Award No. 5100
Docket No. CL-5094

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

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

(a) Carrier violates the provisions of the current agreement when it requires a Class 3 employe at Phoenix, Arizona, to perform Class 1 clerical work without proper compensation; and,

(b) Mr. Geo. W. Perry, a Class 3 Trucker, Phoenix, Arizona, shall be compensated for the difference between eight hours at Truckers' rate, .90 cents (now $1.33¾) per hour, which he was paid, and of four (4) hours at Check Clerk's rate, $9.20 (now $12.53) per day, and four (4) hours at his regular rate, .90 cents (now $1.33¾) per hour, on May 21, 28, 29 and June 14, 18, 20, 24, 25, 1947, on which days he was required to perform Class 1 clerical work.

EMPLOYES' STATEMENT OF FACTS: Mr. Geo. W. Perry, assigned as a Trucker, Class 3, on the Phoenix, Arizona, freight handling platform, was, on the dates shown in Statement of Claim above, used to augment the regular force of Class 1 employes. On these dates he was assigned to and performed the ordinary and regular duties and responsibilities of a Check Clerk position, i.e., he was required to go to various industries to make inspection of the loading and bracing, apply seals, sign bills of lading and make record of various carload shipments, the details of which are shown below:

5-21-47 Left warehouse 4:00 P.M., arrived at Western Compress 4:20 P.M., signed B/L and sealed cars AT 142427 and AT 149851, left Compress 4:40 P.M., arrived warehouse 4:55 P.M.

5-28-47 Left warehouse 2:35 P.M., arrived Reynolds Metals 3:05 P.M., signed bill of lading, left Reynolds Metals 4:15 P.M., arrived warehouse 3:45 P.M.

5-29-47 Left warehouse 3:30 P.M., arrived Reynolds Metals 4:00 P.M., signed bill of lading, left Reynolds Metals 4:15 P.M., arrived warehouse 4:45 P.M. 3.7 miles from warehouse to Reynolds Metals.

6-14-47 Left warehouse 2:00 P.M., arrived Reynolds Metals 2:20 P.M., signed bill of lading, left Reynolds Metals 2:30 P.M., arrived warehouse 2:50 P.M.

Mr. Perry, was performing work which was incidental to and a part of his Class 3 cooperer assignment and was not performing the normal and regular duties which were significant of check clerk positions; i.e. the duties relating to the loading, unloading and transfer of freight at freight platforms. The employes cannot therefore successfully argue that Mr. Perry was used to augment the force of Class 1 check clerks at the Phoenix freight platform for the purpose of handling that part of the work which check clerks handle at such place; i.e., the freight platform.

The Carrier also wishes to state that there is nothing contained in this Article XI, Section 3-b, nor in any other rule of the current Clerks' Agreement, which nullified or otherwise invalidated the parties' agreement with respect to the terms of Article II, Section 3, and which rule, as the Carrier has previously shown hereinabove, has general application, while Article XI, Section 3-b has application only to specific situations and locations described therein; that even if the disputed chore could properly be considered Class 1 clerical work, and which the Carrier again denies, Mr. Perry was, under the terms of Article II, Section 3, properly continued and compensated under his regular classification of cooperer on the dates involved in this claim, inasmuch as he did not perform as much as four (4) hours of Class 1 clerical work.

Definite and conclusive evidence that the Brotherhood has recognized that Article XI, Section 3-b does not have application in the premises is to be found in the absence of any complaint or claim by the Employes or their representatives prior to receipt of the instant claim, which was initially presented to the Carrier on August 14, 1947. The occupant of the cooperer position at Phoenix was performing the chore of sealing cars at industry tracks and picking up bills of lading, here in dispute, as a part of his regular assignment and at the regular rate of pay for that classification, on November 22, 1935, the date the complainant Brotherhood was designated as the duly accredited representative of the Carrier's clerical employes, and has continued to do so without any change up to the present time. The practice was in existence on October 1, 1942 when Article XI, Section 3-b was agreed to between the parties and incorporated into the agreement, and which was nearly five (5) years prior to date (August 14, 1947) that the instant claim was presented. The Employes and their representatives were fully informed in regard thereto and they cannot now successfully contend that the handling was violative of Article XI, Section 3-b. The Third Division has repeatedly held, as it did in Award 1435, that:

> "Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written. Here there is so much uncontradicted evidence of unambiguous conduct by both parties to the issue, evidencing the conclusion which is considered determinative, that no course is open for judicial pronouncement other than that the claim be denied."

See also Awards Nos. 1257, 1397, 2137, 2326, 2851, 3300, 3603 and others.

In consideration of the foregoing the instant claim can only be viewed as an attempt to broaden Article XI, Section 3-b, by an award of the Adjustment Board to cover any and all situations and locations instead of those particularly specified in that rule. This may properly only be accomplished in the manner provided for in the Railway Labor Act and in Article XIII, Section 15, of the current Clerks' Agreement.

In conclusion the Carrier repeats that the instant claim of the Employes is wholly without schedule support or merit, and should for reasons stated hereinabove, be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The instant dispute relates to a disagreement between the parties involving rates of pay applicable to work performed, and

the interpretation and application of Article II, Section 3-b, and related provisions of their agreement, quoted elsewhere in the record.

The Organization contends that the Carrier violated the current agreement when it required Class 3 employes at Phoenix, Arizona, to perform Class 1 clerical work without proper compensation, and petitions the Board to award, to the employe concerned, the difference between the rate paid and that which is contended should have been paid.

The Carrier's opposition to the claim, stated briefly, is that the claimant did not perform Class I clerical work on the dates claimed, but that the work performed was a part of the assigned duties of his regular position. In the alternative, the Carrier maintains that if it should be determined that the work in question was Class 1 clerical work, the employe did not devote as much as four hours to the performance of those duties on any of the days named, and, therefore, the claim has no merit. It holds that Article II, Section 3-b is not applicable and calls attention to other rules of the agreement and alleged practices which it contends are controlling.

The foregoing is intended only as a summary and general statement of the respective positions of the parties. More specific contentions, to the extent deemed pertinent, will be the subject of later comment.

To bgin with the Board finds that (b) of the above claim is in error; that George W. Perry was, at all times in question, regularly assigned as a Cooper, a Class 3 position, and not as a Class 3 Trucker as alleged. The correct rate of pay for the position during May and June, 1947, the time involved in the claim, was 92½ cents per hour and not 90 cents as alleged. Therefore, the claim stands amended and corrected accordingly.

Next, the Board find from the record that on 5 days the claimant was called on to sign bills of lading and on 5 other days he was required to both sign the bills of lading and seal the cars. In connection therewith, we are of the opinion the Carrier unduly minimizes the duties and responsibilities attendant upon performance of the work in question. As practical railroad men, the Board members know the responsibility of the Carrier to the shipper after a bill of lading is signed, as well as the responsibility of the shipper to the Carrier and the full importance that such matters be handled in a business-like way. The proper attention to detail and execution of duties attendant on signing bills of lading and sealing cars requires that the Carrier's representative or agent assume responsibility and exercise judgment peculiar to Class I clerical work and unrelated to a Cooper's job on a railroad.

We cannot believe the Carrier seriously resists this claim on such impractical grounds. The duties such as those with which we are here concerned are universally performed by Platform or Warehouse Foremen, Receiving and/or Delivery Clerks, Check Clerks, or other Class 1 employes at stations such as Phoenix. This view is bolstered by the record which shows that at other points on this same railroad the Carrier bulletined Class I clerical jobs listing among other duties the signing of bills of lading. At this same location the Carrier in advertising positions of Bill Clerk and Assistant Bill Clerk included the duties of sealing cars and signing bills of lading.

We are inclined to agree with the Carrier's contention that Award 4567 enunciates principles controlling here. The Board very properly held that it was not the intent of the disputed rule in that case to require payment of a higher rate for the performance of every task included in the duties of an assigned position. However, the Board went on to say that the performance of work significant to an assigned position will justify payment of the rate for the position. We hold that the importance of signing bills of lading and sealing cars has a significance unrelated to the position of Cooper, but definitely significant to and of a dignity meriting classification as work of Class 1 clerical positions.

If any doubt remains about the work in question being Class I clerical work, attention is called to the foregoing record for evidence that it has been so recognized by this Carrier in the past, when claims, based on the same work and contended for as Class I clerical work, have been paid. We concede the point that this evidence would be insufficient in itself for allowing the claim, but not for the reasons assigned by the Carrier. It does not appear to us that the Carrier here takes issue with the authority of its local supervision to adjust and settle claims prosecuted in accordance with the agreement and the law. Of course the Board would not permit such settlements by whomsoever made, employes or employer representatives, to vary or alter the plain and unambiguous terms of the agreement, but the Board cannot close its eyes to an application of the contract by the parties which appears consistent with the terms of their agreement. A more valid objection to the evidence is that it smacks of compromise and settlement. For this reason the Board will weigh carefully claims based alone on such evidence, because it must look with favor on compromise of differences, and does not want to encourage the parties to bring every dispute arising on the property to the Board. But in cases, such as the instant one, where there is other evidence supporting the claim the Board will consider, as a circumstance bearing on the issue, matters of record which may be considered an admission against interest by either party.

We next give consideration to the Carrier's position that the work in question was a part of the assigned duties of Claimant because performed by him over a period of years. The first fault to be found with this contention is that it begs the issue that the work rightfully belongs to Class I clerical positions. The fact that it is only a part of the duties of such positions is unimportant. The Board has held that the Carrier will not be permitted to do piecemeal what it has agreed not to do as a whole. Award 198. Therefore, the work remains that of a Class I position even though it does not constitute the whole. Neither can the Board, under the facts and circumstances of this case, give recognition to the claim that by past practice the work in question attaches to the position of Cooper. As said in Award 4501:

> "Where rules conflict with former practices, such practices are abrogated and the rules become the controlling guide."

Further there is serious question existing that the record makes out a case of established practice. No showing is made in that regard, the Carrier being content to rely on the general proposition that for about five years from the effective date of the current agreement Class 3 employes, from time to time, have performed the work without claim having been made on the Phoenix property. In Award 4664, the Board said:

> "The Carrier further contends that since the clerical work in question has been performed for many years without complaint or protest, that Claimant cannot now claim violation of the agreement. The 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. The Board has many times held that failure to prosecute a rightful claim in the past does not estop present action.' It follows that Claim (a) must be sustained."

On careful review of the rules of agreement, we find no conflict between Article II, Section 3-b, and the rules cited by the Carrier. We are unable to agree that Article II, Section 3-b has no application to the instant dispute. Clearly the rule was designed to relieve the Carrier of the burden of assigning Class I employes to work normally performed by them where to do so would result in periods of idleness due to the fact that the total work to be handled is not uniform as to occurrence, volume, or duration, over any period of time. Under such circumstances it was agreed that the regular forces could be augmented by using Class 3 employes. In consideration of

the Carrier's right to augment its forces in this way, and because it was contemplated that the work would be sporadic and on occasions of short duration, it agreed to special arrangements for compensating employes called to work outside their regularly assigned positions. The Carrier's stake in the rule is as great as the employes and we are at a loss to understand an attack upon its application to this dispute. In the absence of such a rule the Carrier would have a serious operating problem in handling work of the character here involved.

The rule is clearly applicable to the facts of this case. The work in question belongs to Class I employes. Except for the rule the Carrier would be compelled to assign it to a Class I position. It is sporadic and of short duration, is of small volume and not uniform as to occurrence. Therefore, instead of increasing forces the Carrier, when the need arises, may augment its regular forces by assigning the work to a Class 3 employe. There is a penalty, of course, upon giving the work to a position not otherwise entitled to it and that is a minimum of four hours' pay for work of four hours or less at the Class I rate, and a minimum of 8 hours at the Class I rate for more than 4 hours.

The express language of the rule answers the Carrier's argument that the claim is not valid, because the employe worked less than 4 hours. The contention that the work was not performed on the platform or at other named locations is without merit. The rule contemplates work at other similar locations. We do not believe that we take undue liberties with the language to hold that the performance of work at the shipper's plant is at a location similar to a "stockyards". Further, the Board has overruled a similar contention in Awards 3220 and 3651.

Having searched the record in vain for any plausible grounds supporting the Carrier's opposition to the claim, the Board finds merit in the Organization's position and holds that the claim should be sustained as amended and corrected.

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 Employe involved in this dispute are respectively Carrier and Employe 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 as contended by the petitioner.

AWARD

Claim (a) sustained. Claim (b) sustained with amendment and correction of rates to the extent shown in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of November, 1950.