

C E H

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22388

Docket Number CL-21883

Dana E. Eischen, Referee

PARTIES TO DISPUTE:

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8248) that:

1. Carrier violated and continues to violate the Agreement when, without proper notice as required under Article VIII, Section 3 of the February 25, 1971 Mediation Agreement, it abolished the second shift Operator position at Bison "F" Office and combined the work and/or functions with that of clerical positions and non-contract clerical positions and refused to allow affected employee C. Nestor who lost her position as a result, the benefits provided for in Section 6 of Article VIII.

2. Claimant C. Nestor, shall be allowed the protection provided in Section 6, Article VIII, from the date affected as a result of the abolishment.

CARRIER DOCKET: CLK-BUF-75-166

OPINION OF BOARD: In this case, Claimant seeks a displacement allowance under Article VIII, Section 6 of the February 25, 1971 Mediation Agreement, alleging that she was directly or indirectly adversely affected by the application of Section 3 of that Article. The cited contract provisions read as follows:

"Section 3.

(a) On and after the dates seniority rosters are combined in accordance with the provisions of this Article, the Carrier may combine work and/or functions performed by clerks and telegraphers. When new positions are created and/or when positions are abolished as a result of the combining of such work and/or functions the carrier shall give at least 30 days written notice to the General Chairmen involved. Such new positions shall be assigned on the

"basis of seniority, fitness and ability (fitness and ability being sufficient, seniority shall prevail) to the employees affected by the combining of said work and/or functions and on the basis of their combined roster seniority. If the affected employees do not desire assignment to such new positions, the new positions will be bulletined to employees on the combined seniority roster. If rosters have been combined under Section 1(a) or (b) of this Article, the new positions will be designated "C" or "T" in accordance with the designation of the initial employees assigned to such positions. In the event an employee has no such designation, the designation will be determined by the Organization without liability to the Carrier."

* * * *

"Section 6. On and after the date rosters are combined under Section 1 of this Article employees on such rosters adversely affected either directly or indirectly, as a result of job abolishments resulting from the application of Section 3 of this Article, shall receive the protection afforded by Sections 6, 7, 8 and 9 of the Washington Job Protection Agreement of May 1936, except that for the purposes of this Agreement, Section 7 is amended to read 100% (less earnings in outside employment) instead of 60% and extended to provide period of payment equivalent to length of service not to exceed 5 years, and to provide further that allowances in Sections 6 and 7 be increased by subsequent general wage increases."

The gravamen of the claim on the property was that Carrier combined the work and/or functions of the former second shift operator position at Bison "F" tower with a non-contract position of Assistant Chief Clerk, after abolishing the Operator's position on June 6, 1975. The claim was filed on June 21, 1975 in favor of Ms. Nestor and asserted adverse affects upon her through the following chains of displacement: 1) Second-shift Operator position occupied by H. Figura abolished effective June 6, 1975; 2) Operator H. Figura exercised seniority and displaced T. Lynch from position of Second-shift Assistant Chief Clerk, effective June 7, 1975; 3) Clerk T. Lynch exercised seniority and displaced Claimant C. Nestor from

a position on the clerks' guaranteed Extra Board No. 1 effective June 7, 1975; 4) Claimant had insufficient seniority to hold a regular position on Buffalo Terminal, Seniority District No. 51 and was placed on furloughed status effective June 7, 1975. Thereafter, the instant claim was filed for Ms. Nestor by the Local Chairman on June 21, 1975.

Claimant remained on furlough until by letter of February 17, 1976 she was recalled to service to a position of NoBill Clerk. Claimant orally notified Carrier of her intention to protect the NoBill Clerk position effective March 1, 1976. But before she could commence work she was displaced from that position by a senior Clerk, W. Decker. Accordingly, Claimant again was placed (remained) in furlough status. Thereafter, she was recalled to service effective May 14, 1976. She declined the recall and instead requested a personal leave of absence which Carrier denied, but later granted upon appeal by the Local Chairman.

On August 3, 1976 Claimant was advised as follows:

"We have learned that you worked for Sisters' Hospital of Buffalo, New York as an EKG Technician on June 22, 23, 24, 25, 28, 29, 30, July 1, 3, 5, 6, 7 and 8, 1976 while you were absent from work on leave.

Rule 17-G of the Master Agreement provides: 'An employee absent on leave, or absent account of personal sickness or disability, who engages in outside employment without written agreement between Management and the General Chairman will be considered out of the service and automatically forfeits all seniority.'

As there was no written agreement made between the Management and the General Chairman to permit you to engage in outside employment during the period of time you were on leave of absence, you have forfeited all seniority and your record with this Carrier is closed."

No exception was taken to Claimant's termination but the claim filed on her behalf in June 1975 was still pending and was not resolved on the property. Following final denial on October 20, 1975 proceedings were instituted before this Board on July 8, 1976.

At the outset, Carrier raised several procedural/jurisdictional arguments which must be addressed. We find no violation of the Time Limit on Claims Rule since the claim was brought to us "within 9 months" of the top level denial on the property. Nor do we find that this claim is dismissible under the principle that substantial variation in the claim will not be permitted upon appeal. We do not reject the time honored view that substantial alteration or amendment of the claim is not permissible and constitutes a fatal procedural/jurisdictional defect under Section 3, First (i) of the Act. See Awards 20279, 20147, 20008, 19564 and 18322, et al. But, however, we continue to apply that principle within bounds of reason, recognizing that the Act does not elevate form over substance or technicalities over reality. Our Award 19573, quoting from 13229, made that point persuasively as follows:

" . . . Though the first paragraph of the Statement of Claim presented to this Board is not couched in the identical language used in the claim originally presented to the Carrier on the property it raises substantially the same issue as originally raised. It cannot, therefore, be seriously urged that the Carrier has been misled as to the issue or claim confronting it. Unless there is a real and substantial variance between the claim presented to this Board and the one presented to the Carrier on the property, this Board would not be justified in dismissing this claim; therefore, the request for a dismissal of this claim is denied. See Award 3256--Carter; Award 6656 --Wyckoff."

We think that the foregoing reasoning applies equally to the instant claim and we will not dismiss it out of hand. Finally, we do not agree with Carrier's assertion that the entire claim is rendered moot by Claimant's subsequent declination of work and her ultimate constructive quit. While these events and actions are relevant to the question of possible liability and computation of damages, if any, they do not render the underlying substantive claim entirely moot.

Turning to the merits, it is evident that to prevail on behalf of Claimant Nestor who was derivatively affected by the abolishment, the Organization must address persuasive evidence

that Figura's position was abolished "as a result of the combining of (his) work and/or functions" with those of the Assistant Chief Clerk. The Organization presented substantial eye witness evidence to that end which has been met only by bare denials from Carrier. Admittedly the evidence is circumstantial since it goes to work performed by the Assistant Chief Clerk before and after the abolishment but it nonetheless is substantial and persuasive, especially since Carrier has not effectively refuted it on the property. In lieu of rebutting the Organization's evidence, Carrier relies upon the theory of "exclusivity" to defend against the claim. The exclusivity concept is an interpretive tool for construing and applying ambiguous or general Scope Rules but in our judgment it has no place in the application of Article VIII, Section 3 of the February 25, 1971 National Agreement. Nor are we persuaded by Carrier assertions that so-called "Special Agreements" of October 26, 1965 and April 7, 1971 supersede the requirements of the February 25, 1971 Agreement in this case. So far as we can tell the so-called Telex Agreement of April 7, 1971 has no application whatever in the facts of the present case. As for the October 26, 1965 Implementing Agreement in ICC Docket 21820 it does not serve to immunize Carrier from liability for violating the February 25, 1971 Agreement.

Based upon all of the foregoing we shall sustain Part 1 of the claim. As for damages claimed in Part 2, on this record Claimant is entitled to Section 6 protection only between the dates of June 7, 1975 and May 14, 1976.

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.

A W A R D

Part 1 of the Claim is sustained.

Part 2 of the Claim is sustained only to the extent
indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A.W. Paulos*
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1979.

