Award No. 9647

Docket No. CL-9445

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Oliver Crowther, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated the Agreement when, at North Avenue Transfer, Atlanta, Georgia, it required employes holding seniority in the Freight Handlers' seniority district to perform work belonging to employes assigned to positions in the Clerks' seniority district, and

(b) Mr. A. F. Hatton, senior Check Clerk at North Avenue Transfer, his substitutes or successors, shall be additionally compensated a minimum call of two (2) hours at proper rate of time and one-half rate, retroactive 60 days before date claim was filed (October 2, 1955) for each day the violation stated in Part (a) is allowed to continue.

EMPLOYES' STATEMENT OF FACTS: Less-than-carload freight is received at Carrier's North Avenue Transfer in railroad cars where it is unloaded and separated for delivery to over-the-highway common carriers by truck, patrons, and Express Company trucks.

Formerly, Freight Handlers (Laborers) assigned to Group 5 positions unloaded the freight from railroad cars and Check Clerks (Group 1) checked the freight against the waybills after it was placed on the floor of the warehouse or as it was being transferred directly to trucks.

Sometime before claim was filed, the Carrier began requiring the Check Clerks to enter the railroad cars and check the freight as it was being unloaded by the Freight Handlers. The Freight Handlers, at the same time, began to be required to obtain waybills for freight being delivered to trucks, check the freight against the description shown on the waybills, and to notify a Clerk of any exceptions or discrepancies. The Clerk was and is required to note such exceptions against the waybills without having seen the freight or having had opportunity to verify the accuracy of the check.

Claim was filed under date of October 2, 1955, and appealed to the highest officer of the Carrier designated to receive and consider such appeals. Conference was held on October 29, 1956, the Carrier declining the claim.

Rule of the clerical agreement is not reserved exclusively to employes in each group. It said:

> "Since all work within the scope of the agreement is performed by the various classes of employes classified in Rule 1 and defined in Rule 2, it is clear that the agreement itself contemplates that a clerical worker doing 4 hours of work defined in Rule 2 (a) shall perform 4 hours of other work within the scope of the agreement. Under such a situation, the purpose of defining clerical workers in Rule 2 (a) is to identify the higher skilled employes for pay purposes and to preserve to that group the higher rated positions. It does not have the effect of giving them clerical work exclusively or of limiting them to the performance of that work only."

Carrier in the instant case has shown that Group 5 employes at North Avenue transfer are not performing work belonging to Group 1 clerical workers, and that the claim for additional or penalty compensation is not supported by the effective agreement or by decisions of the Third Division. As a matter of fact, the claim for a two-hour call payment is in itself an admission by the employes that the work performed by the Group 5 warehouse porters is such that it does not meet the requirements of Rule 2 (a). In addition to Award 7167, the Third Division has consistently held in other decisions that the four-hour rule governs as between two classes or groups of employes covered by the scope of the clerical agreement. (Awards 831, 2121, 2158, 6323). Carrier has shown not only that there has been no violation of Rule 2 (a), but also that there was no change in the duties of the two Group 5 warehouse porters when the point of checking inbound freight at North Avenue was changed in May 1955, and that these two Group 5 employes are not performing any clerical work belonging to Group 1 employes.

For the reasons stated, this claim is clearly not supported by the rules of the effective agreement and should be denied in its entirety. Carrier respectfully requests that the Board so decide.

All pertinent facts and data used by the carrier in this case have been made known to the employe representatives.

(Exhibits not reproduced)

OPINION OF BOARD: Under the rules adopted between Carrier and Employes there are five enumerated groups of the craft involved and five "Seniority Districts" are set up. Group 1 Clerks are:

(a) Clerical workers, and

(b) Machine operators, all as herein after defined in Rule 2.

Group 5 Laborers are:

> Persons employed in and around offices, stations, warehouses, etc. except clerks and certain other excepted duties, doing manual labor.

Rule 2 referred to shows no similarity between the duties of Group 1 Clerks and Group 5 Laborers.

Rule 5 sets forth "Seniority Districts". We do not quote but do observe that there is no similarity between "Group 1 Clerks — Seniority Districts" and "Group 5 Laborers — Seniority Districts".

After careful review of the record it appears that this controversy will be resolved by answers to three questions:

1. Did seniority district No. 5 laborers holding seniority rights in the Freight Handlers' seniority district at North Atlanta Avenue, Atlanta, Georgia perform work belonging to employes assigned to Clerks' seniority district No. 1?

In considering that question the Board has discarded from its consideration Organization's Exhibits "O" and "p" for the reason that neither of them was presented or even in existence until after the last handling of the claim on the property.

With those two exhibits eliminated the Board is of the opinion that there is still sufficient evidence requiring it to hold that Class 5 employes did perform work belonging to Class 1 employes. We are satisfied as a matter of fact that Class 5 employes did verify and check freight in the warehouse and also freight as it was being loaded for other Carriers. The verifying and checking of shipments are among the duties of Clerks' Seniority District No. 1. All statements of fact, evidence and citations have been carefully considered but for purposes of brevity are not here repeated.

2. Having determined question 1 in the affirmative, the next question is: Was the Agreement between Carrier and Organization dated October 1, 1938, as subsequently revised and amended, violated by Carrier?

Our answer is yes.

Rule 5 (pages 11-15 inclusive) of the above described Agreement sets up 5 distinct seniority districts. The rule does not, of course and obviously could not, deal with every conceivable situation. Its intent, however, is clear—to set up seniority districts and, together with other rules to protect those employed in the various seniority districts.

Numerous citations to previous Awards have been given the Board. It is unnecessary to repeat or quote from all of them. We quote from but one as illustrative of our opinion on the matter of Seniority Districts.

Award No. 4987, Referee Boyd:

"It has long been settled that seniority is a valuable property right. In order for seniority to be of value, it must be that the parties intended employes in a seniority district to have prior right to perform all work falling within the classifications covered by a seniority district. Any other construction of seniority provisions of a contract would admit of the possibility that work assigned under the contract of one seniority district could be transferred to others so that seniority as a prior right to work would be nullified. This Division has held in a number of awards that work of one seniority district may not be assigned to employes in another."

3. In the light of our opinions upon the first two questions, we must address ourselves to a third: Is a claim for additional compensation justified — if so what is the measure?

It is claimed that any monetary award would, in this case, be a penalty and that since there is no penalty agreement we are without authority to make such an award. That theory of course presupposes that the record does not show loss of time or pay.

We are of the opinion that if work belonging to Class 1 seniority district employes was done by Class 5 seniority district employes, as here found, the work of the Class 1 employes was lessened to the extent that it would have required additional time of Class 1 employes to perform that work. It may well be that a monetary loss accrued because of the work having been performed by an unauthorized seniority group.

In deciding what if any monetary loss resulted from the violation we find little assistance in the record. There is not shown the number of days upon which there was an alleged violation — the number of hours or minutes Class 5 employes did Class 1 employes work, but from the evidence there was some, how much we cannot determine.

It has been shown, however, that starting some time before October 2, 1955 Carrier inaugurated the practice complained of as its regular method of operation. It being the regular practice of Carrier to use Class 5 employes to check freight on the warehouse floor and out to other Carriers there was of course a violation on each day during which that work was done by employes of that class.

Organization as seen by "Statement of Claim" contends for two hours per day (minimum call) at time and one-half rate retroactive to 60 days before date of claim. Since Organization did not make its position known to Carrier before October 2, 1955 or complain to Carrier asking it to cease the practice prior to that time we are of the opinion that retroactive compensation should not be allowed for any period prior to October 2, 1955. In reaching that opinion we have also considered the whole picture depicted by the record.

As to using the two hour minimum call as a measure we are again faced with difficulties because of lack of evidence. There is no showing in the record that to perform the work a "call" would be necessary or even advisable. We can not assume that it would be. It is equally probable that the additional checking could have been done by Class 1 employes working some overtime. Organization had the burden of sustaining the claim based upon "call" time. That has not been done to our satisfaction. We therefore reject "call" time as a measure.

If there is to be a monetary award we are of the opinion that it should be measured by the overtime provisions. Here again we are met with the problem of evidence. Did Class 1 employees lose overtime which they would otherwise have had if Class 5 employees had not performed their work? We are of the opinion that the additional checking would have increased the work load of Class 1 employees had they done it and it is reasonably probable that some additional time would have been necessary.

We hesitate to remand a matter back to the parties but having found a violation but no basis for calculating a monetary award we have no other choice. The parties had and presumably still have access to records from which may be shown:

1. The days upon which seniority district No. 5 employees performed duties which we have held belonged to seniority district No. 1 employees since October 2, 1955.

2. The amount of hours and minutes overtime, if any, that would have accrued to seniority district No. 1 employees had they performed those duties.

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 Carriers 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 Agreement has been violated.

AWARD

Claim sustained as to violation. Monetary claim remanded to be determined upon the property in accordance with this Opinion.

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.

LABOR MEMBERS' SUPPORTING OPINION TO AWARD 9647, DOCKET CL-9445

The Award correctly holds that Carrier violated the Agreement when Group 5 laborers were required to perform Group 1 work of checking freight.

However, the Award is in error, first, in rejecting the sixty (60) day retroactive feature of the claim in view of Section 3, Article V, August 21, 1954 Agreement and second, in holding that the reparations are confined to the "amount of hours and minutes overtime, if any, that would have accrued to Seniority District No. 1 employes had they performed those duties."

First. The rejection of the sixty (60) day retroactive feature of the claim is in direct conflict with Section 3, Article V, August 21, 1954 Agreement, reading:

> "A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. **However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof.** * * *." (Emphasis supplied)

Second. The penalty for violations of an agreement is not based upon wage loss where work is transferred from one seniority district to another, or out from under the scope of the agreement, as the instant award appears to infer. The well established principles governing such cases were summed up by Referee Wenke in Award 6063, he said:

> "Carrier contends that the claim should be disallowed because none of the claimants lost any time as a result of this Company doing the work. This claim is primarily to enforce the scope of the agreement and not for work performed. **If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the Carrier is concerned for if the agreement is violated, it must pay the penalty therefor in any event.** (Emphasis added)

Also, see my "Answer to Carrier Members' Reply to Labor Member's Answer to Carrier Members' Dissent to Award No. 9546, Docket No. CL-9218.

/s/ J. B. Haines

J. B. Haines
Labor Member