Award No. 4867

Docket No. CL-4816

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that:

(1) Management violated rules of our Agreement with Carrier effective July 1, 1924 governing hours of service and working conditions of employes represented by the Brotherhood when or about April 6, 1948 and July 1, 1943 it abolished position of General Clerk, assigned hours of service 7 A. M. to 4 P. M., rate of pay $9.61½ per day at Boulder, Colorado and assigned the work normally theretofore performed by the General Clerk to employes **not** included and/or embraced within the Scope rule of aforesaid agreement, namely to a Supervisory Agent and Telegraph Operators.

(2) That all employes involved in or affected by Management's violation of the rules of our agreement as set forth in Section 1 hereof be compensated for wage losses sustained.

EMPLOYES' STATEMENT OF FACTS: Prior to April 6th, 1948, the station force at Boulder, Colorado (both Freight and Passenger) consisted of:

FREIGHT STATION

Title	Hours of Assignment	Salary	
Supervisory Agent		$419.00	mo
1—Cashier	8:00 a. m. to 5:00 p. m.	10.20	da.
1—General Clerk	7:00 a. m. to 4:00 p. m.	9.61½	da.
1—Warehouse Foreman	8:00 a. m. to 5:00 p. m.	9.07	da.

PASSENGER STATION

1—Senior Ticket Clerk	7:30 a. m. to 4:30 p. m.	9.74	da.
1—Ticket Clerk	12:30 p. m. to 9:30 p. m.	9.61½	da.
1—Baggageman	7:30 a. m. to 4:30 p. m.	8.33	da.
1—First Trick Telegrapher	5:40 a. m. to 1:40 p. m.	1.23	hr.
1—Second Trick Telegrapher	1:40 p. m. to 9:40 p. m.	1.23	hr.
1—Relief Telegrapher	Relief	1.23	hr.

OPINION OF BOARD: The position of General Clerk at Boulder, Colorado was abolished on April 6, 1948; reestablished on June 10, 1948; again abolished on June 30, 1948, and again reestablished on August 19, 1948. The claim is asserted on behalf of the Employes involved during the periods while the position stood abolished, and is for compensation for wages lost because, during said periods, the duties of said position were performed by telegraph operators, and a supervisory agent not under the Clerks' Agreement.

It appears that the position of General Clerk at Boulder was first established in 1942 to handle an increase in clerical work previously performed by three clerks and two telegraph operators.

There is a sharp conflict as to the volume of the clerical duties that were performed by the telegraphers during the periods when the General Clerk's position was abolished but the evidence supports the inference that this was substantial. This conclusion is strengthened by the fact that during a period of less than 18 months the Carrier twice reestablished the Clerk's position, after having abolished it.

The Scope Rule of the effective Agreement does not spell out in detail the specific work embraced, the only classification covering the work of the position here involved reading: "(1) Clerks, Ticket Clerks and Ticket Sellers, except those whose positions are included in the Telegraphers' Agreement." An examination of the Telegraphers' Agreement does not disclose that the nature of clerical work within its scope is any more definitely described.

It is asserted on behalf of the Organization that during the times when the General Clerk's position was abolished a substantial part of the work formerly associated with that position was delegated by the Carrier to a supervisory agent not covered by the current Agreement. This assertion is positively denied by the Carrier and since the evidence is highly conflicting and corroborating proof cannot be found in the record, we are constrained to hold that this phase of the case must be resolved against the Organization.

The Organization also says that it was improper to assign the duties previously performed by the General Clerk to the telegraphers because this necessitated transferring the major portion of the clerical work from the freight station to the passenger station approximately two blocks away.

In the absence of a more specific Scope Rule than the one that here confronts us, it is necessary to resolve this dispute on the basis of the broad principles that have been laid down in previous Awards involving issues of this character.

Award No. 4288 involved a factual situation strikingly similar to that presented here. After taking note of the general principles that govern controversies of this character, and to which we subscribe, the Board (Carter, Referee) said:

> "It was never intended that a telegrapher might be severed from his post and sent to an unrelated location to fill out his time, or, that clerical work might be taken from a clerical position at an unrelated point and brought to a telegrapher to be performed by him. Such an interpretation would permit an improper invasion of the rights of clerks under their agreement and render the positions of clerks very insecure.
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> In the case before us the clerical position abolished was in the freight house, located some 500 feet from the passenger station, where the telegraphers were employed. To abolish a position in the freight house, a position wholly clerical in character, and assign the work to telegraphers at the passenger station to fill out their time, constitutes a violation of the announced rule. The fact that telegraphers had formerly performed this work does not alter the situation. An affirmative award is in order."

On the persuasive authority of said Award 4288, the claim must be sustained.

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 the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of June, 1950.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 4867

Docket No. CL-4816

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: The Colorado and Southern Railway Company.

Upon joint application of the parties involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

This is a joint application for an interpretation of Award 4867. The Award sustained the claim, which asked that all employes involved in or affected by the management's violation of the rules (as set forth in Section 1 of the claim) be compensated for wage losses sustained. Pursuant to the Award, the Board ordered the Carrier to make it effective, "as therein set forth; and if the Award includes a requirement for the payment of money, to pay * * * the sum * * * entitled under the Award on or before August 16, 1950". The question presented by the request for interpretation is this: whether there should be deducted from the amounts that the claimants would have been entitled to receive had they remained on their positions, the sums which they earned in outside employment during the period covered by the claim. The Carrier contends for an affirmative answer to this question, but the Organization says that since a violation of the agreement was found to exist, the claimants are entitled to the amounts which they would have earned on their positions had no violation occurred, without deductions for outside earnings.

Most of the awards cited by the parties in support of their respective contentions constitute nothing more than naked precedents with respect to the matter in controversy, since no reasons are set forth in the opinions of findings of the Board as to the basis for the conclusions reached. In a few decisions of this Board and other tribunals, however, certain basic principles have been laid down that may be helpful. These may be summarized as follows:

1. If the effective agreement provides the penalty to be imposed such penalty will, of course, be applied.

2. The penalties that are imposed for violations of rules may seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case, yet, experience has shown that if rules are to be effective there must be adequate penalties for violation. See report of Presidential Emergency Board of February 8, 1937, quoted with approval in Award No. 4370.

3. The penalty for the violation of an agreement is the important thing in order that the provisions thereof be kept and violations thereof discouraged

and the claim on behalf of an individual is merely an incident which is of no concern to the carrier. See Award No. 4552 and other awards there cited.

4. In Award No. 4022 it was said that the essence of the claim there sustained was for the violation of the agreement and that the relief there sought was more for the exaction of a penalty for such violation rather than for reimbursement of a particular employe.

From the awards referred to above, and others of like tenor that might be mentioned, we think it may be fairly deduced that it is properly within the sound discretion of this Board to impose penalties that go beyond compensating the employe for his financial loss, if the character of the violation is such that a more severe penalty would reasonably appear to be justified or required to discourage future violations of the agreement.

On the other hand, there is ample authority for holding that in some, if not most, instances it is sufficient to make the claimant whole by requiring that he be paid the difference between what he would have received if he had remained on his position and what he has, in the meantime, earned in other employment. Thus, in Award No. 1608 this Board quoted at great length from Award No. 5862 of the First Division and subscribed to the common law rule as applied by the courts, with the qualification, however, that liberality should be exercised in favor of the employe and that he should not be held too strictly to his obligation to seek other employment. In Award No. 4739, it was stated that the rule just stated "is one of justice and common sense which applies to the present Agreement as well as any other contract for personal services".

In said Award No. 1608 reference was made to the subject of punitive damages as that term is used and understood in law. Exemplary or punitive damages are ordinarily regarded as damages awarded as a punishment to the defendant and as a deterrent or example, and not as compensation to the plaintiff. The award of such damages is, as a rule, regarded as resting in the sound discretion of the trier of the facts, rather than as a matter of right. 25 Corpus Juris Secundum (Damages, section 117), page 705.

From our study of the awards referred to above and others we have read we have concluded that no claimant has a right to demand as of right more than the sum of money that will make him whole, after due allowance for what he may have earned in other employment during the interim, but that it is well within the authority of this Board in a particular case to penalize a carrier by refusing such allowance for outside earnings if, in the sound judgment of the Board, the violation is of such a character as to evidence a deliberate or purposeful evasion of the agreement or if the Board feels that a punitive exaction is necessary to discourage future violations. On the theory just stated all of the awards referred to in this opinion can be harmonized, which it is our duty to do if this can consistently be done.

Reverting now to the case presently before us, we are of the opinion that the facts disclosed by the record fall short of establishing an aggravated case of purposeful evasion of the effective agreement on the part of this Carrier. The original opinion of this Board indicates, we think, that the Carrier honestly believed that its action, which resulted in the claim, was permissible. The Board has already resolved that issue against the Carrier, but it does not follow that an extraordinary penalty is warranted. That measure of justice and common sense which was recognized in Award No. 4739 constrains us to forgo imposition of a coercive exaction.

The Board interprets its Award to mean that in discharging the monetary requirements of its mandate the Carrier is entitled to deduct the amount of the claimants' earnings from other employment during the periods covered by the Claim.

Referee Curtis G. Shake, who sat with the Division as a member when Award No. 4867 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 16th day of February, 1951.