



Award No. 18648
Docket No. TD-19131

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

INDIANA HARBOR BELT RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Indiana Harbor Belt Railroad Company (hereinafter the Carrier) violated the effective Agreement between the parties, Article 3(d) thereof in particular when on March 5, 1970, it abolished positions 956, 954, 955 and 959 and reestablished the same positions changing the rest days thereof.

(b) The Carrier shall now be required to restore the assigned rest days to the positions as they existed prior to the March 5, 1970 notice.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, copy of which is on file with this Board, and the same is incorporated into this Ex Parte Submission as though fully set out herein.

For the Board's ready reference Article 3 (d) of said Agreement is quoted in full.

"(d) Change In Rest Days.

Hereafter, when necessity arises to change the rest days of a position, reasonable notice shall be given to all concerned; relief schedule shall be set up in a manner that will avoid violation of the Hours of Service Law by the relief man, and the senior men on a trick will have choice of rest days assigned to their trick. No change in rest days will be considered, except when new positions are added to the dispatching force or when positions are abolished or combined, and it becomes necessary to assign a new relief schedule. Any objections of employes affected will be presented promptly, and every effort shall be made by the Superintendent and Office Chairman to reach an agreement on desired changes."

By letter dated November 19, 1970, Executive Secretary S. H. Schulty of the Third Division, National Railroad Adjustment Board, advised Carrier of petitioner's written notice of intention to file ex parte submission in dispute mentioned in Statement of Claim.

OPINION OF BOARD: The Organization bases this Claim on Article 3(d), and alleges this rule was violated when Carrier posted a notice in the train dispatcher's office abolishing four positions and advertising four new positions which differed only in a change of rest days. The Organization contends that Carrier, in purportedly abolishing the original positions, attempts to do indirectly what it cannot do directly in violation of Article 3(d). Carrier alleges that this Claim is not properly before this Board for the reason that this Claim was not presented in writing on the property to the Chief Train Dispatcher and was not appealed in writing to the Superintendent and Assistant General Manager-Labor Relations as required by Article 11 of the Agreement and Section 3 First (i) of the Railway Labor Act.

As to the procedural point, this Board finds that Award No. 13129 is controlling under the facts disclosed by the record. No objection was made by Carrier to the procedure while on the property. By taking part in conferences and by making a final denial of the claim on the property without objecting to failure of the Organization to process the claim properly, Carrier waived and is estopped to raise this procedural objection for the first time before this Board. Therefore, Carrier's procedural objection is overruled.

In panel discussion, Carrier representative raised question as to Exhibits TD-3, TD-4 and TD-5, attached to the Employees' Rebuttal statement, stating that they had never been discussed or handled on the property and should not be considered here. No consideration was given by the Board to these Exhibits.

As to the merits of the case, this Board finds that the purported abolishment of the positions in question is merely a subterfuge in an attempt to do indirectly what it could not contractually accomplish directly. This Board does not say that Carrier cannot abolish positions; however, in order to abolish positions, there must be a bona fide, good faith undertaking by Carrier. In this instance, no new positions were added; the four positions in question were not combined; no new duties were added; and no duties of the old position were taken away. The end result of the action taken by Carrier merely changed rest days for the involved positions. Re-arrangement of the same work performed by the same personnel does not constitute an abolishment. Therefore, and in accordance with Awards Nos. 3701, 3884, 13749, 14753, 18011, and First Division Award 21446, this claim will be sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July 1971.