

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21274
Docket Number CL-21129

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(The Detroit and Toledo Shore Line Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7888, that:

1. That the Carrier violated the effective Clerks' Agreement when it arbitrarily and improperly established a rate of pay for the new position of Rate and Bill Clerk No. 2 without prior negotiation between the parties;
2. That the Carrier shall now be required to establish through negotiations, a proper rate of pay for the position of Rate and Bill Clerk No. 2;
3. The Carrier shall now be required to compensate Clerk Mary C. Del Brocco, and/or her successor or successors in interest, namely, any other employee who may have stood in the same status as claimant, and who was adversely affected, the difference between the rate of pay of Rate and Bill Clerk Position No. 2, established through negotiations; and the rate of pay arbitrarily established by the Carrier (\$43.4944 per day) commencing on May 7, 1974 and for each and every day thereafter, five days per week Monday through Friday, that a like violation exists;
4. The Carrier shall now be required to compensate all other employees who were adversely affected, for the difference between the rates of pay they received, and that which they would have received had the Carrier properly established a rate of pay by negotiation for the position of Rate and Bill Clerk No. 2 and bulletined said position in accordance with Rules 9 and 10 of the applicable Agreement, to be determined by a joint check of the Carrier's records, commencing May 7, 1974 and for each and every day thereafter that a like violation occurs.

OPINION OF BOARD: As a result of certain asserted technological changes, Carrier made alterations in its clerical forces; abolishing and establishing certain positions.

On May 1, 1974, Carrier bulletined a position in the "Car Control Center", entitled "Rate and Bill Clerk No. 2."

The position was awarded on May 7, 1974, and thereafter, this claim was submitted.

The employees assert that the duties of the new position are so diverse from prior positions that Rule 41 was violated by Carrier's pay rate for the position:

"(a) Rates of pay for new positions shall be in conformity with rates of pay for positions of similar kind or class in the seniority district where created."

Although the Organization does not request this Board to establish a rate of pay for the position of "Rate and Bill Clerk No. 2", it urges us to direct Carrier to enter into negotiations to establish an appropriate rate of pay; and cites authority concerning our jurisdiction in that regard.

Carrier denies that it has violated the Agreement or that its rate of pay for the position is, in any manner, improper. Moreover, Carrier cites authority to support its contention that this Board lacks authority, under the Rules Agreement, to compel negotiations. It notes, in passing, that the Organization has not availed itself of the provisions of Section 6 of the Railway Labor Act, as amended.

Among its numerous defenses, Carrier has argued that Claimants have not satisfied the burden of proof, and notes that a number of factual assertions to this Board were not considered during the handling on the property.

In order for this Board to face the question of an appropriate remedy, it is, of course, necessary to find a factual showing - on the property - to warrant a finding of a rules violation. In this regard, we have thoroughly examined the handling on the property.

In the initial claim letter, it is asserted that Carrier established a new position, and that no similar kind or class existed in the seniority district. The denial letter stated that the Organization had failed to carry the burden of proof to show a violation. In its appeal, the Organization repeated its conclusionary assertions. In its reply, Carrier spelled out, at length, that the position rate was established in accordance with Rule 41, and cited factual bases. The record fails to show any response by the employees or additional assertions at the final conference.

To be sure, the employees made factual assertions to this Board, but that does not substitute for the requirements of handling on the property. In short, the record fails to show that a factual presentation was made on the property sufficient to demonstrate, factually, a violation.

We would be remiss if we did not comment upon a procedural deficiency cited by the employees.

In its submission, the employees present certain correspondence

which purports to show that the Carrier Official who received the initial claim sought (and received) aid and assistance from an official who participated in the appeals procedure - and that said official was aware that his assistance was improper. This activity, it is asserted, violated Rule 25.

We have searched the record, in vain, in an effort to find any direct evidence that the asserted improper intervention was raised on the property.

We do note, however, in Carrier's reply to the Ex Parte Submission, a reference to the fact that the Organization had a copy of the "damaging correspondence" during the November 7, 1974 conference. If that were the case, it would appear to us that the employees had ample opportunity (almost 5 months prior to service of intention to file an ex parte submission with this Board) to assert a violation of Rule 25 on the property. This, they failed to do.

Based upon a long series of well-reasoned Awards, which have fully contemplated the requirements of the Railway Labor Act, we are required to note the failure to present a sufficient basis to support a finding of a violation while the dispute was under consideration on the property, and we will dismiss for failure of proof.

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;

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

That the claim be dismissed for failure of proof.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of October 1976.