Thode, exercised displacement to Cashier Position 20860, btu that Thode was not permitted to occupy Cashier Position 20860 during the period involved but was required to remain on and perform the work of her former position 20880, and that in effect, Cashier Position 10860 was abolishent without benefit of bulletin, and Position 20880 was bulletined as abolished but continued in effect. The Petitioner also contends that as industries at East Moline continued operations, it was necessary that the Carrier manitain operations which required that the work of Cashier Position 20860 and Car Clerk Position 20890 be performed, which work was performed by the Agent and DRI Yardmaster, employes outside the scope and application of the Clerks' Agreement. The Petitioner alleges that Rules 1(e) and 12(a) of the agreement were violated.

The Carrier denies that employe Thode was not permitted to occupy Cashier Position No. 20860 during the period involved and was required to remain on and perform the duties of her former position 20880, and contends that in the handling on the property no substantial evidence or proof was presented by the Petitioner in support of its contention in this respect. The Carrier also denies that work of the positions actually abolished was transferred to the Agent and Yardmaster or that the Agent and Yardmaster did anything other than their own work.

Based upon the entire record, the Board finds that emergency conditions did exist which permitted abolishment of the positions upon sixteen hours advance notice. There was, therefore, no violation of Rule 12(a).

As to the alleged transfer of work to employes outside the Agreement, the Agent and Yardmaster, the Petitioner has not produced substantial probative evidence to prove that work assigned exclusively to clerical positions was transferred to the Yardmaster and to the Agent. This was the burden of the Petitioner when the Carrier contended on the property that —

> "* * * any duties that were performed by the agent and/or DRI yardmaster on the dates of the instant claim were duties incidental to their positions and duties they have performed in the past.
>
> Station work, including any that may have been performed by the agent and/or DRI yardmaster on the dates of the instant claim, is not exclusively reserved to and/or performed by employes you represent at any station on this property, including East Moline, Illinois."

The statement submitted by the Petitioner as signed by five employes falls short of proving an exclusive past practice of assignment of the particular duties to clerks on Carrier's system.

It is well settled that unless the Organization proves a claim by probative evidence, the claim will be denied. See Award 17674 and others cited therein, 14751, 14944, 15920, 16550, among others. We find that the Organization did not meet the burden of proof required of it in the dispute herein and 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 parites 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: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1971.

LABOR MEMBER'S DISSENT TO AWARD 18632 (CL-18839)
(Referee Devine)

It is believed that dissents to Awards should but rarely be filed and, more importantly, should avoid vituperation even under the most provocative circumstances — even when severe censure is required. Award 18632 makes this belief suspect, as the Award is a manifest demonstration of the Refree's failure to remotely comprehend the application of a simple and precise rule to a clearly defined fact situation.

In an emergency, Carrier took advantage of the "sixteen (16) hour" force reduction exception in Rule 12. Under the "sixteen (16) hour" exception to the standard five (5) working days' notice of force reduction, it is clearly required that "* * * the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employes involved in the force reductions no longer exists or cannot be performed." Thus, when Carrier opts to use the "sixteen (16) hour" exception in the standard force reduction rule, it must do so under the agreed to special conditions which **are that the work of the abolished positions no longer exists or cannot be performed.**

The facts of Record clearly reveal that the work of the abolished positions **continued to exist** and was **in fact performed.** The work, however, was not performed by the employes involved in the force reduction. It was done by others. That fact illustrates that Carrier did not have license to the special sixteen (16) hour exception and, lacking such license, caused palpable violation of the agreement by abolishing positions the duties of which were then

performed by others. This should have ended the matter and the claim should have been sustained.

In his zeal to deny the claim, the Referee brought in several completely irrelevant and immaterial issues, absent which would have required a sustaining award. For instance, the Referee improperly placed a pseudo test on the Petitioner to "produce substantial probative evidence to prove that work assigned exclusively to clerical positions was transferred to the Yardmaster and to the Agent." This does not address itself to the special exception of the rule. The "sixteen (16) hour" notice provision contained in Rule 12 does not deal with such nonsense, i.e., that the work of the abolished position must be assigned exclusively to the abolished positions. The rule merely states that the work can **no longer exist** or **cannot be performed.** The only two tests of proper application of the rule are: Did the work exist? If so: Was the work performed? In this Record, we find sufficient evidence to answer both questions in the affirmative and, therefore, the rule was violated.

The Referee further scrambles the eggs in the final two paragraphs of his "Opinion" in dealing with "exclusive past practice" and probative evidence. The Petitioner submitted a statement signed by five individuals (not all clerks and one from a different carrier) proving that the work of the abolished positions **was performed.** In that it was **performed,** it existed. In the Record, Carrier disposed of this signed statement, not with a clear demonstration that the work which the Yardmaster and the Agent performed during the time of the emergency was not that of the abolished positions, but, rather, with complex rhetorical questions expressing difficulty on its part in determining how the five witnesses could observe what work was being done. As is typical in this Referee's Opinions, rhetorical questions posed by Carriers outweigh signed statements presented by Employes. THIS IS THE TEST OF PROBATIVE EVIDENCE? NONSENSE.

Award 18632 in no way whatever addressed itself to the real issue presented to the Board for adjudication. The Referee wandered far afield and committed serious error.

For these reasons, I dissent.

J. C. Fletcher,
Labor Member
August 12, 1971

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