

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20717
Docket Number CL-20474

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees
((Formerly Transportation-Communication Division, BRAC)
PARTIES TO DISPUTE: ((Norfolk and Western Railway Company
((Involving employees on lines formerly operated
(by the Wabash Railroad Company)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation Division, BRAC, on the Norfolk & Western Railroad Company, (GL-7459), that:

- 1) Carrier is in violation of the Agreement, Rules 7 and 16 and related rules, when it changed the Headquarters Point of Relief Position occupied by H. E. Cooper, from Hannibal, Missouri, to Jacksonville, Illinois, and refused to allow claimant to displace a junior employee at Hannibal; and
- 2) Carrier shall be required to compensate H. E. Cooper for eight hours pay for each day he is not permitted to work at Hannibal Bridge, Hannibal, Missouri, in addition to any daily compensation received, plus all dead-head time and daily expenses for auto mileage, lodging and meals, beginning August 7, 1972; and
- 3) Carrier shall pay interest at the statutory rate for the state of Illinois, on all sums included in the above paragraph and payable as a result of the violation.

OPINION OF BOARD: This claim will be dismissed because the basis of the claim, as now presented to the Board, was not handled on the property.

On August 7, 1972, the Carrier bulletined several changes in the Agent-Telegrapher Relief Position occupied by the Claimant, including a change in the headquarters of the position from Hannibal Bridge, Missouri, to Jacksonville Freight House, Jacksonville, Illinois. Because of the headquarters change, the Claimant attempted to displace to position No. 3, Hannibal Bridge, (the point where his headquarters was previously established) but was told by Carrier that such was not permissible under the agreement and that he could only displace one of the 3 youngest regularly assigned employees on the seniority district as provided by Rule 16, paragraph E of the Telegrapher's agreement. The Employees filed claim in an August 14, 1972 letter of the Assistant to the General Chairman which stated

that the Carrier had violated Rules 7 and 16, and that the situation fell under the "office seniority" provisions of Rule 16(e) which apply when "a trick in any office is abolished." The claim letter also relied upon note 3 to Rule 16(e) which provides that incumbents of relief positions shall hold seniority in the office designated as the headquarters of the incumbent of the relief position. In a September 19, 1972 letter the Carrier reaffirmed its initial position and disputed the contentions about office seniority as well, stating that no trick had been abolished.

The positions which the Employees and the Carrier took in progressing the claim on the property are again reflected in their Submissions to the Board. However, the Employees' rebuttal brief repudiates the Employees' initial reliance on Rule 16(e). This brief states that neither of the prerequisites of Rule 16(e), abolishment of a position or displacement of an employee, are present here and therefore "Rule 16(e) cannot be applied nor can it be forced onto an employee." The brief then goes on to say that Rule 7(e) paragraph 7, is a wide open, non-restrictive rule which gave the Claimant a full displacement right without regard to the Rule 16(e) limitation to one of the three youngest regularly assigned employees on the seniority district. Rule 7(e), sub-paragraph 7, with the Employees' underlining, reads as follows:

"Changes in the assignment of regular relief assignments from those advertised will constitute a new position, as referred to in Rule 16, but the employee holding the regular relief assignment at time of change will have the option of retaining it or exercising displacement privileges."

In the oral presentations of the case, the Carrier representative objected to Board consideration of the Employees' Rebuttal Brief contention concerning Rule 7(e), subparagraph 7, on the ground that such contention was not made during handling on the property. The record makes it clear that the Employees' based their case on Rule 16(e), and the "office seniority" provisions therein, in the initial filing of the claim and throughout the handling on the property. This position has now been abandoned and repudiated in favor of a contention concerning Rule 7(e), paragraph 7, which was not advanced on the property. In such circumstances, the Carrier's objection is sound and the claim must therefore be dismissed. Award Nos. 5469, 19101, 19861, and 20166.

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 Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The claim is dismissed because of being based on contentions not handled on the property.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1975.

LABOR MEMBER'S DISSENT TO AWARD 20717 (DOCKET CL-20474)
(Referee Blackwell)

The Referee and the Carrier Members attempt to show that the Organization switched from reliance on Rule 16 to reliance on Rule 7 after the instant claim came before this Board. The final paragraph of the Opinion of Board begins with the sentence:

"In the oral presentations of the case, the Carrier representative objected to Board consideration of the Employees' Rebuttal Brief contention concerning Rule 7(e), subparagraph 7, on the ground that such contention was not made during handling on the property."

That assertion advanced by the Carrier Member is directly contrary to the facts of Record in this dispute. For one example, the original claim letter dated August 14, 1972, contained the sentence: "We maintain that Rule 7 (e) last paragraph gave claimant this right." For a second example, at page 2 of the Employees' Ex Parte Submission, under the Employees' Statement of Facts, it is stated: "The transaction that gave rise to this claim was the establishment of a new relief position pursuant to Rule 7(e) paragraph 7, which reads as follows:" after which the rule is quoted in full.

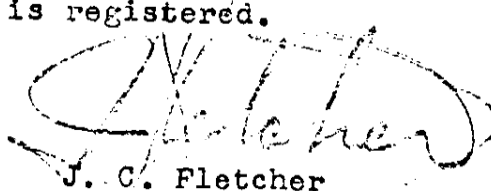
Additionally, the Carrier's Rebuttal Brief contains no objections similar to those advanced by the Carrier Member in oral argument and, thus, it is new argument - however erroneous - that the Referee accepted as a basis for his dismissal of this claim.

The Record clearly establishes that the claim remained unchanged and the rule reliance remained unchanged during handling of the claim on the property. It is palpably erroneous and, to say the least, outrageous that this Referee held:

"This position has now been abandoned and repudiated in favor of a contention concerning Rule 7(e), paragraph 7, which was not advanced on the property."

Vigorous dissent is registered.

May 30, 1975


J. C. Fletcher
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 20717

(Docket CL-20474, Referee Slackwell)

Fortunately for the Carrier Members, the statement made on behalf of Carrier at the "oral presentation" is a matter of record; and to expose the sheer nonsense in the Labor Member's Dissent we are reproducing that statement here.

I

IN THEIR REBUTTAL THE EMPLOYEES HAVE CATEGORICALLY REPUDIATED THE POSITION THEY TOOK IN POSITION OF EMPLOYEES AND HAVE EXPOUNDED AN ENTIRELY NEW THEORY THAT IS BOTH INADMISSIBLE AND UNTENABLE; PARTS (1) AND (2) OF THE CLAIM SHOULD THEREFORE BE DENIED, AND PART (3) OF THE CLAIM SHOULD BE DISMISSED.

The Statement of Claim in this case charges Carrier with violating "Rules 7 and 16" and in Position of Employees, where the Employees are required to state every argumentative fact that is relevant to their case, they give us the following perfectly clear statement of their position as to exactly how Carrier violated Rules 7 and 16 (P. 7):

"How the Carrier can say that the displacement made by the claimant is not permissible under the Schedule Agreement is beyond our comprehension, as the very Rule that they cite, Rule 16 (e), Paragraph 1, and the third note on page 17 of said Agreement, which we have quoted above, give the claimant the right he has exercised.

"Carrier refuses to consider the original Relief Position abolished, but by changes made it can be nothing other than an abolishment as the last paragraph in Rule 7(e) states, that, changes in the assignment of regular relief assignments from those advertised will constitute a new position. If displacement rights were to be restricted in cases such as this, to the three (3) youngest regularly assigned employees on the seniority district, Rule 7(e) would most certainly have said so, but it did not; it gave full displacement privileges, as provided in the Agreement and one (1) of these privileges was to displace the junior employee in point of seniority in the office in event a trick in the office was abolished.

"Note three (e) in Rule 16(e), which gives relief employees office seniority in the office designated as their headquarters can be for no reason other than displacement rights in that office."

From the foregoing it is crystal clear that the Employees' theory in presenting the case to the Board was predicated on two assumptions, the first being that the changes in Claimant's old relief assignment amounted to an "abolishment" within the purview of Rule 16 and that in turn resulted in giving the Claimant the benefit of the provision in Rule 16 providing for the displacement of the junior employee in point of seniority at the office when a trick in the office was abolished. That is the precise language cited, and Rule 7 was cited only for the purpose of bringing the Claimant into Rule 16.

Both of these basic assumptions upon which Petitioner based its entire case in Position of Employees are categorically repudiated in Petitioner's rebuttal statement (Pp. 46 and 47) where we find:

"The Organization takes the position that Rule 16 (e) is a restrictive rule with absolute factors being required to be present before it can be applied. Those factors being:

(1) Abolishment of a position.

(2) Displacement of an employee.

"In the instant claim neither factor is existent, therefore, Rule 16 (e) cannot be applied nor can it be forced onto an employee.

"* * *

"The Organization takes the position that Rule 7 (e), sub-paragraph (7), which reads in part:

'Changes in the assignment of regular relief assignments from those advertised will constitute a new position, as referred to in Rule 16, but the employee holding the regular relief assignment at time of change will have the option of retaining it or exercising displacement privileges.' (Emphasis by Petitioner)

"is a wide open rule with no restrictions on the employees right to exercise his seniority when the Carrier makes changes in the regular relief assignments."

Thus, in their initial submission the Employees rely on Rule 7 (e) only as a means of getting into Rule 16, and they rely on the alleged existence of an abolishment to get an alleged displacement right under Rule 16; whereas, in their rebuttal they deny that Rule 16 was involved and set up for the first time a new proposition that the seventh paragraph of Rule 7 (e) in and of itself creates an "open" and "unrestricted" dis-

placement right that is far greater than the right allowed under the parties' agreement to employees who are displaced or whose positions are abolished.

In the first place, the Employees are precluded from thus changing their theory at the rebuttal stage. No issue can be raised and presented to the Board unless it has been handled on the property in the usual manner and presented in an initial submission, as prescribed by the rules of the Railway Labor Act and this Board. See authorities cited in Subdivision II, below. [Authorities not reproduced here.]

Furthermore, if the matter were properly before us, there would be no rhyme or reason for creating such a displacement right in employees whose positions have been changed when similar rights are expressly denied to employees whose positions are abolished; and the history of Rule 7 (e) establishes that it was not designed to create new seniority or displacement rights at all; rather, it was designed only to refer to rights that otherwise existed under the agreement. As Carrier notes at page 51:

"Rule 7, 'WORK WEEK,' SECTION 1, ESTABLISHMENT OF SHORTER WORK WEEK,' Paragraph (e), 'REGULAR RELIEF ASSIGNMENTS -' is not intended to provide privileges or restrictions on the actual exercise of seniority, said rule has for its purpose, the establishment of the forty (40) hour work week. The exercise of seniority is governed by Rule 16, 'PROMOTION AND RIGHTS.'"

Clearly, the Petitioner has failed to prove the claim that is stated in the Statement of Claim. To the contrary, Petitioner has repudiated

the portion of the claim alleging that Rule 16 was violated, and has delayed until its rebuttal coming forward with any theory that Rule 7 was in and of itself violated; furthermore, that tardily presented theory is completely untenable. Parts (1) and (2) of the claim should be denied.

Part (3) of the claim should be dismissed because the controlling agreement has no provision for the payment of interest on an unliquidated claim. See authorities on this point cited in Subdivision III, below.
[Authorities not reproduced here.]

M. E. Naylor
H. J. B. B.
P. C. Carter
H. F. B.
G. M. Goulin