Award No. 6861

Docket No. CLX-6813

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

RAILWAY EXPRESS AGENCY, INC.

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

(a) The Agreement governing hours of service and working conditions between Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated in the Nebraska-Wyoming-Iowa Division Over-the-Road Truck Service Seniority District No. 4 January 2, 1951, when two regularly assigned Chauffeur positions were allegedly abolished and the work turned over to employes of the Roush Transfer Company without any rights under the Agreement between the parties;

(b) The work shall now be restored under the scope and operation of the Agreement; and

(c) A. C. Anton, B. P. Boos, and all other employes adversely affected shall be compensated for salary and earnings loss sustained retroactive to and including January 2, 1951.

EMPLOYES' STATEMENT OF FACTS: Prior to January 2, 1951, A. R. Anton and B. P. Boos, with seniority dates of January 12, 1940 and January 29, 1940, respectively, were the regular occupants of Chauffeur positions assigned in over-the-road truck service, Rapid City, Rapid City via Deadwood, and Newall, South Dakota route, six days per week, scheduled to operate on alternate days as follows:

Report Rapid City at 7:30 A. M.
Released Rapid City at 7:30 P. M.
(On continuous time at Deadwood and Newall)

January 2, 1951, the over-the-road truck service as described in the preceding paragraph, was allegedly abolished by letter dated December 28, 1950 (Exhibit "A"). The work thereafter was turned over to and performed by employes of the Roush Transfer Company without any seniority rights under the agreement between the parties.

February 5, 1951, a protest was registered and claim filed by General Chairman O. P. Channell, with Superintendent R. L. Linihan challenging the

"The Organization has the right to perform all of the work properly belonging to the Carrier which is covered by the Scope Rule. It also has the right to perform all work embraced by the Scope Rule done by the Carrier by agreement or arrangement with another carrier so long as the agreement or arrangement continues. It may not claim any right to the performance of work which was done because of agreement or arrangement with other carriers after discontinuance of the agreement or arrangement, no matter what was the motive or reason for the discontinuance."

There can be no question that the operation of the truck route by the Agency prior to January 2, 1951, for the Chicago & North Western Railway was work arising through contract with a third party, and when the Chicago & North Western Railway on January 2, 1951, cancelled its contract with the Agency and elected to perform the work by another contractor, no rights could arise in favor of the express employes formerly assigned to the truck route because the Agreement effective September 1, 1949, between the Agency and the employes represented by the Clerks' Organization could only extend to work contracted to it by the Railway Company so long as the contract continued and no rights to that work could arise after the discontinuance of the contract. The Scope Rule of the Agreement between the parties cannot embrace work which is properly railroad work because such work is not primarily an obligation of the Agency. There is nothing in the Agreement between the parties which specifically describes the work which it covers. Obviously it can only cover such railroad work as is actually performed under contract or agreement. When the party upon whom the primary obligation rested for its performance elected to perform the work itself or by another party after January 2, 1951, the Agreement between the parties does not give to Petitioner the right to compel Respondent to maintain such work or any part thereof acquired by contract. This has definitely been determined in the Awards cited by Respondent above. The Scope Rule of the Agreement with the Clerks' Organization does not relate to "work" but rather to "employes". That rule reads:

"**Employes Affected—Rule 1.** These rules shall govern the hours of service and working conditions of all employes in the United States subject to the exceptions noted below."

Employes have failed to establish violation by the Carrier of the Agreement effective September 1, 1949, in the discontinuance of the positions held by employes Anton and Boos at Rapid City, S. D., effective January 2, 1951, necessitated by the cancellation by the Railway Company of its agreement with the Agency to operate the Railway Company's over-the-road truck route between Rapid City, Newell and Deadwood. A denial of the claim is in order under the facts, the rules of the effective Agreement, and the precedent Awards cited.

All evidence and data set forth have been considered by the parties in correspondence and in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: On December 1, 1939, passenger train service was discontinued by the Chicago and Northwestern Railway between Rapid City and Newell, South Dakota. Thereupon, to furnish service for freight and express previously served by train service, such railroad and Railway Express Agency, Incorporated, hereinafter referred to as the Agency, entered into an agreement whereby the latter agreed to furnish the railroad, subject to its direction and control, such motor vehicles as it would require for the transportation of both freight and express between the cities above mentioned and all intermediate points, the service to include drivers for motor vehicles and all other details necessary to the complete operation.

In conformity with the foregoing Agreement the Agency established, and commencing January 6, 1940, maintained, Over The Road Truck Service,

Rapid City, Rapid City via Deadwood and Newell, South Dakota, by mean of which it transported both freight and express for a period of some eleve years.

The record, it may be added, discloses the service above described wa established by the Agency in accord with the terms of a collective bargain ing Agreement it had entered into with the Claimant, effective August 1 1937, which among other provisions included Article 9, dealing with Over Th Road Truck Service; that such service was thereafter maintained and con tinued for the eleven-year period throughout the life of two succeedin Agreements, the latter being the current Agreement, effective September 1 1949, containing like numbered articles of similar if not identical import and that during such period of time the work required to perform servic was assigned to and performed by employes covered by the terms of suc Agreements.

Sometime prior to January 2, 1951, and effective as of that date, th railroad gave the Agency notice it was cancelling their arrangement of eleve years' standing. Subsequently it contracted with the Roush Transfer Compan for the operation of a truck route over the same territory. On December 28 1950, after receipt of the above mentioned notice from the railroad, th Agency posted a notice on its bulletin board advising A. C. Anton and B. P Boos, the employes named in the claim, who were on the date and for a lon time prior thereto had been the regularly assigned occupants of the tw truck drivers and/or chauffeur positions set up and maintained by it in main taining its Over The Road Truck Operations, that it was abolishing suc positions, effective January 1, 1951, because of notice from the railroad t the effect it would not continue the theretofore existing arrangement. There after, and concurrent with the establishment of the new truck route, th Agency turned over and transferred the work of transporting and handlin its express traffic between Rapid City and all points between such city an Newell, theretofore performed by its employes, to the Roush Transfer Com pany, which has since continued to perform such work with employes wh hold no rights under the Agreement existing between the parties to thi dispute.

February 5, 1951, Claimant filed a claim on the property challengin the Agency's right to remove the work in question from the scope and opera tion of the current Agreement and requested that it be restored to employe covered by its terms, with reparation retroactive to January 1, 1951. Thi claim was progressed on the property through regular channels until it finall reached the Agency's highest reviewing officer, the General Manager, wh denied it on August 1, 1951, stating in substance that since the railroad which had operating rights over the route, had cancelled the contract th Agency could no longer handle the express traffic on such route and thu had no choice but to accept the substituted service provided by the railroad Just what happened after the claim was thus denied does not appear o record. However, it is clear that nearly two years ensued before Claiman gave notice on September 10, 1953, of its intention to bring the dispute t this Board for decision.

Standing alone, and mindful it is well-established under collective bar gaining Agreements that positions cannot be abolished so long as their worl remains and that even when properly abolished such work as remains mus be performed by the class of employes to which the Agreement applies, decision of the claim on the foregoing facts appears quite simple. It become more complex when such facts are supplemented by a statement that on al dates in question, and notwithstanding its collective bargaining Agreement with Claimant, the Agency had a long standing contract with the railroad known as the Uniform Express Operations Agreement whereby, although i was to operate, conduct, transact, manage and control the express business contemplated by its corporate set up, it had agreed with the involved railroad and for that matter all other railroad parties to such Agreement, that it express traffic was to be transported by trains or other transportation facilitie of the railroads unless otherwise agreed upon.

With the facts established the positions of the parties should be noted. In a general way it can be said the Claimant contends that under the current Agreement the handling of all express work on the route here involved belonged to employes covered by its terms; and that since the express service now furnished and performed by the Agency in Newell, Deadwood and intermediate places in South Dakota by employes without the Agreement is the same as it was prior to January 2, 1951, when carried on by employes within its terms the Agency's unilateral action in removing such express work and the involved positions from the scope and operation of the Agreement violated the scope rule of that contract, also other rules therein set forth, particularly those relating to seniority, Over The Road Truck Service, Established Positions, and changes in its contractual terms and conditions.

The Agency does not contend the express work performed on the involved truck route prior to January 2, 1951, was not work that belonged to employes under the scope rule of the Agreement. In fact it impliedly, if not expressly, admits that under its terms, so long as it was operating such route, the work of handling all express traffic thereon was the work of drivers or chauffeurs to which the Agreement applied. Boiled down the gist of its position is that the Uniform Express Agreement supersedes its Agreement with the Organization to the extent it had the right to remove the handling of the involved inter-city express work from the Clerks' Contract whenever the railroad elected to take over transportation of such inter-city express under rights it had given to such railroad under the Uniform Agreement.

In support of its position the Agency relies on numerous Awards holding that a Carrier does not violate an Agreement, such as is here involved, by removing work covered by its scope rule when another Carrier, from whence such work came and to whom it belonged in the first instance, sees fit to take it back. There is no question about the soundness of the rule announced in such Awards. The trouble from the Agency's standpoint is that they deal with situations where the work came initially from the Carrier, or other concern, taking it away. Here the reverse is true. The work in question came from the Agency who gave it to the railroad pursuant to another contract, to which the Claimant was not a party. This presents a third and vital element which, since it is not therein involved, makes these Awards on which the Agency relies, including Awards Nos. 4945, 5774 and 5878, on which it places great weight, clearly distinguishable and of no value as precedents under the confronting facts and circumstances. For the same reasons, and since it cannot be denied the Agency had the same amount of express work and continued to offer the same express service after January 1, 1951, as before, the same holds true of Awards relied on, which recognize the rule that an established position may be abolished where the work thereof has disappeared.

The Organization in support of its position relies on repeated Awards of this Division holding a clerical position cannot be abolished and the work appertaining thereto assigned to an employe holding no rights under the Agreement or, as is sometimes stated, that a Carrier may not arbitrarily or unilaterally take work from under the scope of an Agreement. It may be conceded, as the Agency points out, that such Awards deal in the main with situations where the Carrier had undisputed dominion and control over the work in question. Of a certainty none of them involved a dispute where—as here—the Uniform Express Operations Agreement was relied on as affording a basis for concluding work, which would otherwise be regarded as coming within the terms of a collective bargaining Agreement, could be removed from the scope of the last mentioned contract. Nevertheless, it would seem the Awards on which Claimant relies are entitled to some weight as precedents where—as here—it appears from the facts and contentions of record that the Agency has placed itself in the position of having contracted the actual work of handling its express traffic on the route in question to more than one party.

It might be well to pause at this point and state that none of the above Awards relied on, or others cited, by either of the parties to this dispute deal

with a situation such as has been heretofore outlined. It can be added that we know of no Award of this Division that does so or can be regarded as decisive of the instant case. However, it can be said there have been decisions rendered by Express Board of Adjustment No. 1, dealing with similar disputes, which must be regarded as precedents, entitled to weight and highly persuasive of our own decision.

In Decision R-1346, with Frank P. Douglas participating as neutral referee, the facts were that prior to January 19, 1942, express work on certain Southern Pacific trains was handled exclusively by Agency Messengers. The railroad discontinued the trains and established service by motor truck with a Carrier having no contract between the Brotherhood and the Agency. Thereupon the Agency transferred its express work to employes of the Carrier who had no rights under the Agreement. The Board sustained a claim similar to the one here involved and in the opinion said:

> "Under a long line of decisions by this and other adjustment boards 'work' is the subject matter about which collective bargaining agreements in transportation is written. Where that work, as in this case, is within the scope of the agreement, carrier is not privileged to deny it to their employes by the simple expedient of changing carrier contracts."

In Decision E-1380, with Fred W. Messmore sitting as neutral referee, the Board sustained a claim based on the premise the work of handling express had been taken away from employes covered by the terms of the Agreement between the Brotherhood and the Agency, to whom it belonged, in violation of its terms. There the rail Carrier by contract with the Agency had furnished the Agency with transportation facilities to transport express, between certain terminals, the express traffic being handled by an Agency employe who held the established position of Messenger. The railroad discontinued the operation of rail service between such terminals and in lieu thereof contracted with a subsidiary transportation company for the movement of express and other traffic, with the result the Agency eventually turned the handling of its express traffic over to the truck driver, a railroad employe. In the opinion, after an exhaustive discussion of previous express decisions and applicable principles, with direct application to the obligation of the Agency with respect to conditions similar to those here involved, it is said:

> "Some contention is made that Management, by contract with the Rail Carrier, is subservient to the Carrier, as far as transportation facilities are involved; that is, to take such facilities as the Carrier desires to furnish. In any event, this would not foreclose the right of an employe, holding an established position under the agreement here in question and performing work covered thereby, from making a claim to the other contracting party i. e., the Management unless the agreement otherwise provided.
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> "While Management's argument is persuasive on the economics involved, and should a change be required to cover conditions as contended for by Management, then the change must appear in the contract."

Decisions E-1381 and E-1382, with Fred W. Messmore participating as neutral referee, involved factual situations and were based on claims similar to those discussed at length in Decision E-1380. Both Claims were sustained on the basis of that decision.

The Decision in E-1552, with referee John Thad Scott participating as neutral referee, seeking restoration of express work, formerly performed by Agency employes to the scope and operation of the Agreement, is less similar from a factual standpoint. Nevertheless, it can be safely stated, it recognizes and approves the principles announced and conclusions reached in the foregoing decisions.

At this point it should be noted the Agency contends that Decisions E-1173, E-1174 and E-1175 of Express Board of Adjustment No. 1, where James H. Wolfe participated as neutral referee, are directly contrary to the decisions heretofore mentioned and discussed. It is neither necessary nor required that such decisions be spelled out or commented on at length. It suffices to say that a close analysis of Decision E-1173, on which E-1174 and E-1175 are based, discloses that decision deals with a dissimilar factual situation and does not purport to determine the rights of the parties, where it is claimed a current working Agreement has been violated by reason of the Agency having transferred the work of handling its express over to a motor trucking concern under the existing conditions and circumstances. That it may be added is the only question involved or to be determined in this case.

After an extended examination of the record we have become convinced that under all the facts and circumstances disclosed by the record the work of handling express, transferred by the Agency to the Roush Transfer Company, which it cannot be denied was necessary to the performance of the functions of the Agency, was work which belonged to the Organization under the scope rule of the Agreement. Therefore, based on that construction of the record and what is said and held in the decisions of Express Board of Adjustment No. 1, to which we have heretofore referred at length and which we believe should be regarded as sound and controlling precedents, we are constrained to hold that such work was transferred to employes of the Roush Tansfer Company in violation of the Agreement and should be returned to the employes covered by its terms. This, we may add, is so notwithstanding it appears that by reason of its interpretation of its contractual obligations with the railroad under the Uniform Express Operations Agreement the Agency has twice contracted the work and is thus placed in the line of two fires from which it must find some means of extricating itself.

The conclusion just announced means that subsections (a) and (b) of the Claim must be sustained to the extent heretofore indicated. Subsection (c) of the Claim must also be sustained with loss, if any, suffered by affected employes, compensated from January 2, 1951, to August 1, 1951, the date of final declination of such claim on the property, also loss, if any, sustained by such employes from and after September 10, 1953. Reparation for the period August 1, 1951, to September 10, 1953, is denied because the record discloses unreasonable delay in progressing the Claim to this Division of the Board for which the Claimant is mutually responsible and must therefore assume liability.

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 Agency violated the Agreement.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of January, 1955.

DISSENT TO AWARD NO. 6861, DOCKET NO. CLX-6813

The majority in this case, by ignoring certain salient facts of record, has committed grievous error in its findings and conclusions. Despite voluminous evidence of record filed with the Board, and the oral argument made before the Referee, the majority has failed to grasp the relationship of Railway Express Agency to the Railroads generally. It will suffice to state that the majority mistakenly gained the impression that the Agency had the free and untrammeled right to conduct all aspects of the express business, including the inter-city transportation of express, whereas in fact it could not perform inter-city transportation except by consent of the railroads who would participate in such transportation under the terms of the Uniform Express Operations Agreement.

The Award as rendered is impossible of performance. To apply it in accordance with the Opinion and Findings, this Board would have had to have jurisdiction over the Railroad concerned in this proceeding, which it did not have. There is no court or other forum that could enforce such an Award. The findings and conclusions of the majority are not only contrary to the facts in this case but find no support in law or under the prior Awards of this Division of the National Railroad Adjustment Board. For these reasons, therefore, we dissent.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ E. T. Horsley
/s/ J. E. Kemp
/s/ C. P. Dugan