Award No. 9639

Docket No. CL-9209

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Oliver Crowther, 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, except as amended, particularly the Scope of the Agreement by requiring Car Inspectors to prepare and compile records, which are maintained as a permanent office record in the C. T. Yards at Pitcairn, Pennsylvania, former Pittsburgh Division.

b. Clerks P. E. Betts, J. W. Fix, D. W. Cutshall, D. G. Peer, C. H. Wertz, and R. G. Stuchal should each be allowed eight hours pay a day for January 30, 1955, and all subsequent dates on which the violation occurs until corrected, as a penalty; Clerks J. P. Whalen and G. C. McCarrison should be allowed eight hours pay a day for February 3, 1955, and all subsequent dates on which the violation occurs until corrected, as a penalty. (Docket C-801).

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 held 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, except as amended, covering Clerical, Other Office, Station and Storehouse Employes *between the Carrier and this Brotherhood which the Carrier has filed with the* National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. *Various Rules thereof may be referred to herein from time to time without* quoting in full.

Mr. P. E. Betts and the seven other named Claimants in this case are employed as Clerks at Pitcairn Yard, Pitcairn, Pennsylvania, former Pittsburgh

(e) (Effective September 1, 1949) When employes paid on a tonnage or piece work basis are allowed compensation on the basis of time and one-half under the provisions of this rule (4-A-6), the compensation allowed will be calculated in accordance with the provisions of Rule 4-A-1 (g)."

Therefore, in the absence of any express or implied provisions of the applicable Agreement requiring the Carrier to compensate the Claimants' eight (8) hours each date as a penalty, it is respectfully submitted that should your Honorable Board decide that the Agreement has been violated in the instant case, the Claimants would only be entitled to a call as provided under Rule 4-A-6 of the Agreement, quoted above, and such compensation would only be payable on such dates that the lead Car Inspectors performed the work in question.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

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, which constitutes the applicable Agreement between the parties, 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 claim in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to the Agreemnt. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement in the instant case and that the Claimant is not entitled to the compensation which he claims.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same.

All data contained herein have been presented to the employes involved or to their duly authorized representatives. (Exhibits not reproduced)

OPINION OF BOARD: Before stating facts in this case we dispose of some contentions which we do not believe to be well taken.

1. Carrier in its ex parte presentation raised the matter of the jurisdiction of the Board to hear this claim. We are of the opinion that the question raised has no merit.

2. Carrier raised a procedural issue. In our opinion proper procedure has been followed.

3. Upon somewhat similar facts Organization presented to Carrier, in C 369 Case No. W. P. 498 a grievance requesting that certain work being performed by car inspectors be assigned to clerks. On November 1, 1948, Organization withdrew the case and closed its file "without prejudice to the principles that may be involved in this or similar cases". Carrier has mentioned that withdrawal in various stages of this precedure and claims that the withdrawal is an admission and establishes a precedent to be followed in this claim.

4. Upon somewhat similar facts Organization claimed September 29, 1950 that lead car inspectors were performing clerical work and demanded a monetary award. It is shown that there was a substantial monetary award made upon that claim but as Carrier states as a part of a "wash out" of a good many other and different claims. This settlement was also made "without precedent". Organization cites, at numerous places in the record, this settlement as constituting an admission of violation in the instant case.

We are cognizant of the fact that a contending party may choose not to prosecute a claim, without that lack of prosecution constituting an admission of lack of validity of the claim particularly where as in C 369 it was made "without prejudice".

It is likewise true that a party may pay a claim without conceding that it is just, particularly where it is a part and parcel of an overall settlement of different and other claims and most particularly where the settlement was made "without precedent".

If either withdrawals of claims or settlements of those by the disputing parties can not be made without establishing a binding precedent it would be necessary for both parties to refuse settlement and carry contentions as far as the law permits. That is not the spirit of the act under which Organization and Carrier must operate, neither is it the spirit of the rules jointly adopted.

We hold that in 3. above Carrier is not sound. We hold that in 4. above Organization is not sound. Neither the withdrawal of claim on the one hand nor the allowance of claim on the other hand will be further considered in this opinion despite the fact that both parties on the property and in ex parte presentations as well as oral arguments to the Board devoted space and time to these seemingly inconsistent positions. We may, however, allude to the two claims mentioned not as admissions by the parties, but rather as background of facts involving former and present practices.

The practices giving rise to the present complaint go back for a good many years. There is in the present claim and file a "Joint Statement of Agreed Upon Facts". We summarize and where necessary quote.

The Claimants are listed by Name, Symbol No., Position, Tour of Duty and Rest Days. "For a number of years, lead car inspector positions have been in existence on each trick in the eastbound and westbound classification yards at Pitcairn, Pa. These positions were last established in 1951." The advertised duties of these jobs are as follows:

"Car inspection and repairs in connection therewith, plus relay orders to and from Yard Master and assign work and direct movements of C. T. Yards.

The advertised duties involved the following:

1. Lining up relief Lead Car Inspector relieving him of the yard situation.

2. Keeping Yard Master advised as to specific tracks that were okayed for dispatchment, as well as the tracks on which cars may be worked by crews.

3. Preparing air brake clearance cards, Form MP-261.

4. Keeping Yard Master advised with respect to initial, number and location of shop cars to be set out.

5. Relaying information on trains due to arrive in order that inspection forces may be lined up to handle them.

6. Prepare MP-111 on each train worked during particular tour of duty.

The following information is stamped on the MP-111 which is completed by the lead car inspector:

Power Up, Engine Number, Coupled, Doubled, Cabon On, Delays, Train Made Up_____Cars on #_____ track at _____, Air test started _____ Completed _____, total cars _____ leakage _____, Departed _____.

This case has been presented and handled in accordance with the applicable Rules of the Rules Agreement."

Other facts are of course necessary to determine this claim. As to some of them there is no material disagreement although these are not included in the agreed upon statement.

There are and have been during the pertinent times clerks employed at the location mentioned. These clerks have made out and handled as a part of their duties "Train Sheets". Two copies of forms are a part of the record as "Ex. I"; we cannot make out from the copies the form numbers. One is dated "194__", the other "195__". The former has 29 columns with captions plus a space for remarks. The latter has 21 labeled columns plus a larger space for remarks. They are, however, calculated to record essentially the same information. Car inspectors, prior to the time of this dispute, used the form dated "194__", but in writing super imposed their own captions on some 14 columns, did not use 8 of the columns but did use column "Remarks" at the top of which bears the hand writing "Delays". The record contains a sample marked "Exhibit J". They also used the form dated "195__". The difference in the forms is relatively minor and not essential to our opinion. We mention the practice as background. The car inspectors used the car sheet forms, modified them as to captions so as to show inspection data.

Later, and encompassing the time here involved, Carrier had its lead car inspectors discontinue the use of train sheets as modified but had them use

"Form M. P. 111" upon which a rubber stamp was placed with blanks to be filled in. The form M. P. 111 with the rubber stamp calls for much, but not all, of the data required by the "modified train sheets" which the inspectors had been using.

Carrier at the local level and in oral presentation contends that the clerks have never used form M. P. 111. That is probably correct but it is not determinative of the issue here. Change of forms used does not necessarily change the work actually performed.

In our opinion it makes little, if any difference, if inspectors use a printed form, traditionally used by clerks and modify it to show the performance of their own duties or on the other hand use a different form with a rubber stamp calling for information somewhat similar. We cannot base our opinion upon the use of a form as modified or upon a different form adopted to show in the main the same facts. We have devoted time and space to this phase only because Carrier and Organization have so done.

Our decision must rest not upon forms used but rather upon work performed in relation to the Scope Rules.

There is no question in our minds that lead car inspectors did perform some work in connection with their duties which might be termed clerical, regardless of forms used in that work. That is inherent in their positions. It is equally true that the Carrier may not under the guise of creating a different position or adding responsibilities to a different class or craft take away work belonging to a class of employes under the agreed upon rules.

We recognize, without citation, the numerous awards that supervisory, semi-supervisory and perhaps some other employes must perforce do some work which might be defined as clerical without violating the rules. The four hour rule found in many of the agreements defining clerks, as here, must as a practical matter mean that to be classified as a clerk one must spend at least four hours per day in performing the duties determined in the rules. The converse is not necessarily true, i.e. in some situations and under some rules it might well be held that one performing less than four hours of clerical work was not a clerk under the definition but was, however, performing clerical work to which the clerks were entitled.

Having eliminated some of the contentions we view the evidence which we consider pertinent.

Claimant asserts that lead car inspectors spend all of their time in the office doing no inspection of cars, but merely doing clerical work. Carrier asserts that lead car inspectors do actually inspect cars and supervise car inspectors and that clerical work is included in a supervisory position. There is no testimony proving either assertion. Claimant has not on this point sustained the burden of proof.

Carrier asserts that lead car inspectors spent not more than fifteen minutes per shift or a total of forty-five minutes per day for the three shifts making out the reports complained of. Organization by its data in the record which we believed more nearly depicts the true factual situation shows that at least ninety minutes of time was consumed in that work on each shift. The time being less than four hours per shift does not necessarily mean that the work is not clerical. An employer might conceivably split clerical work among a number

of employes so that none of them was doing four hours of clerical work but the total of clerical work on one shift might well exceed the four hour measure.

In deciding the present claim and without any intention of giving forth obiterdictum to be used in other claims we are of the opinion that the matter of hours and minutes is not the sole measure. It may well be that the hours spent on certain work is indicative of the class or craft to which that work should be assigned. For example we are of the opinion that if a supervisory employe is regularly called upon to perform four or more hours of *purely* clerical work he should be either a clerk or a clerk should be assigned to do the work.

That is not, however, the case here. Lead car inspectors have the duties above stated. Except for assertions and counter assertions they spend in connection with their work approximately ninety minutes out of their eight hours recording data and filling out forms. It is apparent that car inspectors and lead car inspectors must note and assemble facts and transmit them; some kind of form must be used. As stated above, we are not here concerned with the forms used but rather what was the work.

We are of the opinion that regardless of the forms used the lead car inspectors made reports which they should make incidental to and as a record of the performance of their duties.

The duties above outlined for lead car inspectors could not have been performed without their making some kind of record of what they did, what they found and what was done after their findings.

In view of the lack of evidence presented upon the property we are of the opinion that employes have not sustained their burden of proof.

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 there was no violation.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 17th day of November, 1960.