Award No. 15140
Docket No. CL-13703

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

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

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5214) that:

(1) Carrier violated the rules of the Clerks' Agreement effective September 1, 1952, and as supplemented effective March 23, 1959, (designated and referred to as Decision CL-46) when effective at close of work November 17, 1960, it abolished position No. 7, Storehelper, at Charleston (Boston) Engine House, third trick, hours — 11 P. M. to 7 A. M., rate $18.896 per day, Saturday through Wednesday inclusive, rest days — Thursday and Friday; and by unilateral action taken concurrently therewith, permitted and/or required the duties and work of said position and its Relief thereof, to be performed by other employes not coming within the Scope of the controlling Rules Agreement and as supplemented between the Parties, who had no prior right to the performance of the duties and work of said abolished position.

(2) Carrier shall now be required to compensate Storehelper James J. O'Leary, one (1) additional day's pay at the rate of $18.896 per day, commencing November 18, 1960 (plus any wage increase which may subsequently be applied thereto), together with two (2) additional days' pay at the rate of $18.896 per day to the Relief Storehhelper on the sixth and seventh day (to be designated subsequently by the Organization) and continuing each day thereafter until the Agreement is complied with.

EMPLOYES' STATEMENT OF FACTS: Under date of November 9, 1960, Local Storekeeper W. J. Britton posted notice abolishing position of Storehelper at Charlestown (Boston), Mass., Engine House, known as Job No. 7 (a seven-day position) Third Trick, hours 11 P. M. to 7 A. M. daily, effective at close of work November 17, 1960.

Under date of November 11, 1960, Local Chairman James J. O'Leary the Claimant, wrote to Storekeeper Mr. W. J. Britton, protesting the abolishment

cedure of material procurement by the using department, from either the general bins outside the storeroom or by picking up the material personally by the using mechanic, had been an accepted and unchallenged practice at East Deerfield, the other major engine repair point on this property, since 1957. In view of numerous awards supporting Respondent's action, claim in the present instance at Boston was denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Effective at the close of work on November 17, 1960, the third trick Storehelper position at the Stores facility at Carrier's Boston engine terminal was abolished. One of the duties of the position was, on receipt of a disbursement slip filled out by a mechanic, and, after looking up the item in a catalog and location index, if necessary, to get the required material from the shelf or bin in the storeroom and to hand it over to the mechanic. Before the position was abolished mechanics did not go into this storeroom to help themselves; after the abolishment mechanics on this shift went into the storeroom and did what was necessary to get material for themselves.

CONTENTIONS ON OTHER THAN MERITS

Carrier argues that the portion of the claim for relief days must be dismissed because it is a claim added after the claim left the property. The original claim was for "all days that this (the alleged violative) condition exists."; relief days are encompassed by that language. The changed language of the claim did not change the substance in this respect and Carrier was not prejudiced by it; we will not dismiss the case on this ground.

Carrier argues that the claim for pay for relief days should be dismissed because it is in behalf of an unnamed claimant. We have held in the past that failure to name a claimant does not defeat the claim where the claimant is otherwise clearly identified; that is, where the description of the claimant makes possible the determination of his name from the records. But here Clerks have (for relief days) substituted for O'Leary, the only claimant originally identified, an unnamed claimant who is identified only as "the Relief Storehelper on the sixth and seventh day (to be designated subsequently by the Organization)." We will not award a remedy to a claimant so nebulously identified; if a remedy is warranted on the merits, we will not award pay to anyone for the sixth and seventh days, since there is now no identifiable claimant before us for those days.

Carrier further contends that Claimant O'Leary was neither affected nor involved in the dispute in any way, and is therefore not an eligible participant; thus, according to Carrier, since there is no employe before us who was damaged by the action of Carrier, we have no jurisdiction. We do not agree. Our jurisdiction is conferred by the Railway Labor Act. In this case we have a dispute between Clerks and a Carrier growing out of alleged improper application of their agreement; according to Title 1, Section 3. First (h) and (i), the Third Division of the National Railroad Adjustment Board has jurisdiction over such disputes. Carrier may mean, in making this contention, that with no identified damaged employe there is no dispute; and with no dispute, there is no jurisdiction by the Board. But we find that there is a dispute between Clerks and Carrier about an alleged violation of their agreement; thus the jurisdictional contention, if intended in this sense, is without merit.

However, it may be that Carrier is using the term "jurisdiction" more loosely to argue that since as Carrier sees it, no employe identified in the claim was damaged by Carrier's alleged violation, the Board can properly award no remedy and the Board should therefore decline to deal with the merits of the dispute. This is not a jurisdictional argument which may properly be raised at any time, and Carrier advanced it in this case too late: Clerks were afforded no opportunity on the property to meet it with argument and facts, and, possibly to dispose of it by negotiation, as contemplated in the procedures prescribed by the Act. We shall dispose of the case on its merits.

CONTENTIONS ON THE MERITS

Clerks contend that Carrier is in violation of Rule 1(f)(1) in failing to assign the involved work of the abolished position to another position remaining at the location and covered by the Agreement.

Carrier contends: 1. that the involved work has been eliminated; 2. that, in any event, since less than four hours per day of the work in dispute remained to be performed, Rule 1(f)(2) permits its performance by other than Clerks; 3. that the same change and procedure was introduced in 1957, and continues, at other places on Carrier's system without protest by Clerks; and 4. that the involved work does not belong exclusively to Clerks and may therefore be assigned to other than Clerks without any violation of the Agreement.

FACTS

There is no dispute that the abolished position was in a class occupied by employes affected by the Scope Rule and was a position covered by the Agreement. Rule 1(f)(1) and (2) read:

> "(f) 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 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, Ticket Agent, or Ticket Seller, or by a Yardmaster, Foreman, or other supervisory employe, provided that less than four 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 such Agent, Ticket Agent, Ticket Seller, Yardmaster, Foreman, or other supervisory employe."

In the record made on the property, and not rebutted by Carrier, we find Clerks' description of the involved work as performed after the abolishment of the position:

". . . Foreman comes to storeroom with 1 or 2 mechanics. They all look up part numbers in Stores Department catalogs, reference is then made to the material index location file to find location of material, then follows disbursement of material . . ."

Carrier's description of the work performed prior to the abolishment of the position ("passing material over the counter") is inadequate; we find that the work involved prior to the abolishment of the position was in fact as we described it in the first paragraph of this Opinion.

WAS THE WORK ELIMINATED?

By comparing descriptions of the work as performed before and after the abolishment of the position, we find, as a fact, that the involved work was not eliminated; only the last bit, passing material over the counter to the mechanic, was eliminated; the balance remained and was performed by persons not covered by the Agreement.

IS RULE 1(f)(2) APPLICABLE?

There is no dispute in the record that other positions covered by the Agreement remained in existence at the location where the work was to be performed. Thus subdivision (2) of Rule 1(f) was not triggered and does not apply to the events involved here.

THE EFFECT OF THE UNPROTESTED CHANGE ELSEWHERE

Carrier claims that the same change and procedure as here was made and continues to operate elsewhere on its System without objection by Clerks. Clerks deny that there was no effectvie objection by them.

If the word "work" in Rule 1(f) was intended to be unmodified, as it appears in the Agreement, and is thus not restricted only to work otherwise exclusively reserved to Clerks, as, in effect, is argued by Carrier, then it would not be necessary for us to deal with this factual dispute: We would then be dealing with all of the work assigned to a specific position, and how and by whom that work was performed elsewhere in connection with a possible unprotested violation of the Agreement at that place would not clear the way for a violation of the unambiguous injunction of Rule 1(f) here.

IS "WORK" IN 1(f) LIMITED TO WORK OTHERWISE RESERVED TO CLERKS?

Resolution of this dispute turns on a correct reading of the word "work" in Rule 1(f). The Rule, when read giving usual meanings to the language, establishes procedures and limitations for the assignment to others of work previously assigned to and abolished position. There is no indication in the text of the Rule that the only such work intended to be covered by the Rule is work of a kind reserved elsewhere in the Agreement exclusively to Clerks'; on the contrary, some of the provisions of Rule 1(f) indicate that some of the work referred to is not of the kind exclusively the Clerks', but is of a kind which may be normally performed as a duty incidental to their position by others than Clerks. Thus unless we find that Carrier has presented persuasive evidence to the contrary, there being no obscurity or obvious ambiguity, we must find that the word "work" in Rule 1(f) refers to all of

the work previously assigned to the abolished position, including work which is not otherwise reserved exclusively to Clerks.

Cited to the Referee in support of Carrier's position were numerous awards. On the property or in its Ex Parte Submission Carrier cited Award Numbers 3431, 5391, 7350, 8767, 3216, 5397, 7081, and 8021. Among others referred to in the panel discussions were Award Numbers 10894, 12341, 12513 and 12514. The others cited were in effect duplicative of these.

Awards 7081 and 8021 involve different issues (work on unassigned days) and do not involve a discussion of a rule such as Rule 1(f) here; Awards 3216, 3431, 5397, 7350 and 8767 do not involve a discussion of a rule like 1(f). If Award 8767, cited by Carrier on the property, were applicable here it would tend to support Clerks' claim because it sustained Clerks in that case under circumstances similar to those here; but there were differences in the facts and the award there was made on the basis of the Scope Rule without discussion of a rule such as 1(f).

Awards 12513 and 12514 were decided on the basis of following Awards 10894 and 12341. Award 10894 warns that it is "limited to the particular facts of this case."; in it the primary duties of the abolished position were found to include: "Filling MP 151 orders at counter . . . ," and the Board found:

> ". . . all of the above listed duties of this position which remained to be performed were assigned to other positions covered by the Clerks' Agreement . . ."
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> * * * * *
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> ". . . the function of filling MP 151 orders at the counter . . . ceased to exist . . . After the position in question was abolished, material required . . . during the hours 11:00 P.M. to 7:00 A.M. usually was procured by the enginehouse personnel from a working stock section set up in the enginehouse in the Crew Dispatcher's office, and stocked by the storehouse employes who worked on the first and second tours . . . The only issue is whether the procural of materials from the storeroom by the Gang Foreman under the specific circumstances of this case is work within the Agreement . . . In our opinion the occasional procural of an item of material from the storehouse by the Gang Foreman as established by this record and under the specific circumstances of this case is not work in violation of the Agreement and does not constitute 'Filling MP 151 orders at counter', therefore this claim cannot be sustained."

It is apparent that the facts as found in Award 10894 are distinguishable in critical respects from those in this case; furthermore, there is at least an implication in Award 10894 that if persons other than Clerks had been found to have performed the function "Filling MP 151 orders at counter," a violation may have been found.

Award 12341 was based on findings (as distinguished from this case) that all items of work of the abolished position were assigned to another covered position, and that work similar to work involved here was not part of work there described in a bulletin as "attending Storehouse"; the reasoning and evidence leading to this latter conclusion are not set forth in the award.

Awards 10894, 12341, 12513 and 12514 thus do not help Carrier in its burden of proving that an unexpressed restricted meaning was intended in the word "work" in Rule 1(f) here.

Award 5391 is cited by Carrier as being in an identical situation. It contains a warning in the last line of the Opinion: "This award is limited to the particular facts of this case."; and there are some differences between the facts of that case and this one: there the description of the involved work made no reference to the details we have related here; there Carrier's estimate that the disputed work took only 20 minutes a day is noted with no dissent as to that fact by Clerks; here Carrier's estimate that a similar small amount of time is involved is so disputed and without resolution in the record that we are unable to determine how much time in fact is involved. But, in spite of such factual differences, the base on which Award 5391 rests does support Carrier's contention in this case, and is representative of the line of similar awards cited to the Referee in this case. The "Assignment of Work Rule" (1(f) in this case) is the same in 5391 as here. Award 5391 says:

> "There is no question that under the scope rule of the agreement as interpreted in numerous awards by this division, if work within the agreement remains to be done after the postions were abolished which was not assigned to other employes within the agreement but instead was assigned to employes outside the agreement, there would be a violation of the agreement.
>
> The only issue is whether the procural of materials from the storeroom by mechanics under the specific circumstances of this case is work within the agreement . . ."

Award 5391 does not recite the reasoning on which its apparent conclusion that "work" in the Assignment of Work Rule refers only to work reserved otherwise exclusively to Clerks; without direct reference to or discussion of the Assignment of Work Rule, Award 5391 deals with the dispute under the Scope Rule. We are unable to discuss, agree with or disagree with the absent reasoning.

We agree with the reading of the Assignment of Work Rule given by Referee Coburn in Award 12901, a case involving basic facts similar to those in this case and to those in Award 5391. In sustaining Clerks' claim, Award 12901 says:

> "Its (3-C-2's — the Assignment of Work Rule in Awards 12901 and 5391) language is clear, precise, unambiguous, and mandatory. It says, interalia, that the work 'previously assigned' to an abolished position which 'remains to performed' will be assigned, under subparagraph (1), to another clerical position or positions remaining in existence 'at the location where the work of the abolished position is to be performed. . . .'"
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> * * * * *
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> ". . . the Board finds no necessity for exploring at length the much debated issue of proof of an exclusive right to the work by clerks under what has been characterized as a general, non-specific Scope Rule. There is nothing general or ambiguous in the language of Rule 3-C-2 applied to the facts of record here. The work was assigned by bulletin to the clerks and was performed by them. If it remained to be performed after abolishment of the clerical positions

it had to be assigned to the remaining clerks' jobs at the location under Rule 3-C-2 (a) (1) . . ." [Note: 3-C-2 (a) (1) in Award 12901 is the same as 1(f)(1) in this case.]

If Carrier would have us read into Rule 1(f) a limit to the meaning of the word "work" which is not spelled out in the Rule, it was up to Carrier to supply evidence sufficient to convince us that such an unstated limitation was intended by the parties to the Agreemen;t Carrier failed to do this. Thus, we find that in failing to assign the involved work to other clerks at the location Carrier violated Rule 1(f)(1).

As we noted above, we are unable to determine from the record precisely how much time was involved each day of the violation; we are not persuaded, however, that more than a call each day was involved. Therefore, in sustaining the claim, we will limit the remedy to awarding pay to O'Leary for a call on each day, except his relief days, beginning on November 18, 1960, and for as long as the violation continues.

The record in this case shows that a "third party notice" was served on Railway Employes Department notifying it of the pendency of this dispute before this Division of the Board, to which Railway Employes Department responded with the standard letter reserving its rights under its agreement with Carrier and disclaiming involvement in the dispute between Clerks and Carrier. While this case was still under discussion among members of this Board, including the Referee, the Supreme Court issued its decision in Transportation-Communication Employes Union v. Union Pacific Railroad Co. (decided 12/5/66). The information in this record is not adequate for us to determine what, if any, is the third party interest; thus we here come to no conclusion on this question.

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 violated the Agreement.

AWARD

Claim sustained as modified in the Opinion above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of January 1967.

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Serial No. 224

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Interpretation No. 1 to Award No. 15140

Docket No. CL-13703

Name of Organization:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS

Name of Carrier:

BOSTON AND MAINE CORPORATION

Upon application of the representative 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 basis for the request for intepretation arises from disagreement concerning payment Carrier was directed to make in the Award. The Award is clear and unambiguous: our award was that the Claim was sustained as modified in the Opinion; in the last sentence of the second paragraph under the heading "Contentions On Other Than Merits" in the Opinion and in the last sentence of the next to the last paragraph of the Opinion we stated the modifications we were making to the Claim as presented:

> "We will not award a remedy to a claimant so nebulously identified; if a remedy is warranted on the merits, we will not award pay to anyone for the sixth and seventh days. . . .";

and

> "Therefore, in sustaining the claim, we will limit the remedy to awarding pay to O'Leary for a call on each day, except his relief days, beginning on November 18, 1990, and for as long as the violation continues."

The above Award, not being ambiguous, requires no interpretation. The Board has no authority to change the meaning of an Award already rendered; nor does it have the authority to consider new factual evidence, such as was presented in connection with this request for interpretation; and, as we said in Interpretation No. 1 to Award 6427:

> "This Board has no authority to consider a factual controversy regarding the compliance or noncompliance of the terms of the Award

by the Carrier. The Board has no duty to perform in policing the enforcement of its Awards."

Referee Daniel House, who sat with the Division as a Member when Award No. 15140 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 21st day of December 1967.

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