Award No. 12219
Docket No. CL-11748

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, 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 Rule 3-C-2, when it abolished position of Chauffeurs, no symbol numbers, at Cincinnati, Ohio, Buckeye Region, effective August 7, 1956.

(b) The positions should be restored in order to terminate this claim and that Ford Mills, Earl Cull, A. Range, and all other employes affected by the abolishment of these positions should be restored to their former status (including vacations) and be compensated for any monetary loss sustained under Rule 4-A-1 and Rule 4-C-1; be compensated in accordance with Rule 4-A-2 (a) and (b) for work performed on Holidays, or for Holiday pay lost, or on the rest days of their former positions; be compensated in accordance with Rule 4-A-3 if their working days were reduced below the guarantee provided in this rule; be compensated in accordance with Rule 4-A-6 for all work performed in between the tour of duty of their former position; be reimbursed for all expenses sustained in accordance with Rule 4-G-1 (b); that the total monetary loss sustained, including expenses, under this claim be ascertained jointly by the parties at time of settlement (Award 7287). (Docket 312)

EMPLOYES' STATEMENT OF FACTS: The Claimants in this case, Ford Mills, Earl Cull and A. Range, were the incumbents of regular positions of Chauffer at Cincinnati, Ohio, Buckeye Region. They each have seniority dates on the seniority roster of the Buckeye Region in Group 2.

By Bulletin dated March 7, 1956, four positions of Chauffeur were established at Cincinnati, Ohio, one each on first, second and third trick, and one relief position, with bulletined primary duties as follows:

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 interpretations 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 thereto. To grant the claim of the Employes 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 this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown conclusively that no violation of the Clerks' Rules Agreement resulted from its actions in abolishing the three positions of Chauffeur at Cincinnati, Ohio, on August 7, 1956. It follows, therefore, that the Employes' claim in this case is completely without merit and your Honorable Board is respectfully requested to deny it in its entirety.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employes, 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 representative.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 7, 1956, Carrier established three regular and one relief Chauffeur positions at Cincinnati, Ohio. The Bulletin which noticed the positions described the primary duties as follows:

> "Driving Company station wagon in transporting Company employes to and from various points in Cincinnati District."

The four employes assigned to the positions transported Carrier's employes to and from their reporting and "tie-up" points, when deadheading, to and from eating places during lunch periods, "late" and "short" calls, and other regular and emergency requirements.

Prior to the establishment of the four positions, the Carrier used taxicabs to transport the employes to and from various points in the District.

Effective August 7, 1956 Carrier abolished the second and third trick positions as well as the relief position, leaving only one employe as chauffeur on the first trick. Thereafter, Carrier again used taxicabs to transport employes to and from various points in the Cincinnati District.

Petitioner argues that once the transporting of employes by taxicabs had been withdrawn and chauffeur positions assigned to Claimants, that Carrier may not thereafter abolish their positions and again resort to the use of taxicabs. This, they contend, is in violation of Rule 3-C-2.

The record shows, without contradiction, that taxicabs were used to transport employes prior to the date when the positions were established, that they

were established to avoid traffic delay at a time when traffic flow was abnormal; that taxicabs were used on occasions when the positions still existed; that a study showed that actual transportation of employes took less than four hours per tour of duty.

Rule 3-C-2 does not prohibit the abolishment of positions which, in the opinion of the Carrier, are no longer needed. It concerns itself only with the manner in which the work of the abolished position is assigned.

The Scope Rule does not classify or describe the work. It only lists the positions covered by the Agreement. It is a well established principle of this Board that under these circumstances Petitioner must establish by a preponderance of evidence that the work has been traditionally, historically and customarily performed by employes covered by the Agreement. This, the Petitioner has failed to do. It has not met the requisite burden of proof.

On the contrary, the record shows that for some time prior to March 7, 1956, in the interim between that date and August 7, 1956, when the positions were abolished, and since that date Carrier has used taxicabs to transport employes in the Cincinnati District. Since this work has not been traditionally, historically and customarily performed exclusively by employes covered by the Agreement, the assignment of such work in accordance with the provisions of Rule 3-C-2, after the positions were abolished, does not apply.

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

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1964.

LABOR MEMBER'S DISSENT TO AWARD 12219 DOCKET CL-11748

The decision evidenced by Award 12219 is but another prime example of a Referee invoking and substituting a "Board made Rule" for the clear and unambiguous terms of a rule arrived at by the parties. The negotiated rule contains no test whatsoever of "exclusivity", but on the contrary, is all em-

bracing as to work previously assigned to a position which is abolished. The rule involved reads, in part pertinent hereto, that:

> "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."

Note well the clearness of the rule. No test of exclusivity nor custom, tradition or historical practice is included therein. Yet the Referee concludes that "Since this work has not been traditionally, historically and customarily performed exclusively by employes covered by the Agreement, the assignment of such work in accordance with the provisions of Rule 3-C-2, after the positions were abolished, does not apply."

The invocation and application of such a test is doubly repugnant here. Ordinarily, if a rule be ambiguous and the Board renders an interpretation which one of the parties cannot live with the proper procedure, and one that should be followed, is to serve a notice under the terms of the Railway Labor Act setting forth the change desired. Here, however, the rule involved is so clear and unambiguous it would be sheer folly to attempt to clarify it. In fact, it is so clear and unambiguous that this Board, including the Referee, has no business even attempting to construe it in any manner other than set forth in its clear language. Unless the reasons be questionable there is no reason whatsoever for applying general "tests" of this Board to render a special rule meaningless and useless and leaving it of no use whatsoever to one of the parties who negotiated the rule. Tests may be devised which no one can meet and language of a rule cannot overcome, however, I question both the propriety and legality of any such test which ignores and emasculates clear language of a negotiated rule designed and worded to reserve work to employes in whose behalf the Agreement was made.

The rule here involved is so clear and unambiguous it is not subject to construction and even so cannot, by its terms, be constructed so as to reach the result here arrived at. The facts set out in the Opinion are quite ample to show that Rule 3-C-2 was violated. The Award is in error and only further evidences the correctness of my warning, as set out in my Dissent to Award 11963, as to the effect such erroneous Awards will have.

In Award 10888, Referee Eugene Russell, correctly held that:

> "* * * We are not authorized to read into a Rule, that which is not contained therein, or by an award add to or detract from the clear and unambiguous provisions thereof. * * *"

Yet in this case the Referee would read into the rules that Rule 3-C-2 covers only work "traditionally, historically and customarily performed exclusively by employes covered by the Agreement." He had no such authority.

This Award cannot be accepted as precedent and for the above reasons, and those in my dissent to Award 11963, I most vigorously dissent.

D. E. Watkins

3-17-64

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 12219, DOCKET CL-11748

(Referee Dolnick)

The Labor Member would have the reader believe that the "stream could rise higher than its source". He would assign to Rule 3-C-2, an attribute which is reserved to the Scope Rule. In fact, he attempts to persuade the uninitiated that Rule 3-C-2 supersedes the Scope Rule and "is a reservation of work rule" rather than an "assignment of work" rule. There have been over fifty decisions from this Board and Special Boards, rendered by twenty or more different Referees, refuting the argument now advanced by the Labor Member in his dissent. Those awards hold that the Scope Rule in question is a general Scope Rule, and custom, practice and tradition on the system must be examined to determine whether the work in question belongs exclusively to the Clerks. It is only when the Petitioner makes out his case under the Scope Rule that we consider the application of Rule 3-C-2. Contrary to the Labor Member's argument here and in numerous cases before this Board, Rule 3-C-2 does not assign any work to the Petitioner's craft. It merely details the method for distributing that work which the Scope Rule contemplates they have the exclusive right to perform.

The Labor Member argues there is no test of exclusivity to be found under Rule 3-C-2. Again, the Dissentor ignores the facts. He disregards the Scope Rule and the test applied by this Board in hundreds of cases — many from this same Carrier — to determine whether work belongs to a claiming craft. The mere fact that certain work may be assigned to a clerical employe does not — contrary to Dissentor's belief — assign that work exclusively or forever to the Clerks. The test of exclusivity is applicable even in those cases where a position is abolished and Rule 3-C-2 would apply. Rule 3-C-2 is subordinate to the Scope Rule. The Dissentor tries to persuade us that the reverse is true.

If the Clerks' Organization is desirous of converting Rule 3-C-2 into a reservation of work rule, the only proper way to obtain this change is to follow the procedures outlined under Section 6 of the Railway Labor Act. This Board is not the proper forum for making a change in the Agreement.

W. F. Euker
R. E. Black
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