Award No. 7287
Docket No. CL-7118

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, 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 violated the Rules Agreement, effective May 1, 1942 as amended, particularly Rule 3-C-2(a), when it abolished position of Clerk, Symbol No. F-477, held by H. H. Creamer, located at Wise Avenue Yard, Baltimore, Md., Maryland Division, effective June 13, 1952.

(b) The position should be restored and that H. H. Creamer and all other employes adversely affected by the abolishment of this position should be restored to their former status and be reimbursed for any monetary loss sustained in accordance with Rule 4-A-1(a) and Rule 4-C-1.

(c) H. H. Creamer and all such other employes required to work the relief days of their former position be compensated in accordance with Rule 4-A-2(a).

(d) H. H. Creamer and all such other employes whose working days were reduced below the guarantee provided in Rule 4-A-3 be compensated for such lost time.

(e) H. H. Creamer and all such other employes who were required to work in between the regular tour of duty of their former position be compensated in accordance with Rule 4-A-6.

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 in which the Claimants in this case hold positions 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, as amended, and reprinted as of August 1, 1953, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the

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, First, subsection (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 Agreement between the parties to it. To grant the claims 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 the clerical position herein involved was properly abolished and that the claim of the Employes here before your Honorable Board is wholly without merit.

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

All data contained herein have been presented to the employes involved or to their duty authorized representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute results from Carrier's action in abolishing a 7 day position of Clerk No. F-477 effective June 13, 1952. The assigned hours were 3:00 P. M. to 11:00 P. M., at Wise Avenue Yard, Baltimore, Maryland and in lieu thereof establishing a position of Assistant Yardmaster.

Petitioner contends that Carrier's action was in violation of the applicable Agreement, particularly Rule 3-C-2(a), in that, the work was assigned to one outside the scope of the Clerks' Agreement. Also that at this location there were two other 7-day Clerk positions having assigned hours 7:00 A. M. to 3:00 P. M. and 11:00 P. M. to 7:00 A. M. respectively. And that the position of Clerk No. F-477 was first established at this location on April 1, 1913 and except for short intermittent periods, commencing in 1941, was maintained there for approximately 40 years. In July of 1947 this Clerk position was abolished and an Assistant Yardmaster position was established. However, on June 18, 1949 the Assistant Yardmaster position was abolished and Clerk position No. F-477 was re-established by Bulletin No. 9 dated June 22, 1949. A claim for the Yardmasters was then progressed to the Fourth Division of the National Railroad Adjustment Board which resulted in Award 779 of that Division sustaining the claim on the theory that a new position had been established, which Petitioner contends was not the fact and that the true situation was the re-establishment of Clerk position F-477. That here the Clerks' Agreement is controlling and that it may be that Carrier made agreements with two Organizations covering the same work and on this subject there is cited Awards 2253 and 5865. In the latter we said in part:

> "If a Carrier should sign Agreements with A to perform certain work and then contract with B for the performance of the same work, then it follows that A and B are each entitled to the things for which they individually contracted, or else pay in lieu thereof. * * *"

That under the Special Rule dealing with the disposition of work remaining when a position is abolished, 3-C-2 (a) the first step is specifically provided for in paragraph (1), reading:

> "To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed."

That in accordance therewith it was mandatory that the remaining work should have been assigned to the two other clerical positions covered by the Agreement, which were maintained at this location. That it is unnecessary to give any consideration to the other sections of Rule 3-C-2 (a), since they only become operative when and if Section (1) is not applicable, which it was. Cited in support of this position is Award 4045, same parties, in dealing with this same rule, also a like situation in Award 3877. Also Awards 3583, 3826, 3870, 3871, 4043, 4044, 4291, 5541, involving the same parties, same Agreement. Also cited Awards 5436, 6527, 6528 and 6529.

Respondent Carrier cites Fourth Division Award 779 to the effect that the work in question properly belonged to Yardmasters and that it is difficult to draw a distinct line between exclusive clerical work and Yardmaster's work and the scope rules of the two agreements concerned makes no effort to define exclusive work, citing Awards 615, 3494, 5112, and 6269. Also citing on the legal principle involved Section 3 First (m) of the Railway Labor Act, as amended, on the proposition of complying with Award 779 of the Fourth Division.

That Petitioner here seeks to set aside an Award of the Fourth Division of this Board and that Claimant suffered no monetary loss by reason of the Fourth Division Award as he continued to work in other positions at the same or higher rate of pay, relative to Section (c), (d) and (e) of the claim and for any period subsequent to June 24, 1954 we cannot consider a claim for Claimant Creamer as he was off on his own time and unavailable for any service and that claims for other employes adversely affected is not good, citing Awards thereon.

Apparently the main defense presented to these claims by Carrier is the doctrine or legal principle of res judicata to the effect, as applied here, that material questions which were in issue in a former proceeding and were there judicially determined are conclusively settled by the decision rendered and may not again be litigated between the same parties in any subsequent action. However, this doctrine cannot be said to apply in this case by reason of the fact that the Fourth Division of this Board did not have before it, when Award 779 was adopted, the Clerks' Agreement with Carrier which is the subject matter of the instant dispute. Also under the division of work of the respective divisions of this Board as set out in the Railway Labor Act, as amended, the Fourth Division cannot legally consider cases involving Clerks or Agreements involving Clerks. Therefore, that division of the Board cannot interfere with the rights of the organization presenting this claim. Likewise this division of the Board does not consider claims of yardmasters. We have before us in this controversy for interpretation the rules of the Clerks' Agreement with Carrier, as the same apply to the facts presented.

On the merits of this claim Claim (a) should be sustained in accordance with our previous awards on this Agreement. In the matter of Claim (b) it is not clear as to the amount, if any, of monetary loss sustained by Claimant, but this is a matter which can be ascertained and adjusted on the property, likewise the matter of any employe adversely affected by Carrier's action. On Claim (c) a like situation exists and it likewise is true of Claims (d) and (e).

In conclusion it is the opinion of the Board:

1. The legal principle or doctrine of res judicata does not apply as the subject matter in controversy in this dispute has not been previously decided between the parties hereto.

2. Likewise the question of the so-called third party notice is not properly presented here. This Division of the Board does not have jurisdiction over Yardmaster Agreements with Carriers even though the involved Carrier may have been a party to a dispute which resulted in a sustaining award in favor of Yardmasters (Award 779 of the Fourth Division of the Board) involving the same location on Carrier's property. And by the same legal measuring yardstick the Fourth Division of the Board cannot construe rules of Clerks' Agreement as the Railway Labor Act, as amended, sets out the manner in which disputes involving certain crafts or organizations are to be progressed to this Board and designates the Division of the Board which has jurisdiction to hear and decide by binding awards the matters in dispute. Clerks cases and interpretations of rules in Clerks' Agreements are within the jurisdictional province of the Third Division of the Board.

3. We are in agreement with the principle, as stated above, in Award 5865 relative to a Carrier making agreements with two organizations which may prove to conflict with one another.

4. The rule under consideration in this claim is a Special Rule appearing only in a limited number of agreements, and

5. In keeping with numerous awards of this Division the facts as presented here as applied to this Special Rule warrant a sustaining award.

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 Carrier violated the Agreement.

AWARD

Claim (a) sustained.

Claim (b) sustained in accordance with Opinion and Findings.

Claim (c) sustained in accordance with Opinion and Findings.

Claim (d) sustained in accordance with Opinion and Findings.

Claim (e) sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of March, 1956.

Serial No. 187

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 3 TO AWARD NO. 7287

DOCKET NO. CL-7118

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

NAME OF CARRIER: The Pennsylvania Railroad Company

Upon application of the representatives of the employes 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, as approved June 21, 1934, the following interpretation is made:

In accordance with many Awards of this Board, in some of which this Referee has participated, it has been held that straight time rates are paid for time not worked, where a violation of the Agreement has occurred. It appears that this fact has been expressly stated in the original Award and in the two Interpretations thereunder.

It appears to the Board after a careful review of the entire Docket, including correspondence between the parties and the Board, that Carrier has sufficiently complied with the Finding in the original Award and the two Interpretations thereunder, with one exception as stated below.

We consider the offer of payment made in letter dated February 10, 1960 by Carrier, to be in compliance with Award and Interpretations, and is fair to the employes involved and should be accepted by the Organization in full settlement under paragraph (d). On the payment as stated by the Carrier, we conclude that Carrier has fully complied with the Finding in Award 7287 and the two Interpretations previously rendered.

Referee LeRoy A. Rader who sat with the Division, as a member, when Award No. 7287 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 22nd day of November, 1960.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 7287
Docket No. CL-7118

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

NAME OF CARRIER: The Pennsylvania Railroad 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:

We have carefully noted the request for interpretation of award 7287 and conclude that in the sustaining of paragraphs (c), (d), and (e) relating to the special situations cited therein that the intent of the award was to pay the actual monetary loss sustained by employes coming within the purview thereof.

This monetary loss is to be computed from the records of the Carrier, and, in the case of paragraph (c), to be at straight time rates of pay in accordance with the holding in numerous awards of the Board, and not at the so-called penalty payment rate. This also applies to paragraph (e).

Referee LeRoy A. Rader, who sat with the Division as a member when Award 7287 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1958.

Serial No. 180

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 2 to Award No. 7287

Docket No. CL-7118

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

NAME OF CARRIER: The Pennsylvania Railroad Company.

Upon application of the representatives of the employes 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, as approved June 21, 1934, the following interpretation is made:

The Organization propounds the following questions:

(1) Did the Board intend that under Paragraph (c) of the claim that the two claimants were to be allowed monetary loss, that is, pay at pro-rata rate for days which were the relief days of their former positions that they were required to work during the period involved, which was June 13, 1952 to June 2, 1956?

(2) Did the Board intend that under Paragraph (d) of the claim that the two claimants were to be allowed monetary loss sustained by each, that is, pay for working days of their former positions which they did not work during the period of the claim?

(3) Did the Board intend that under Paragraph (e) of the claim that the two claimants were to be allowed monetary loss, that is, pay at pro-rata rate for all time they were required to work outside of the tour of duty of their former positions during the period of the claim?

The Carrier's position, in brief, is as follows: Award 7287 and Interpretation No. 1 are clear in confining the payment due the Claimants to the actual monetary loss sustained by them.

The original Award and Interpretation No. 1 deal, as a matter of course, with Special Rule 3-C-2 (a):

"When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

(1) To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed.

(2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yard Master, Foreman, or other supervisory employe, provided that less than 4 hours' work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of an Agent, Yard Master, Foreman, or other supervisory employe.

(3) Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements, or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, may be performed by employes of such other craft or class.

(4) Performance of work by employes other than those covered by this Agreement in accordance with paragraphs (2) and (3) of this rule (3-C-2) will not constitute a violation of any provision of this Agreement."

We agree with Carrier to the extent that we consider the original Award and Interpretation No. 1 to be clear and that the placing of a yardmaster in the position of a clerk was in violation of the current Agreement.

Therefore, we believe that the questions propounded by the Organization should be answered in the affirmative, claimants to be paid in accordance with straight time rate as provided in Interpretation No. 1.

Referee LeRoy A. Rader, who sat with the Division, as a member, when Award No. 7287 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1959.