Award No. 5404

Docket No. CL-5531

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

NORTHWESTERN PACIFIC RAILROAD COMPANY

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

(a) Carrier violated and continues to violate the Rules of the Clerks' Agreement at Tiburon, California, when it requires and/or permits Hostlers, employes not covered by the Clerks' Agreement, to handle the crew board, call engine crews, and perform clerical work incidental thereto between the hours of 4:30 P. M., to 8:00 A. M.

(b) That the work of handling the crew board, calling crews, and clerical work incidental thereto shall be restored to the scope and operation of the Clerks' Agreement and employes M. E. Silverthorn and C. E. Cannedy, and/or their successors, on respective dates assigned to Position No. 302, Roundhouse Clerk, be compensated retroactive to March 1, 1950, on a call basis, two (2) hours at the rate of time and one-half, for each time a crew is called outside the assigned hours of the position, 8:00 A. M., to 4:30 P. M.

EMPLOYES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the Northwestern Pacific Railroad Company (hereinafter referred to as the Carrier) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Petitioner) having effective date of April 1, 1926, which Agreement (hereinafter referred to as the Agreement) was in effect on the dates involved in the instant claim. A copy of the Agreement is on file with this Board and by reference is hereby made a part of this dispute.

2. At Tiburon, California, the Carrier maintains a Roundhouse, at which point engine crews tie up, register, and make themselves available for further service. The duties of position of Roundhouse Clerk, a position properly rated and classified under the Agreement, consist principally of dispatching, (operating the Engineer's and Firemen's crew board), calling engine crews, and performing other clerical work incidental thereto, as well as preparing locomotive inspection reports.

3. Prior and subsequent to March 1, 1950 (the first date involved in the instant claim) employes M. E. Silverthorn and C. E. Cannedy (hereinafter referred to as the claimants) were regularly assigned to Position No. 302, Roundhouse Clerk. The duties of Roundhouse Clerk Position No. 302 being necessary to be performed seven (7) days per week, Mr. Silverthorn

A closely parallel claim of petitioner was denied by the Third Division, NRAB, in Award No. 2326, in which, in its opinion, the Board stated in part:

> "The situation at Horace has existed for many years and this Docket appears to be the first claim presented by the Organization that the work at this station belongs under the Agreement. The failure of the organization for more than twenty years to make any claim to the work at Horace would seem to indicate rather conclusively that it was not the intention of the parties that the work of calling crews at such a station is considered as coming under the agreement."

Having first pointed out that the work involved in this docket does not come within the scope of the Clerks' Agreement, the carrier also desires to call attention to the fact that the work consists of calling an average of only 4.3 enginemen during the hours 4:30 P. M. to 8:00 A. M. and incidental duties in connection therewith.

While it is self-evident that the volume of work involved in calling an average of 4.3 enginemen during a period of 15 hours 30 minutes is insignificant, in presenting the instant claim "on a call basis, two (2) hours at the rate of time and one-half, for each time a crew is called," it must be assumed that the organization contemplates that either Silverthorn or Cannedy (or their successors) be called for the work involved.

In the event either of the claimants (or their successors) were called, they would necessarily be called by the hostlers, and the amount of telephoing which would be required of the latter would be essentially the same as at the present time.

Furthermore, the claimants, being award that the work involved has never come within the scope of the Clerks' Agreement, did not reside where they could report for duty within a reasonable length of time. Silverthorn, when regularly assigned as roundhouse clerk at Tiburon, lived 14 miles by highway from Tiburon, and Cannedy, when relief man, lived 10 miles from Tiburon. The successor to Cannedy lives 23 miles from Tiburon.

Obviously, if the hostler were to call the claimants to report for duty, and claimants after reporting were to call the engine crews, an impracticable method of handling would be created, in which the carrier's service would be less efficient, and the claimants would receive compensation for which no bona fide service would be performed and which was never agreed to by the parties to the Clerks' Agreement.

Conclusion

Carrier avers that the claim in this docket is without basis or merit and therefore respectfully submits that it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The material facts involved in the instant claim are not in dispute and will be related as we glean them from the record.

Tiburon, California, is one of four division terminals maintained by the Carrier for a long period of time. Sausalito, California, one of the four, is now and since 1941 has been a division terminal in name only inasmuch as during that year the Carrier abandoned its ferries and electric train service out of that location and transferred the remaining steam passenger service, shops and roundhouse force to Tiburon.

The Carrier's arrangement for calling engine crews, first at Sausalito and later at Tiburon, has not changed for a period of more than forty years. Prior to 1941, the roundhouse clerk at Sausalito on the daylight shift, hours 8 A. M. to 4:30 P. M., and hostlers during the remainder of the 24-hour period, hours 4:30 P. M. to 8 A. M., were required to perform whatever

calling of enginemen was necessary for trains originating at both Sausalito and Tiburon. During the year 1941, the roundhouse clerk was transferred with the shop and roundhouse force to Tiburon and from that time to this the roundhouse clerk at Tiburon on the daylight shift, and hostlers during the night shift, have performed whatever calling of enginemen was necessary for trains originating at that terminal. Train and engine crew callers have never been employed at either Sausalito or Tiburon.

In its ex parte submission the Petitioner asserts the Carrier violated Rule 1 (The Scope Rule) of the existing Agreement when it removed the work of calling crews therefrom and assigned such work to hostlers, covered by the Firemen's Agreement. Inasmuch as the work in question has always been assigned to hostlers we cannot see how that can be. Actually the foundation on which the claim is based is that crew calling work belongs to the Clerks under and by virtue of the Scope Rule of the current Agreement and that the Carrier is assigning such work to hostlers in violation of its terms.

The first Agreement negotiated between the parties and now in force and effect except for certain modifications, to be presently mentioned, became effective on April 1, 1926. Its Scope Rule provides "These rules shall govern the hours of service and working conditions of the following employes, subject to the exceptions noted below" and then lists three classes of positions. Included in class two are "train and engine crew callers." We are not concerned with the other classes of employes nor with the exceptions set forth in the rule and hence will make no further mention of them.

The above Agreement was supplemented but not superseded by subsequent Memorandum Agreements, dated December 23, 1946, July 22, 1949, and July 31, 1950. Reference to the first Supplemental Agreement mentioned discloses that it eliminated Rule 1 of the then existing Agreement. The others do not pretend to amend such rule. However, for all purposes pertinent to the issues here involved the Memorandum first mentioned readopted verbatim the terms of the rule as they appeared in the original Agreement, the only changes made being with respect to the exceptions which, as we have heretofore indicated, are not here involved.

Thus it appears we are called upon to determine whether under the confronting facts and circumstances the Scope Rule of the instant Agreement, which does not purport to describe the work encompassed within it but merely sets forth the classes of positions covered, in and of itself gives train and engine callers the exclusive right to performance of all crew calling work on the Carrier's property. The question presented is one fraught with difficulty. It is also one on which there is no unanimity among our decisions. Early in the history of the Division of the Board in Award 615, frequently cited with approval in subsequent Awards, we said it is a mistaken concept that the source of the right to exclusive performance of the work covered by an agreement is to be found in its scope rule. However, the Opinion of that Award does recognize that subject to certain exceptions the right to exclusive performance under collective bargaining agreements does exist from the application of an elementary prinicple of law. In other Awards, see 3696, 3890 and 4664, heavily relied on by the Petitioner, it appears we have gone so far as to hold the mere fact an agreement has a scope rule and does nothing more than to list the classes of employes covered is enough to insure such employes the exclusive performance of all work which can be regarded as ordinarily performed by members of the craft to which they belong. In between the two extremes to which we have referred, however, is a line of decisions basically founded upon the fundamental and universally recognized legal principle (see Awards 3727, 2436, 1435, 1397, 1257 and 507) that where a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself. In substance these decisions, to which we adhere, deal with all types of collective bargaining agreements, see e.g., Awards 4464, 2326, 1435 (Clerks) 4922, 4791, 2090 (Telegraphers) and 3727 (Pullman Conductors) and hold that where the work to be performed

by the particular craft in question is not described or spelled out in the scope rule or elsewhere in the agreement specifically reserved, and the question for decision is whether the work involved was ever within the purview of the contract, there is such ambiguity in its terms that intention of the parties, to be determined by recourse to custom, tradition, practice and other indicia of their understanding, is the decisive factor in determining whether the scope rule covers all work ordinarily performed by the classes of employes listed therein or was intended to leave to other employes that which they had been performing prior to the negotiation of the agreement.

The decisions last referred to in no sense conflict with the oft repeated principles, with which we are in agreement, that a long existing practice does not change the clear terms of an agreement and repeated violations thereof, even though acquiesced in, do not preclude enforcement of its expressed terms.

The record in the instant case makes it clear, as we have heretofore indicated, that for at least forty years during the portion of the day involved the work in controversy has been performed by hostlers and has never, either at Sausalito or Tiburon, been performed by Clerks. That situation existed when the contending Organization negotiated the first Agreement effective April 1, 1926. It prevailed at the time of the negotiations resulting in the Memorandum Agreement, effective December 26, 1946, amending divers rules of the Agreement, including the Scope Rule. It continued during the negotiations which brought about the Memorandum Agreements of July 20, 1949 and July 31, 1950. Notwithstanding the practice was not even mentioned, referred to or abrogated by the terms of any of these Agreements. Indeed it was not until March 23, 1950, that there was any complaint thereof or effort made to change it. The Organization seeks to avoid the effect of this delay by the assertion it had no knowledge whatever of the alleged violation until the claim was first submitted by its representative. That is not a meritorious or valid excuse. In Award 1609 and many others, to which we need not refer, this Division of the Board has held that under facts similar to those existing here the Organization is chargeable with knowledge of the working conditions in operation on the property and that we must assume it had knowledge of what is now claimed to be a violation of the Agreement. Of a certainty it was bound to know of the situation when the change from Sausalito to Tiburon was made in 1941.

Surveying the record as a whole we are convinced this is a case which calls for application of the rule announced in the Awards referred to and to which we have said we adhere. We are further convinced the uncontroverted record facts not only establish a custom and practice, but almost a tradition, clearly indicating an understanding and intention on the part of all parties to the present Agreement that the work in question could be assigned to hostlers without violating its terms. Applying the rule to the facts this conclusion requires a denial of the claim.

Many Awards, other than the three to which we have heretofore referred, are relied on by the Organization as requiring a contrary conclusion. We do not agree with the construction it seeks to have us place upon them. When carefully examined they appear to be based on entirely different factual situations and are otherwise clearly distinguishable. In Awards 4977 and 4812 the specific work involved had been recognized by the Carrier and the issue was whether it could then be taken away from employes who had theretofore performed it. The same is true of Awards 3506 and 3979. Award 4651 was based on an express ruling stating "It is recognized and agreed that all work referred to in Rule 1 (the Scope Rule) belongs to and will be assigned to employes holding seniority rights and working under the Clerks' Agreement." Award 5013 is premised upon an express rule providing that no employe other than those covered by the Agreement and train dispatchers would be permitted to handle train orders at certain points. Generally speaking it can be said that Awards 561, 1518, 4501, 4428 and 5100 were based on rules other than the Scope Rule and that it was either not involved or given no consideration in reaching the decisions therein announced.

In conclusion it should be stated the Organization points out the involved work was split work and hence could not be divided. We find nothing in the Agreement to prevent it under the existing facts and circumstances. It also directs our attention to the fact that Organization to which the hostlers belong does not claim it. That in our opinion has no bearing on the issue involved. Both points might be entitled to considerable weight in the event of future negotiations respecting the work in question but they are entitled to little consideration in reaching a conclusion whether it comes within the scope of the current Agreement.

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 hearing thereon;

That the Carrier and 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 record does not disclose that the Agreement was violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of July, 1951.