Award No. 4664

Docket No. CL-4602

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles S. Connell, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Carrier violates the provisions of the Rules Agreement, effective May 1, 1942, particularly the Scope, at Brazil, Indiana, in the use of the Agent to perform routine clerical work.

(b) A clerical position be properly established and rated in accordance with the provisions of the Rules Agreement.

(c) The senior available clerical employe be allowed a day's pay at the appropriate rate on account of this violtaion of the Rules Agreement January 16, 1947 until adjusted. (Docket W-546)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes designated as Clerical, Other Office, Station and Storehouse Employes and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and the Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act, and which has also been filed with the National Railroad Adjustment Board.

This dispute has been progressed by means of a joint submission which is attached as a part of this Statement of Facts and marked Employes' Exhibit "A". The facts as agreed upon in this joint submission are substantially the facts involved in the case.

Under date of May 28, 1948, the Carrier's General Managers wrote the General Chairman as follows:

> "The facts in this case are summarized, as follows:
>
> The force at Brazil, Ind., consists of an Agent, three Clerks, and one Trucker. The Agent is, in fact, an Agent-Yard Master, and has jurisdiction over the stations at Seelyville, Ind., and Center Point, Ind., and he supervises engine and train service crews in Mine Run

tries in the district is performing work customarily done by the supervisory employe who is responsible for the work of the crews.

The Carrier respectfully submits, therefore, that there is no justification for a finding that the agreement has been violated or that a new position of clerk be established at the point in question.

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement Between the Parties and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3 (i), confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment, and obligations with reference thereto, not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that, under the applicable Agreement between the parties to this dispute, the work involved was properly performed by the Agent at Brazil, Indiana, Station and was not performed in violation of the Scope Rule of the Agreement. Further under such circumstances, the Carrier was not required to establish an additional position of Clerk at this point, nor is such action necessary under the circumstances presently existing at Brazil.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute, the parties having submitted a joint statement of Agreed Upon Facts. This is a so-called Scope Rule case, and the principal question for decision by this Board is whether the Agent at Brazil, Indiana performs sufficient duties normally performed by clerical employes, and covered by the Clerks' Agreement, to be in violation of said Agreement. It should be noted that since this claim was initiated, the work of the Agent at Brazil, Indiana has been taken over by an Acting Agent and a Special Duty Conductor, neither of whom are employed under the Clerks' Agreement. This fact does not, in our opinion, materially affect the Award of this Board.

The Carrier admits that the Agent is and has been performing duties which are normally performed by clerical employes, and that these duties require in excess of four hours' time daily to perform, and that there are clerical positions at this location. The Carrier contends that the Scope Rule of the Agreement is not being violated, by reason of the exception to the Scope Rule contained in Rule 3-C-2, and that paragraph (3) of Rule 3-C-2 is a self-contained rule providing that other than clerical employes may be required to perform clerical work which is attached to and incident to their duties. The Claimant contends that the provisions of Rule 3-C-2 do not apply in the instant case since it is agreed by the parties that the question of the abolishment of a clerical position is not involved.

In Award No. 3825, a dispute between the same parties under the same Agreement, this Board held:

> "The Scope Rule of this Agreement covers all clerical work, as there defined, 'except as provided in Rule 3-C-2'.
>
> Rule 3-C-2 clearly only provides that employes not covered by the Agreement may perform clerical work incident to their positions when it is work previously assigned to a clerical position which has been abolished.
>
> The parties agree that the work done by the Yardmaster here was not 'work previously assigned to' a clerical position which had been abolished.
>
> While there have been some awards of this Board holding that the performance of some clerical duties by others than Clerks, where such duties were incidental to the positions of the positions of the persons performing them, did not constitute a violation of the Clerks' Agreement, such Awards were based on general Scope Rules which contained no exceptions—as to 'work previously assigned' to a position which has been abolished.
>
> One expressed exception to a provision in a contract negatives the intention of the parties that there should be any other exceptions implied. This rule of construction was recognized by this Board in Award No. 2009."

The Board is in accord with this Award and findings.

On behalf of the Carrier were cited some Awards holding that clerical work may be excluded from the Scope of Clerks' Agreement, and rightfully performed as incident to duties of employes outside the Clerks' Agreement. All these Awards can be distinguished from the facts in this case, and none are based on a Scope Rule with the exception, or a like exception, as contained in the Agreement in question.

The Carrier further contends that since the clerical work in question has been performed for many years without complaint or protest, that Claimant can not now claim violation of the Agreement. This Board has held in many Awards that continued violations of an Agreement do not change or lessen the binding effect thereof. In Award 3696 it was stated, "The fact that the Organization has never claimed coverage before 1946 must be dismissed. This Board many times has held that failure to prosecute a rightful claim in the past does not estop present action." It follows that claim (a) must be sustained.

In claim (b), the Claimant asks that a clerical position be properly established at Brazil, Indiana and rated in accordance with the provisions of the Agreement. This Board can not properly so order, since the Carrier may be able to comply with the Agreement by assignment of the work in question to others, or in some other manner. However, of course, failure to comply with the Agreement in some manner would place upon the Carrier the obligation to compensate Claimant for future loss of employment. Claim (b) will be denied.

In claim (c), Claimant seeks allowance to the senior available clerk of a day's pay at the appropriate rate from January 16, 1947 until adjusted. The claim was first presented to the Carrier's Supervisory Agent of the St. Louis Division on January 16, 1947 and was then handled in the usual manner. Claim (c) will be sustained at the pro rata rate of pay.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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, as indicated in the Opinion.

AWARD

Claims (a) and (c) sustained. Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of December, 1949.

DISSENT TO AWARD NO. 4664, DOCKET CL-4602.

The affirmation of the first paragraph of the Opinion of Board here places the basis for this decision upon Award 3825, as subsequently in this Opinion quotation therefrom appears.

The members of the Third Division hereto dissenting reaffirm the dissent to Award 3825, and note more particularly the illogical impractical conclusion which results from the Opinion as quoted, viz: that it there interprets the Agreement, Rule 3-C-2, to mean that a yardmaster could perform clerical duties incident to his position providing such duties had previously been performed by an employe covered by the Clerks' Agreement, but could not perform such duties incident to his position unless they had first and previously been performed by one covered by the Clerks' Agreement.

The error in interpretation of the Agreement arising from the assumption that the parties would enter into such an incongruous agreement, unprotective of the interests of either party, is so apparent as to require no further comment.

(s) C. C. Cook
(s) R. H. Allison
(s) J. E. Kemp
(s) C. P. Dugan
(s) A. H. Jones