NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20384
Docket Number CL-20317

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7332) that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rules 2-A-1, 3-C-1, 3-C-2, 4-E-1, 4-F-1, when position of Chief Clerk, Symbol F-166, Pier 1, Canton, Baltimore, Maryland, Chesapeake Division, Eastern Region, was abolished, effective February 18, 1970.

(b) L. W. Doyle, clerk, be allowed the difference between the rate of his position, $621.14, and $681.51, rate of position, Symbol F-166, beginning February 18, 1970, and continuing until the violation ceases.

(c) Any other employe who was affected as a result of this sharp practice be allowed monetary loss.

OPINION OF BOARD: Claimant, the senior qualified employee, claims the difference between the rate of his position, $621.14, and the rate of the Chief Clerk position, Symbol F-166, contending that the Carrier violated the Agreement in making a paper abolishment of the Chief Clerk position while in fact transferring work of this position to a junior employee whose position was then rerated, without the title but with the duties, prerogatives and rate of pay of the Chief Clerk.

The instant claim was progressed on the property to the Carrier's Director, Labor Relations, the chief operating officer of the Carrier designated to handle such disputes, on the following "Employes Statement of Facts":

"A. P. Santoro, Sr., was the incumbent of Clerical Position F-166, which position was fully covered by our Rules Agreement.

During the month of October 1969, Santoro was elected to a full time Union Job, as Vice General Chairman, but did not take over the job until January 1, 1970.

"From the period during October after Santoro was elected and January 1, 1970, when he left Position F-166, the Agent (P.H. Cruciano) was trying to establish a 'P' personal appointment to F-166, but the Union would not agree to this as the Agent wanted to give this appointment to one of the Junior Clerks (W.D. Stambaugh) and the Union wanted the Senior Qualified employe to have the appointment, thus, after all efforts were exhausted to come to an agreement, the Agent advised the union representative A. P. Santoro, Sr., then Division Chairman, that he (the agent) was going to give the job to Stambaugh his own way and abolish F-166. The agent kept his threat to the union, which resulted in this claim. The agent further stated that after he abolishes F-166, he will increase the rate of F-187 by re-study and get the same result without the union and without advertising any position.

The union representative Santoro, advised the Agent that in accordance with our Rules Agreement Position F-166 had to be advertised and awarded to the Senior Qualified Bidder and Agent (Cruciano) did not agree but instead, Clerical Position F-166 (Head Clerk) located at Canton Pier 1, Baltimore, Tour of duty 7:30 A.M. to 4:00 P.M., rest days Saturday and Sunday, was alledgedly abolished effective with close of business February 18, 1970.

On February 19, 1970, W. D. Stambaugh, incumbent of Position F-187 at the same location, and even prior to this, to be exact on January 1, 1970, was moved to Position F-166 as Head Clerk and performed the duties of F-166 (Copy of bulletin attached as Exhibit A.)

W. D. Stambaugh's Position F-187, effective January 1, 1970, was filled by an Extra Clerk, which continued until February 19, and beyond.

Position Symbol F-166 was eliminated on paper but not in fact. The salary of Position F-166, which was the highest rate in the office, was eliminated and the same position and or work was still in existence at a lower rate, now under the disguise of Symbol F-187, being worked by W. D. Stambaugh. Subsequent re-study was asked for by W. D. Stambaugh to make good Agent's plans. New rate was eventually produced which equaled that of F-166 which was allegedly abolished,..."

The Organization contends that the Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rules 2-A-1, 3-C-1, 3-C-2, 4-E-1, and 4-F-1. Rule 4-F-1 is of immediate interest, reading:

> "Established rates of pay, or positions, shall not be discontinued or abolished and new ones created covering relatively the same class of work, which will have the effect of reducing rates of pay or evading the application of these rules***."

The record before us discloses the fact that the Carrier maintained at Pier 1, Canton, a force of some forty employes to carry on its operations at this Marine Terminal, and that Carrier transferred to Clerk Stambaugh the following duties of the Chief Clerk's position:

> "Supervise clerks and chauffeurs at Canton and other stations under the Agent's jurisdiction;
>
> Handle extra clerks' list, assigning personnel to clerical and chauffeur vacancies;
>
> Check and approve contract labor bills;
>
> Compile contract budget volume figures and estimate same for future months for budget purposes;
>
> Check and prepare AD 9728 for all invoices presented for payment;
>
> Maintain record of extra clerks' assignments;
>
> Maintain vacation schedules."

The record also shows that with the Carrier's transfer of work from the Chief Clerk position F-166, three other clerks positions remained in addition to Stambaugh's to which F-166 duties were transferred, respectively: (1) "Arrange for the bulletining of vacancies; Prepare water bills for vessels taking on water; Type list of employees organization for all employees under the jurisdiction of the Agent; Check, order and receive postage stamps for all stations under Agent's jurisdiction; Prepare MM-3, MM-154, and MM-254 requisition orders." (2) "Prepare daily time sheets and maintain time cards for all employees under the following Responsibility Centers:***; Prepare CT 601 statistical figures on a daily basis." (3) "Handle all mis-routed cars."

The Carrier, nevertheless, denies any "sharp practice", stating:

"It is the Carrier's position that the position of Chief Clerk, Symbol F-166, at Pier 1, Canton, Baltimore, Maryland, was properly abolished, effective February 18, 1970, in strict accordance with the clear and unambiguous provisions of Rule 3-C-2 (a) (1) of the applicable Agreement, which reads as follows:

'Rule 3-C-2 -- Assignment of Work

(a) When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

(1) To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed.'"

The Agreement of the Parties expressly recognizes in Rule 3-C-2 the right of the Carrier to abolish positions and to assign the work previously assigned to such abolished positions in accordance with specified limitations. The Agreement also expressly commands that "established rates of pay, or positions, shall not be discontinued or abolished and new ones created covering relatively the same class of work, which will have the effect of...evading the application of these rules." (Rule 4-F-1). The Parties, accordingly, have agreed to the power of Management to abolish positions and reassign work of such positions, but they also have mutually agreed that such power shall not be exercised in a manner that "will have the effect of reducing rates of pay or evading the application of these rules". The problem before this Board, accordingly, is whether the statements of fact presented by the Organization on the property and before this Board establish "the effect of reducing rates of pay or evading the application of these rules."

On the basis of the facts of record, this Board is convinced that the Agent desired to make the F-166 Chief Clerk position a personal appointment position for the purpose of appointing the junior clerk with less seniority than Claimant, and that the Agent's design and actions in abolishing the F-166 position and reassigning the work of that position to the junior clerk, as indicated above, and having the junior clerk's position then re-rated equivalent to that of the Chief Clerk, F-166, and refusing to advertise the position which he abolished so that Claimant, the senior qualified clerk, would not be able to obtain such assignment, were all facts and circumstances which produced "the effect of reducing rates of pay or evading the application of these rules."

We have carefully considered and evaluated the Carrier's contention that it made a bonafide abolishment of the F-166 Chief Clerk position. We note, however, that the functional requirements for a chief clerk on a pier with a work force of about forty employees not only were unlikely to evaporate with the abolishment of the F-166 position, but that the major responsibilities of such supervisory position were in fact preserved and continued largely intact in the work transfer to the junior clerk. We cannot, in the context of the Agent's clearly stated design and behavior, come to any conclusion other than that the Agent's actions sought to achieve by indirection what he was unable to achieve through direct negotiations. His actions, in avoiding the advertising of the vacant position pursuant to Rule 2-A-1(a) so as to deny Claimant rights of seniority under the Agreement, had the effect of evading the application of the rules of the Agreement, thus violating Rule 4-F-1.

Paragraph (c) of claim is that "Any other employe who was affected as a result of this sharp practice be allowed monetary loss." In the absence of evidence of record in support of this claim, this paragraph (c) is denied.

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 has been violated.

A W A R D

Paragraph (a) of Claim sustained as per Opinion.

Paragraph (b) of Claim sustained.

Paragraph (c) of Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: C. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 6th day of September 1974.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20384 -
DOCKET NO. CL-20317 - REFEREE LAZAR

The Award in this case is in such serious error that it cannot stand uncontested. The majority have gone far beyond the plain terms of the applicabl rule of the Agreement in seeking to reach a sustaining Award. It is apparent th Award is based upon contentions, assertions and opinions of the employes, which were obviously considered from the standpoint of emotion and equity rather than from the provisions of the Agreement.

The Award recites the "Employes' Statement of Facts" as set forth in the Ex Parte Submission formulated by the Division Chairman of the Organization and the Superintendent-Labor Relations. The existence of one party's position and assertions in support thereof in an Ex Parte document under the caption "Employes' Statement of Facts" does not make those contentions facts. The only reason for an Ex Parte Statement of Facts is because the parties are in disagreement as to "Facts". In any event, the record is clear that these alleged "facts" were denied and refuted by the Carrier.

The pertinent facts with respect to the application of the applicable rule of the Agreement in the situation are clear and brief. There were five clerical positions in existence at the location in question prior to February 18, 1970. One position was abolished and then there were four -- not five. Work of the abolished position remained to be performed at the location and even the Award agrees that this work was assigned to the four remaining clerical jobs. This either conforms to the rule of the Agreement covering the assignment of work when positions are abolished, or it does not.

The primary and controlling rule in this dispute is Rule 3-C-2, which specifically covers the assignment of work when a position is abolished and work of the abolished position remains to be performed. Rule 3-C-2 provides as follow

"RULE 3-C-2 -- ASSIGNMENT OF WORK

"(a) When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

"(1) To another position or other positions covered by this Agreement when such other position or positions remain in existence, at the location where the work of the abolished position is to be performed."

Nowhere in the Award is there a showing that Rule 3-C-2 was violated. Rather, the Award points out that Rule 3-C-2 expressly recognizes the right of

the Carrier to abolish positions and assign the work previously assigned to such abolished positions "in accordance with specified limitations". Those "limitations" are not identified in the Award, but a look at the Rule will reveal the only stated limitation is that the work be assigned to another position or positions covered by the Agreement at the location where the work is to be performed. The facts, and neither the employes nor the Award deny it, show that this is exactly what occurred. The only proper conclusion in this case is that the Carrier did act strictly within the terms of Rule 3-C-2.

The majority, obviously unable to conclude that the terms of Rule 3-C-2 were violated, found it necessary to go elsewhere and beyond the controlling rule to reach a basis for a sustaining Award. It is indicated that the Carrier's real error was a violation of Rule 4-F-1 of the Agreement, apparently on the assumption that Carrier discontinued or abolished a position and then created a new position covering relatively the same class of work, thus having the effect of reducing rates of pay or evading the application of the rules of the Agreement. The error of the majority in this line of reasoning is that no new position was created. Moreover, Rule 3-C-2 permitted the Carrier to do exactly what was done in this case. The number of positions at the location was reduced from five to four.

Under an application of Rule 3-C-2, which is the controlling rule in this dispute, the Carrier cannot reduce rates of pay. As the Carrier pointed out in its Rebuttal Brief, Rule 3-C-2(c) recognizes that work of an abolished position may be assigned to a position the rate of which is less than the rate of the position that was abolished. Under such circumstances, provision is made for an adjustment in the rates in accordance with the established procedures. It is also a fact of record that one of the positions involved was re-evaluated and re-rated as prescribed in Rule 3-C-2. The Award says that the Agent had the job re-rated, but the fact is that this action was initiated by the employes. Obviously, Rule 3-C-2 takes precedence in a factual situation such as involved in this case, and Rule 4-F-1 has been erroneously relied upon to find in favor of the claimant.

Rule 4-F-1 applies when an established position is abolished and a new one created. No new position was created here as there was a reduction in the total number of positions at the location. Furthermore, rates of pay were not reduced, as the Carrier paid the same rate for the work in question; nor was the application of the rule evaded.

The Carrier is at liberty to rearrange its forces in any manner it sees fit so long as the Agreement is complied with. It cannot be, and has not been, shown that Carrier did not comply with the terms of the applicable rule of the Agreement in this case. Therefore, all of the assertions and opinions of the employes as to intent, sharp practice or otherwise are not controlling factors and do not make the actual abolishment in this case any less bona fide. The Board in this case had only to decide whether there was a violation of the Rules of the Agreement, not whether the Carrier engaged in "sharp practice" in exercising its rights under the Agreement.

The application of Rule 3-C-2 on this property has been well settl[illegible] as the result of numerous cases decided by this Board. If any weight were to

be given to the instant Award, the situation concerning the application of Rule 3-C-2 would certainly be confused. In the instant matter, the Carrier literally and fully complied with every requirement of the rule incident to the abolishment of a position, and with regard to the distribution to other clerks of the work of the abolished position that remained to be performed. Despite the clear provision of Rule 3-C-2 covering the assignment of work of an abolished position to a lower-rated clerical position, the majority has now said that this constitutes a violation of Rule 4-F-1.

At the very least, this Award is palpably erroneous. It borders on the writing of a new rule and going beyond the jurisdiction of the Board. For these and the reasons mentioned above, we dissent. No precedential value whatsoever can be attached to the Award.

H F M Braidwood
H. F. M. Braidwood

P C Carter
P. C. Carter

W. B. Jones
W. B. Jones

G L Naylor
G. L. Naylor

G M Youhn
G. M. Youhn