NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24492
Docket Number CL-24444

Robert Silagi, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotlierhood (GL-9542) that:

(a) The Carrier violated Rule 1, among others, when on 07-10-79 they failed and refused to compensate Clerk D. Hatfield and,

(b) The Carrier shall now compensate Clerk D. Hatfield 40 minutes pro-rata rate in addition to all other earnings.

OPINION OF BOARD: Pursuant to the provisions of the Clerk's General Agreement the Carrier gave written notice to the General Chairman of its intent to transfer, consolidate and reorganize certain clerical and related functions so as to establish a Terminal Service Center at Flint, Michigan. Said notice was given in April 1977. The Carrier proposed to abolish certain positions, transfer duties, add duties to existing positions and create new positions. Among the numerous proposals of the Carrier was the suggestion to establish 8 new Messenger-Checker positions. To the Carrier's notice was appended a duty description sheet which proposed that the duties of the Messenger-Checker should consist of:

> "Check inbound and outbound trains; pick-ups from local plants, into and out of support yards, interchange and weigh cars. Prepare, distribute and file various reports and records, handle messenger functions, way-bills, data cards and related functions, and transport crews. Assist with pulling and lining way bills and side card where necessary." (Emphasis supplied.)

Negotiations ensued between the parties which finally culminated in a Memorandum Agreement signed on September 13, 1978 with an effective date of October 3, 1978. At the request of the Carrier the Memorandum Agreement was not implemented until November 1, 1978. Paragraph 5 of said Memorandum Agreement recites:

> "It is further understood that all work of the craft or class of Clerical, Office, Station and Stores employees in the offices, departments and operations covered by this Agreement, including all supervision thereof, shall be performed by employees holding seniority rights in and assigned to positions in the offices and departments at the locations and on the Seniority Districts as shown in this Agreement, unless otherwise agreed to in writing between the Management and General Chairman of the Chesapeake and Ohio System Board of Adjustment."

The Memorandum Agreement, as signed, retained the language describing the duties of Messenger-Checker as originally proposed by the Carrier. However, instead of 8 positions the parties agreed to establish 15 positions, 9 at Flint, 3 at Grand Blanc and 3 at Fisher within the seniority district. The duties of the 9 Messenger-Checker positions at Flint were delineated in words unchanged from the duty description sheet first proposed. The other 6 Messenger-Checkers had certain additional duties added to their duty description sheet.

On July 10, 1979, Claimant Hatfield was regularly assigned to the position of Messenger-Checker at Flint, working hours from midnight to 8 A.M. At 12:40 A.M. of that day the Carrier utilized an independent taxi company to transport a train and engine crew from McGrew to Flint. On August 5, 1979, Claimant filed a time claim for 40 minutes pro rata rate alleging a violation of the Memorandum Agreement. The Clerks allege a violation of Rule 1, of the General Agreement, among others.

Rule 1 - Scope, after listing positions and work contains the following:

"(b) Positions or work within the scope of this Agreement belong to employees herein covered and nothing in this Agreement shall be construed to permit the removal of such positions or work frw the application of these rules except as provided in Rule 66."

The Carrier declined the claim as not allowable in accordance with applicable rules of the working agreement. The Carrier advanced objections addressed to procedure and to the merits of the claim. The procedural objections will be treated first.

The Carrier claims that the function of transporting crews was inserted in the duty description sheet by error. The parties negotiated the terms of the Memorandum Agreement for almost one and one-half years during the course of which the duty description sheets were corrected, changed and modified to reflect corrected duties, workweek, rates and work location of positions. The duty description relating to transportation of crews was never changed. To assert at this late date that this function somehow slipped into the signed agreement by error stretches credulity to the breaking point. This Board has often said that Claimants are presumed to have knowledge of the contents of their contracts. This principle must apply to Carriers no less than to Employes (Award 13741 - Dorsey). The claim of error is an embarrassment which must be rejected out of hand.

The Carrier complains that the Clerks were dilatory in presenting their claim. This objection merits serious deliberation but must nevertheless be rejected. As stated earlier, the Memorandum Agreement went into effect on November 1, 1978. The claim was presented to the Carrier on August 5, 1979, four weeks after the incident which gave rise to the claim and 8 months after the Agreement was implemented. Laches is an equitable defense. The Supreme Court teaches that a court of equity applies the rule of laches according to its own ideas of right and justice, each case being governed by its own circumstances, Brown v. Buena Vista County, 95 U.S. 157; Hayward v. Eliot Nat. Bank, 96 U.S. 611; Patterson v. Hewitt, 195 U.S. 309. But " . delay in and of itself is not sufficient to constitute a bar. There must be, in addition, such a change of situation as to make it inequitable to grant the relief sought." Seligson v.

Weiss, 227 N.Y.S. 338. To prevail, the Carrier must not only show an inordinate delay by the Clerks in processing their claim but also injury or some disadvantage resulting from such delay. Feldman v. Metropolitan Life Ins. Co., 18 N.Y.S. 2d 285. Beyond the mere assertion that the Clerks slept on their rights, the Carrier failed to show any detriment to its position caused by the Clerks' delay. This Board long ago noted that the Railway Labor Act carries no limitation which bars a claim by reason of lapse of time. Awards 5790 - Wenke; 6260 - Wenke. For these reasons the objection of laches must be rejected.

We now turn to those objections which are addressed to the merits of the claim.

In its ex parte submission and subsequent arguments the Carrier cites many awards which hold that the designation of certain primary duties in advertised bulletins does not convey an exclusive right to the work involved, e.g. Award 16544 - Devine. The defect with this argument is that this case does not deal with a bulletin. The Memorandum Agreement which forms the basis of this claim is a collectively-bargained contract, not a unilateral invitation to bid for a position. A bulletin is primarily informational in nature and is not necessarily the controlling factor restricting the employe's work (Award 16931 - Engelstein); it does not rise to the level of an agreement. Similarly the Carrier argues that for the Clerks to prevail they must show that the function of transporting crews is exclusive to clericals and that if other crafts engage in the same work then such function does not belong to any one craft. In this connection the language of the Memorandum Agreement and the Scope Rule must be reexamined.

At the outset it should be pointed out that while the Scope Rule is system-wide in application, the Memorandum Agreement is limited to one geographic area. A scope rule does not necessarily classify or describe the work, but the Memorandum Agreement does precisely that. The language of the Memorandum Agreement is clear and unambiguous. The duty to "transport crews" is tersely stated. No doubt the phrase could be embellished but redundancy would not change its meaning. The same comments are equally pertinent to paragraph 5 of the Memorandum Agreement and to Rule l(b). No amount of sophistry can change their obvious sense. In this connection it is interesting to note that Rule l(b) was the subject of interpretation by this Board in Award 20382 - Dorsey, wherein it was held that:

> "The words 'positions or work within the scope of this Agreement belong to the Employees covered herein' have been interpreted by the case law of this Board to mean that work not exclusively reserved to Clerks but assigned to a clerk's position becomes the work of the position and it subject to the Rules of Clerks' Agreement."

Where the intent of the language is apparent on its face, this Board is bound by such meaning. No useful purpose will be served by inquiring into the history of assignment of the work in question. A close examination of the cases cited by the Carrier on this issue reveals that they are inapposite. The Memorandum Agreement read in conjunction with Rule 1 leads us to the conclusion that the Carrier violated the Agreement when it allowed an independent taxi company to transport a crew on July 10, 1979 instead of assigning such task to a Messenger-Checker.

Having found that the Carrier violated the Agreement we shall now consider that most vexing question of damages. Without conceding that the instant claim is valid, Carrier argues that even if the claim does have merit, the demand for payment of 40 minutes pro rata rate is excessive and not supported by Agreement rules. The objection does not turn on the number of minutes it took the taxi to transport the crew but rather on the contention that any payment at all would constitute a windfall for Claimant Hatfield and a penalty against the Carrier, neither of which is allowed by the Agreement. Carrier alleges, and the Clerks do not deny, that Hatfield received full pay for the trick that he worked when the event occurred. The Clerks, on the other hand, vigorously argue that by failing to assign the work to a Messenger-Checker, the Carrier deprived a clerical employe of a work opportunity for which he must be compensated. Moreover it is urged that the only realistic method to compel the Carrier to adhere to the terms of the Agreement is to impose economic sanctions. Carrier counters with the arguments that the Railway Labor Act does not permit penalty awards and that the common law of damages relating to contracts is applicable; namely that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. In the case of Hatfield that sum is zero.

We have carefully read all of the cases cited by both parties and paid particular attention to the scholarly analysis of Referee Wallace, Award 22194 (22 pages), the trenchant remarks of the Labor Member's Dissent (40 pages) and the thoughtful answer by Carrier Members to Labor Member's Dissent (30 pages). Nothing would be accomplished by a review or repetition of the arguments and counter arguments set forth therein. There is, obviously, an irreconcilable conflict between those who believe that for every violation there must be a remedy and those who do not share that view. This Board is of the opinion that the common law of damages is applicable herein. It is the rule followed by civil courts and by the National Labor Relations Board, a federal administrative agency which has many years of experience and great expertise in industrial relations, albeit not in the railroad industry, in related areas. To grant nominal damages of $1.00, as was done in Award 22194, is pointless, even insulting. Accordingly no monetary award will be granted to Claimant Hatfield. This does not mean, however, that this Board will hesitate to apply economic sanctions in an appropriate case, that is if the proof conclusively demonstrates a wilful disregard or a deliberate effort to evade the Rules. The proof in this record does not lead to that conclusion.

The record contains an unrefuted letter from the Clerks which purports to show that between July 5 and July 15, 1979, there were 36 violations similar to the Hatfield incident. The letter then skips to September 5, 1979 when it is claimed that there were 3 violations. No further information is given beyond the names of the Claimants and the amount of time claimed which range from a low of 20 minutes to a high of 3 hours. The Carrier alleges that neither before nor after the implementation of the Memorandum Agreement were Messenger-Checkers used to transport crews. These data are much too meager to supply the basis for analysis, statistical or otherwise, which would support a finding that the Carrier acted wilfully or evasively.

This Board can and shall apply a remedy which it is hoped will encourage compliance with the Rules. We speak of a cease and desist order, a remedy applied by arbitrators from time to time, and used consistently by the National Labor

Relations Board. We therefore direct that henceforth the Carrier shall cease and desist from failing and refusing to employ the 9 Messenger-Checkers at Flint, Michigan and the 3 at Grand Blanc and the 3 at Fisher to transport crews unless and until Management of the Carrier and the General Chairman of the Chesapeake and Ohio System Board of Adjustment agree otherwise in writing.

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 Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1983.