Award No. 10866

Docket No. CL-10113

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Harold Kramer, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

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

1. Carrier violated the Clerks' Rules Agreement when it abolished a regularly assigned position covered thereby and assigned some of the work to an employe of another craft and class outside the scope and application of that Agreement.

2. Carrier shall now be required to return the chauffeur work which is presently being performed by Locomotive Department Chauffeur L. Norenberg, which was a part of Store Department Chauffeur Position #422 prior to September 17, 1956, to Store Department employes in Seniority District #118 at Milwaukee Shops, Milwaukee, Wisconsin.

3. Carrier shall compensate Employe H. Sum for an additional eight (8) hours per day at the time and one-half rate of chauffeur position for each day subsequent to September 17, 1956 that Locomotive Department Employe L. Norenberg performs chauffeur work which was a part of Store Department Position #422.

EMPLOYES' STATEMENT OF FACTS: Prior to September 17, 1956 Carrier had in effect a regularly established chauffeur position in the Store Department at Milwaukee identified as Position #422 with assigned hours of 3:00 P. M. to 11:30 P. M. Monday through Friday. The regular occupant of Position #422 was Employe E. Turnbull whose seniority date is January 30, 1929.

The regularly assigned duties of Chauffeur Position #422 consisted of the following work:

Hauling mail, baggage and express shipments to and from the Milwaukee Shops, the depot and the express office.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute arises from the fact that on October 12, 1956 the Carrier abolished the Position #422, second shift, Chauffeur, in the Store Department at Milwaukee, Wisconsin and assigned those duties of Position #422 involving chauffeuring to an Employe of another craft and class, namely L. Norenberg in the Locomotive Department.

The position of the Organization basically is expressed in their submission on page 5, to wit.

> "When the Carrier chose to assign the services required in transporting dispatchers, helpers, diesel repair crews and injury cases for either convenience or necessity to Store Department Chauffeur Position #422, it in effect placed that work under the scope and application of the Clerks' Rules Agreement; and the arbitrary removal of that work by abolishment of Position #422 and the assignment of the work to employes outside the Clerks' Agreement is in violation of the Agreement."

The record clearly indicates that:

(1) Position #422 was in existence from October 15, 1953 until October 12, 1956.

(2) That Position #422 did in fact include duties now in dispute and transferred to another craft.

(3) That Employe Hickey was assigned to Position #434 on February 21, 1950 and that Position #434 was later (date not known) changed to Position #422. Employe Hickey occupied Position #434 up to the time that Employe Turnbull was assigned on November 1, 1953.

(4) There is further evidence as contained in Employes' Exhibit H taken from a letter written by Mr. C. P. Downing on October 17, 1952, Case 526 that "A second shift utility chauffeur position, Position 434, in the Store Department, with assigned hours 4 P. M. to 12 Midnight, was first established on September 20th, 1948."

Further from the same letter as above:

> "While the second shift utility chauffeur position mentioned above was first established September 20th, 1948 for the purpose of assisting with the handling of Company mail between the Shops and Depot, handling scrap and assisting with the handling of rubbish between various locations and also for the handling of material, there were some occasions, when Shop Craft employes were not available, when the occupant of this position was used to transport Locomotive Department employes to various points in the Terminal for the purpose of making Locomotive repairs, also to transport engine crews or injured employes. However, the work of transporting Locomotive Department employes to various points in the Terminal for the purpose of making Locomotive repairs and transporting engine crews had been work performed by Shop Craft employes for many years and of course,

the occasional use of the Store Department chauffeur after September 20th, 1948 could not be used as a means to transfer this work from Shop Craft employes to Store Department employes."

Under the Scope Rule 1, Section (e) effective September 1, 1949 we find as follows:

"(e) The inclusion of: "Crane operators, chauffeurs, truck drivers, tractor operators, lift truck operators and operators of other automotive equipment and their helpers" in Group 2 of Rule 1 (a) is intended to retain for these employes the right to perform the work with these machines that has heretofore been performed by these employes, and does not establish the right to perform such work now covered by other agreements."

Also taken from Scope Rule 1 of the Agreement.

"Positions within the scope of this agreement belong to the employes covered thereby and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 57."

It is a well established rule of contract construction that the readoption of a rule generally has the effect of re-adopting the mutual interpretation placed upon it by the parties themselves. It evidences an intent not to change the existing interpretation. Award 7322, 4791.

Rule 1 (e) of the Agreement dated September 1, 1949 has been taken in its entirety from the previous Agreement of January 16, 1946.

Under similar circumstances as presented in this case many awards could be cited to require denial of this claim. Employes Exhibit H, does in fact demonstrate that clerks have performed certain chauffeur duties prior to the Agreement of September 1, 1949. It is not clear that clerks performed these claimed chauffeur duties prior to January 1, 1946.

We are remanding this matter back to the parties on this property to ascertain, through a joint check of the records, whether in fact prior to January 16, 1946 the clerks performed duties claimed on page 3 of the record, to wit.

"the work of transporting dispatchers, helpers, diesel repair crews and injury cases."

on the second shift at Milwaukee, Wisconsin.

Further, that if the joint check does in fact demonstrate that the above duties were performed on the second shift, by the clerks, that such duties be returned to the clerks.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

AWARD

Claim remanded under conditions outlined above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of October 1962.

LABOR MEMBER'S DISSENT TO AWARD 10866 (Docket CL-10113)

The Referee committed a series of errors in rendering this award.

In his proposed award released September 14, 1962 the referee in his "Findings" held "That this is a violation of the Agreement"; and his "Award" reads: "Claim (1) Sustained. Claim (2) Sustained. Claim (3) **Not** sustained". (Emphasis ours.)

The Referee's first error was committed when he declined to sustain compensation for the violative action of the Carrier (Claim (3)).

When the Award was called up for adoption, the Labor Member requested and the Referee consented to a **reconsideration of Claim (3)** for the purpose of assessing a penalty.

The Referee's second error was twofold: (1) he did not, as he had agreed to do, reconsider his decision of Claim (3); and (2) he did, in lieu thereof, permit the Carrier Member to completely **re-argue the entire case.**

The third error was committed when, during his **reconsideration** of Claim (3), the Referee permitted the Carrier Member to introduce into the dispute a completely new issue which is not a matter of record and which was not a subject discussed or handled between the parties on the property, which action is directly contrary to National Railroad Adjustment Board's Circular No. 1, issued October 10, 1934. Thus, this third error resulted in the Referee's inclusion of the following statement in his revised Award:

> "Rule 1 (e) of the Agreement dated September 1, 1949 has been taken in its entirety from the previous Agreement of January 16, 1946.
>
> Under similar circumstances as presented in this case many awards could be cited to require denial of this claim. Employes Exhibit H, does in fact demonstrate that clerks have performed certain chauffeur duties prior to the Agreement of September 1, 1949. It is not clear that clerks performed these claimed chauffeur duties prior to January 1, 1946.
>
> We are remanding this matter back to the parties on this property to ascertain, through a joint check of the records, whether

in fact prior to January 16, 1946 the clerks performed duties claimed on page 3 of the record, to wit:

> 'the work of transporting dispatchers, helpers, diesel repair crews and injury cases.'
>
> "on the second shift at Milwaukee, Wisconsin."

Error number four occurred when the Referee completely revised his original decision, notwithstanding the fact that Claim (3) was the only subject to be reconsidered, and changed his Award in its entirety to: "Claim remanded under conditions outlined above" the conditions, of course, being that stated with respect to the previous Agreement of January 16, 1946 which the Carrier Member had been permitted to inject as a new issue in the dispute.

The Railway Labor Act, Section 3, First (1), reads in part:

> "* * * the National Mediation Board * * * shall * * * name the referee to sit with the division as a member thereof and make **an award.**" (Emphasis ours.)

It is evident therefrom that a referee is limited to making one award on a dispute, for to permit more than one award to be made on a dispute could continue that dispute into infinity and it is doubtful that such was the intent of Congress.

The fifth and final error was made by the Referee at the Adoption Session on October 19 when, in an effort to assist in correcting all these errors, the Labor Member requested and the Referee declined to refrain from voting on this Award which, if the Referee had agreed, would have prohibited this travesty of justice to one which would entail a "due process of law" by permitting this dispute to pass to another referee for an Award.

This Award, which is based on an issue never handled on the property and was injected into the dispute by Carrier Member of the Board, abetted by the Referee, is erroneous in its entirety.

For the above reasons, I dissent.

C. E. Kief

C. E. Kief, Labor Member
November 15, 1962

CARRIER MEMBERS' COMMENTS ON AWARD 10866 AND LABOR MEMBER'S DISSENT THERETO

The dissenting Labor Member alleges:

> ". . . during his **reconsideration** of Claim (3) the Referee permitted the Carrier Member to introduce into the dispute a completely new issue which is not a matter of record and which was not a subject discussed or handled between the parties on the property, . . ."

But let us look at the record. Carrier's Statement of Facts asserts, in material part (pages 23 and 24 of the record):

> ". . . throughout all the years Shop Craft Employes have performed all of the chauffeuring requirements of the Locomotive

Department during second shift hours at Milwaukee, Wisconsin exclusively and this arrangement prevailed as of January 1, 1946 when there was placed in Group 2 of the Scope Rule of the Clerks' Agreement the following:

> 'Crane operators, chauffeurs, truck drivers, tractor operators, lift truck operators and operators of other automotive equipment and their helpers'

"and at which time the parties entered into a 'side agreement' identified as 'Memorandum No. 1', copy of which is attached as Carrier's Exhibit 'N', . . . When the Schedule Agreement was revised as of September 1, 1949 this 'side agreement' (Memorandum No. 1) was included in the Agreement as Rule 1 (e), first paragraph."

Here we have Carrier asserting in the clearest possible terms the precise defense which **Award 10866** properly holds to be controlling. Carrier also asserts that this data was submitted to the employes on the property, and this is not denied. This is the defense asserted by the Carrier Member in the first panel argument (pages 4, 8 and 9 of Carrier Member's Memorandum), as well as at the so-called "reconsideration".

Award 10866 places on the word "chauffeurs" in the Scope Rule the same meaning that the parties attributed thereto by the mutual agreement (Carrier's Exhibit "N") which was adopted at the time the word "chauffeurs" was originally added to the Scope Rule and which was readopted without change when the Agreement was revised. Under the facts of this case, no other interpretation would have been proper (**Award 4791** — Robertson).

The Congress of the United States has conferred upon this Board the functions of a Labor Court and the responsibility of making a correct decision in each case adjudicated. The Referee is to be commended for his integrity in attempting to make a correct decision rather than adamantly clinging to his first proposal after learning that it was erroneous. In following that procedure, revising his erroneous proposal and eliminating what he knew to be wrong, he was following the precedents established by the most successful and respected Referees who have sat as members of this Board in the past.

The claim should have been denied instead of remanded, because the employes clearly failed to prove the essential elements of their claim (**Award 9222** — Hornbeck); but in other respects **Award 10866** is clearly correct.

/s/ G. L. Naylor
G. L. Naylor

/s/ O. B. Sayers
O. B. Sayers

/s/ R. E. Black
R. E. Black

/s/ R. A. DeRossett
R. A. DeRossett

/s/ W. F. Euker
W. F. Euker