NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20622
THIRD DIVISION Docket Number CL-20672

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7511) that:

1. Carrier violated the Clerks' Agreement, Rules 3 and 9 and related rules, when it required Mr. Claude Thorne, Jr. to leave his regular assigned position as Telegrapher-Clerk, Union-Nebraska City, Nebraska, and work position of Telegrapher-Clerk at Omaha, Nebraska, May 16, 17, 18 and 19, 1973 (Carrier's File 380-3098).

2. Carrier shall now be required to compensate Claimant Thorne eight hours' pay, for each of the aforementioned dates on which he was withheld from his regularly assigned position, in addition to the amount he was actually paid for working at Omaha, Nebraska.

OPINION OF BOARD: Claimant was regularly assigned as a Telegrapher-Clerk at Union-Nebraska City, Nebraska. On May 16, 17, 18 and 19, 1973, he was instructed to protect a shift at Omaha.

Claimant asserts a violation of Rule 9 which specifies the basic rules and regulations concerning filling of positions or vacancies of less than thirty calendar days' duration. Claimant did not request a rearrangement, in writing, as required by Rule 9(b).

Carrier defends its action on the assertion that an "emergency" situation prompted its action, and that Rule 28 permits this type of utilization:

> "An employe holding a regular position when required to perform emergency or relief service away from home station will receive the higher rate, but not less than $5.0330 (effective April 1, 1973) for each hour so paid."

The Ex Parte Submissions and Rebuttal Briefs filed with this Board (by both of the parties) contain extensive arguments based, to a great extent, upon testimonial assertions contained in those documents. The parties present varying views as to the factual circumstances surrounding the dispute and the basis and intention of the parties when

the current Rule 9 was negotiated. Unfortunately, the parties did not develop these matters while the dispute was under consideration on the property. Had they done so, we would be in a position to issue an Award based upon all of the contentions advanced. However, it has long been held that under the procedures of this Board, we may only consider the issues as framed on the property, and may not consider factual allegations advanced, for the first time, to this Board. Accordingly, we are precluded, by the parties, from a full exploration of all of the contentions advanced; but rather, we are confined to a determination of the dispute as it was considered and handled on the property.

We feel that Claimant submitted sufficient factual information (on the property) to show a prima facie case of a violation. Rule 9 does not refer to "emergency" situations, and thus it is clear that when Carrier raised that affirmative defense it assumed the burden of proving same.

In its June 19, 1973 denial of the initial claim, Carrier stated that Claimant was used in an emergency due to a lack of qualified personnel at Omaha. That assertion was repeated on July 24, 1973. On July 31, 1973, the Organization stated: "We disagree with the ....position that an emergency existed...." While that assertion is general in nature, on November 5, 1973 the Organization notified Carrier that there were three named employees who were available and who could have filled the position on the claim dates. Carrier did not respond to that assertion on the property. While Carrier did offer testimonial rebuttal in the documents submitted here, for the reasons stated above, that information should have been submitted previously.

The Board is compelled to hold that Carrier has not established its affirmative defense and therefore we must sustain Claim 1. We emphasize that our determination in this regard is limited solely to this record as developed on the property, and the burden of proof concerning said record. Obviously, we may not, under the status of the record, consider the broader issues suggested by the parties.

Similar considerations control our disposition of Claim No. 2. Claimant seeks eight hours' pay, for each claim date, in addition to the amount he was actually paid.

In Award 19899, we considered the question of damages, at length. But, in that case (which dealt with loss of work opportunities) we noted that we would not entertain speculative claims, but rather, we would require that the claim be presented and advanced on the property.

Under this record, we find no such circumstance. Carrier consistently stated that it could find no basis for a claim for an additional day's pay per claim date. Nonetheless, Claimant failed to advance or urge a basis for the monetary claim. We do not suggest that it would be inappropriate, under a different record, to award monetary damages if the status of that record warranted same. However, for the reasons stated above, under this record, we must dismiss Claim 2.

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 violated.

A W A R D

1. Claim 1 sustained.

2. Claim 2 is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secreeary

Dated at Chicago, Illinois, this 21st day of February 1975.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO AWARD 20622 (Docket CL-20672)

Award 20622 has correctly found that an Agreement violation occurred when Claimant was required to abandon his assignment at Union-Nebraska City to work a vacancy at Omaha.

The Board's failure, however, to allow Claimant eight hours' pay for each of the four days on which his services were improperly utilized at Omaha is basically wrong for two reasons. First, the issue of not allowing a penalty for violation of the Agreement does not appear in the Record as having been raised during handling by the parties on the property. It long has been held in Awards of this Board that issues not raised during handling on the property and subsequently raised for the first time before the Board are inadmissible and will not be considered. See Awards 20163, 20166 and 20288, in which this same Referee participated. In this instance, the issue raised by the Carrier for the first time before the Board was improperly considered.

The second error made in this Award is the failure to allow the penalty requested in Part 2 of the Statement of Claim. As the Board has reaffirmed in a long line of Awards, when a breach of an Agreement is found to exist, a penalty must be imposed to uphold the integrity of the Agreement. Failure to require reparations ignores the Carrier's responsibility as a party to the Agreement. See Awards 11701 (Engelstein), 17973 (Kabaker) and 19814 (Roadley). In Award 20311, Referee Lieberman correctly stated:

> "Carrier contends that Claimant sustained no monetary loss as a result of the dispute, Carrier concludes, therefore that the Board has no jurisdiction to assess a monetary penalty in this case. Petitioner argues that the monetary claim is not for a penalty as such, but rather for damages. There have been many awards dealing with this issue, upholding sharply conflicting points of view. It is our conclusion that no useful purpose is served by the Board finding that the Agreement has been violated and offering no remedy except reprimand to Carrier; such action might well serve to encourage repeated violations of the Agreement and appears to constitute condonation. We believe that the Devaney Emergency Board established in 1937 was correct when it stated: '...experience has shown that if rules are to be effective there must be adequate penalties for violation.' We shall affirm the line of Awards that hold that violation of the Agreement requires compensation as reparation for such breach (Award 17973)."

In light of the above, concurrence and dissent are registered.

J. C. FLETCHER
Labor Member

March 5, 1975