Award No. 4660

Docket No. CL-4663

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John M. Carmody, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier did not properly apply provisions of Agreement dated Chicago, April 4, 1946, between the participating carriers, one of which was the Kansas City Southern Railway Company, represented by the Carriers' Conference Committees and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

1. When it failed and refused to apply and/or allow the wage increase therein provided to Walter Gray, File Clerk in Office of Vice President, Traffic Department, Kansas City, Missouri, for services performed February 23, 1946 to April 26, 1946, inclusive.

2. That the Carrier now be required to properly apply certain provisions of the aforesaid Agreement, namely, Section 1 and applicable subparagraphs thereof, namely, (d), (i) and (j) by compensating Mr. Gray for services performed, namely:

6 days during month of February, 1946
31 days during month of March, 1946
14 days during month of April, 1946

upon the basis of the difference between what he was paid at rate of $113.25 per month and at rate of $150.97 per month, said difference representing the amount of the increase, viz., $37.72 per month, to which claimant is entitled under the April 4, 1946 Agreement.

EMPLOYES' STATEMENT OF FACTS: A. There exists an Agreement between the Carrier and its Employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, dated April 1, 1943, the Scope Rule of which reads:

"SCOPE—EMPLOYES AFFECTED

Rule 1. These rules shall govern the hours of service and working conditions of all that class of clerical, office, station and storehouse employes of The Kansas City Southern Railway Company of which the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes is the duly authorized representative, grouped as follows:

If the sense of the argument of the Organization in this matter should be sustained and effectuated, its next contention would, no doubt, be that it has the authority to negotiate wage matters for all 2 (a) positions. Under such line of reasoning there would be no difference between a National wage adjustment and a wage adjustment affecting but one position. The provisions of the schedule dealing with matters of pay are contained within the various Rules 3 to 62, inclusive, of the schedule. If we had (and we have in many past instances), or should desire to make adjustment in the rate of pay of one, or more, 2(a) positions, we have not been (and would not be) required to consult with, or even advise the representatives of the organization. This they have understood in the past and, we believe, understand now, as no protest has ever been made against such adjustments.

If the pay provisions were extended to 2(a) positions—such as it now contends—the organization would, without doubt, also contend that the other provisions, Rules 3 to 62, inclusive, likewise would govern these 2(a) positions. This claim is made, therefore, for the purpose of rewriting a rule and regaining jurisdiction over positions which were voluntarily (by agreement) relinquished when the schedule was made, and is therefore, in effect, request for the Board to write a new rule, annulling the first paragraph of Rule 2.

Now, as to Mr. Gray, the length of his service, the hours of his monthly assignment and the rate of pay of the position of Messenger boy.

(1) Mr. Gray was employed February 23, 1946, and the last date he performed service was April 14, 1946—not April 26, 1946.

(2) The hours comprehended in the assignment of the position were 204, not 243-1/3. He did not work at any time on Sunday (and so far as records show at no time after 12:30 P. M. on Saturdays); the hours of the assignment were based on the working days of the month, and is so reported to the Interstate Commerce Commission.

(3) The increase applied to the position of Messenger boy was $31.65 and not $37.72 as is called for in the claim.

(4) No "back pay" allowance was authorized for, nor paid to former employes of such excepted positions who had left our service before date the increase was granted.

The claim should be denied for the reasons shown herein and the Board is respectfully requested to so find.

Exhibits not reproduced.

OPINION OF BOARD: The differences of opinion with respect to the application of the Award of the Board of Arbitration, described in the record, out of which this case springs, have been so thoroughly discussed in the voluminous record it is not necessary to detail them here. In essence the Carrier contends that that Award and the subsequent agreement to "execute the award", to which it is a party, does not bind it to pay the increase provided for to Claimant Walter L. Gray because Gray was among a group of employes covered only by Rules 1, 2 and 63 of the applicable Agreement; and also, because he left the Carrier's employ before the increase was paid to other employes.

Gray's employment began February 23, 1946. The termination date is in dispute; it is shown in one submission to have been April 15, 1946 and in another to have been April 27, 1946. If the claim is denied the date is of no consequence; if it is sustained we shall look to the Carrier's records for verification. He was an office boy or file clerk or messenger, or a combination of these, in the office of the Vice President Traffic. As such he was excepted from Rules 3 to 62 included.

He was, as already indicated, not exempted from the Scope Rule. It is under this rule that the claim is brought here.

Unless the instant case can be distinguished from similar cases that this Division has decided, growing out of the same Board of Arbitration Award and the same agreement to execute that Award, to which the Carriers there, as well as the Carrier here were parties, it appears that we should resolve the instant dispute by affirming those awards.

It is contended by the Carrier and in his behalf that the instant case is distinguished from those cases disposed of in Awards 3916 and 4060, because the employes there had some rights under the applicable Agreement, whereas Gray had none except the limited rights he acquired under Rules 1, 2 and 63, "while Gray was one of a class of clerical employes represented by the Organization, the position he occupied was exempted from all rights and benefits of the Agreement."

In Award No. 3888, where the Carrier contended the increase did not apply to employes who were "breaking in" or "learning a new job" we said—"The 16¢ per hour increase was a 'cost of living increase'. It applied to * * * all * * * rates of pay for employes covered by this agreement. By its terms it was to be applied so as to give effect to the increase in pay irrespective of the method of payment."

In Awards Nos. 3916 and 4060 the Claimants were exempted from some of the rules, including pay rules, but there, as here, they were covered by the Scope Rule. In both of those cases application of the increase was ordered.

In Award No. 3916, where the general question raised here was given exhaustive consideration, we said: "The apparent assumption of the Carrier that since these employes were excepted from provisions of the Agreement * * * they were not parties to and not entitled to the fruits of the two Agreements (only one here) was incorrect * * *. The Arbitration Award does not exclude them."

In Award No. 4060, after quoting from Exhibit "B" in that record, which is also the record before us, "Authority is coextensive with Scope of Agreement except where otherwise noted", we say—"The Carrier now contends that employes coming within the provisions of Rule 3(a) and 3(b) * * * same being employes excepted from rules governing hours of service, rates of pay and discipline, are not within the confronting Agreements providing for pay increases of 16 cents per hour * * *. This question has previously been determined by this Division by Award 3916."

We have examined Exhibit "B" independently as it appears in the record before us to determine what exemptions, if any, were taken or allowed by the Board of Arbitration to the Carrier here. The record shows that such exemptions as were allotted were marked by number opposite each Carrier's name and under the Organization affected by the exemption. Each of these exemptions is then explained under "Notes" on page four of the Exhibit. Under Note No. 1 we find this statement: "Does not include so-called excepted clerical employes not subject to all rules of Clerks' Agreement."

This exception was allowed to one named Carrier. It was not allowed to the Carrier here. Taken together with the "Authority is coextensive with scope of Agreements except where otherwise noted", is there sufficient difference in the instant case and those disposed of in Awards Nos. 3916 and 4060 to warrant our coming to a different conclusion here than we reached in those cases? We think not.

We conclude that the Agreement was violated when the Carrier refused to compensate Claimant Gray in the manner provided for in the Award of the Board of Arbitration and the Agreement the Carrier participated in to "execute the award."

Having concluded that Claimant Gray is entitled to receive the cost of living increase thus provided for, we come now to the Carrier's refusal to pay Gray on the ground that he had left its employ. That contingency appears

to have been anticipated in sub-paragraph (j) of Section 1 of the Agreement "to execute the award":

> "(j)—All employes who were on the payroll of the carrier on January 1, 1946, or who were **hired subsequent thereto, regardless of whether they are now in the employ of the carrier,** shall receive the amounts to which they are entitled under this agreement. Overtime hours will be computed in accordance with the individual schedules for all overtime hours paid for."

This Division in several Awards, among them Awards Nos. 3916, 4060, 4087 and 4429, already has determined how sub-paragraph (d) of Section 1, dealing with hours, shall be applied. We merely affirm those findings as applicable here on that point.

FINDINGS: The Third Division of the Adjustment Board upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 Carrier was not justified in denying Claimant Gray the increase in pay provided for in the Award of the Board of Arbitration.

AWARD

Claim 1 sustained; claim 2 sustained for period of employment as shown by Carrier's records.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 16th day of December, 1949.