NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24861

THIRD DIVISION

Docket Number CL-240

Herbert Fishgold, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9832) that:

(1) Carrier violated and continues to violate the Clerk-Telegrapher Agreement when, commencing May 8, 1976, and continuing, it causes and permits employees not covered thereby to perform work around-the-clock seven (7) days per week in connection with the operation of receiving teletype units and similar devices used for receiving communications, including tearing off and separating message reports of cars at the East and West Bound Hump Yard Offices, East and West Bound Hump Yard Shanties and East and West Bound Retarder Towers, which are six (6) locations at Willard, Ohio, and

(2) As a result of such impropriety, Carrier shall compensate eighteen (18) designated employees at Willard, indicated below, each, one (1) eight (8) hour days' pay at overtime-rate for each date beginning Saturday, May 8, 1976, and continuing for each and all subsequent dates until the violations cease:

Westbound Hump Yard Office

7:59 AM - 3:59 PM - C.J. Heffley
3:59 PM - 11:59 PM - C.I. Runion
11:59 PM - 7:59 AM - R.E. Neidermeier

Eastbound Hump Yard Office

7:59 AM - 3:59 PM - G.H. Bursiel
3:59 PM - 11:59 PM - M.A. King
11:59 PM - 7:59 AM - A.E. Runion,Jr.

Westbound Retarder Tower

7:59 AM - 3:59 PM - H.J. Haupricht
3:59 PM - 11:59 PM - R.L. Hastings
11:59 PM - 7:59 AM - Helen Rinker

Eastbound Retarder Tower

7:59 AM - 3:59 PM - L.D. Dawson
3:59 PM - 11:59 PM - L.J. Oney
11:59 PM - 7:59 AM - R.J. Neidermeier

Westbound Hump Yard Shanty

7:59 AM - 3:59 PM - J.M. Underwood
3:59 PM - 11:59 PM - J. Rusynyk
11:59 PM - 7:59 AM - G.H. Hiltburner

Eastbound Hump Yard Shanty

7:59 AM - 3:59 PM - F.N. McQuown
3:59 PM - 11:59 PM - P.E. Clemons
11:59 PM - 7:59 AM - J.C. Beekman

OPINION OF BOARD: This dispute, one of six involving the same issue between the parties, concerns the Carrier's right to permit Yard-masters to "tear off" a list of freight cars, a "switch list," from a receiving machine following transmittal by use of telecommunications printers at Willard, Ohio.

By way of background, on February 15, 1976, Carrier established a Terminal Service Center at Willard, Ohio. Similar data centers have been established at various other terminals throughout the Carrier's system and such data centers are essentially a consolidation of yard and agency functions into a central location where the same machinery and data are available. In most of the terminals where Carrier has established these data centers, yard and agency personnel have been moved into the new Terminal Service Center, leaving only yardmasters in the individual yards.

The Carrier placed communication receiving devices (Kleinschmidts) in the East and West Bound Hump Yard Offices, (Data Fax) in the East and West Bound Hump Yard Shanties, and (Data Fax) in the East and West Bound Retarder Towers at Willard, Ohio. The Organization contends that by so doing, the Carrier is causing and permitting employes not covered by the Clerks-Telegraphers Agreement to operate such communication receiving devices, including the work of removing (tearing off) and separating message reports of cars from such devices.

The dispute involves the parties' Scope Rule and Rule 67, Printing and Telegraph Machines, which, in relevant part, reads as follows:

"Rule 67 - Printing Telegraph Machines

Positions in telegraph or other offices requiring the operating of printing telegraph machines or similar devices that are used for transmitting and receiving or both, information, or communications of record, irrespective of title by which designated or character or services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement."

Claims that the Yardmaster tearing off the lists and separating the copies violated Rule 67 began to be received on all Carriers' properties. Since the dispute could not be resolved on the property, the Organization processed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours pay "for work that took just a few seconds to perform" to a three-hour call.

The Organization argues forcefully that the merger of Clerks' and Telegraphers' crafts in 1973 guaranteed to employes covered by the joint Clerk-Telegrapher agreement the exclusive right to perform all work in all offices involving teletype machines including tearing off and separating mesages. The Organization acknowledges that hundreds of demands for eight hours' pay based upon claimed violations of Rule 67 were submitted and held in abeyance pending a decision in Award 22912. The Organization asserts that Carrier bargained in bad faith when it refused to honor Award 22912 and apply it to the pending identical

claims. The Organization attacks Carrier's reference to former Telegraphers' Agreements with Carrier as outmoded for over 30 years. The Organization also claims that the disputes as to "communication work" over the years was between Clerks and Telegraphers and not Yardmasters, nor have Yardmasters even contended for such work. Moreover, the Organization points out that although the Railroad Yardmasters of America were named as an interested third party in the proceedings in the claim leading to Award 22912, the Yardmasters elected not to participate in that case. Nor are the Yardmasters making any claim to the disputed work in the instant case. The Organization rejects the notion that any portion of the operation of a teletype machine, no matter how slight, may be splintered from the jurisdiction of the Clerks, citing Awards 1501 (Shaw) and 2282 (Fox).

The Carrier argues with equal vigor that Award 22912 must be overturned. The doctrine of stare decisis, says the Carrier, is not absolute and should not be followed when an award is palpably erroneous. The history of collective bargaining must be given due consideration. Past practice is an important element in disclosing how the parties' themselves interpreted their agreement. In any event Claimant's demand for 8 hours' pay is harsh and excessive.

The Organization relies heavily upon Rule 67, second paragraph, which assigns to Clerks the work of "tearing off and separating messages and reports." Such language in the Organization's view, states in the simplest, most positive, unequivocal language that certain work, including the tearing off and separating of messages and reports, can only be performed by employes covered by the Clerks' Agreement; that the rules leave nothing to interpretation.

Citing both Award 22912 and Rule 75, the Organization also argues Rule 67 did not adopt, unchanged, Article 36. Rule 75, which was apparently intended to provide a continuum of interpretations of the rules extracted from former contracts, reads as follows:

> "This Agreement supersedes previous Collective Bargaining Agreements, and interpretations thereof, between the parties, and existing Circulars, Memoranda of Agreement and Letters of Agreement are cancelled unless otherwise agreed between the parties. Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement. Effective National Agreements remain in effect unless, or until, changed in accordance with Railway Labor Act, as amended."

The Organization contends that since Article 36 was not adopted unchanged; and Rule 67 is clear on its face, any conflicting past practices are irrelevant.

The Carrier submits that Rule 67 was not changed; that all of the language found in that rule was also found in Article 36 of the former Telegraphers' Agreement. Referring to the collective bargaining history, the Carrier asserts that Rule 67 had its origin in Article 36, a former Telegraphers' Article dating back to 1945 (Memorandum of Understanding dated February 17, 1945, made between the Carrier and the former Telegraphers' Organization). According to Carrier, former Article 36 was allegedly applicable only to "inter-city" communications. Thus, following the Carrier's argument, since the current dispute centers on the handling

of "intra-city" communications, allegedly not covered by Rule 67, it is permissible for a Yardmaster or some other employe not covered by the Clerks-Telegraphers' Agreement to operate such teletype and/or similar devices, including the tearing off and separating of the reports in question. The Carrier concludes that Article 36 never had application to intra-city communications, and since the parties purposely intended to preserve the prior applications of rules found in the former separate agreements through the provisions of Rule 75, Award 22912 must be found to have no precedential value.

Continuity in the interpretation of contract rules is highly desirable, and such interpretations should not be overruled without strong and compelling reasons. While it is true that Award 22912 involved only one instance at the Cincinnati Terminal of the Carrier, there is no meaningful way to distinguish the rationale of the decision in this dispute from that decision since it involves interpretation of the same contract language. The parties are the same, the agreement is the same, and the facts are virtually identical. This Board is certainly aware that there will be difficulty on this property in having contrary awards in different locations on the same issue under the same basic facts. However, the Board is also aware that it has a responsibility to properly assess the intent of the parties as evidenced by the contract language. In so doing, we conclude that the opinion reached in Award 22912 is the correct one.

In so holding, we are not disregarding the origin of Rule 67 nor the clear intent of Rule 75. Prior to the June 4, 1973 Clerks-Telegraphers Agreement, there had been a history of contract language and Rules, and memorandum of understanding and letters of agreements which attempted to embody interpretations of the existing language. The overwhelming basis for this history was the continuing claims being made by both Clerks and Telegraphers for work related to the introduction of printing teletype machines on Carrier property. Indeed, with the apparent exception of the Barr Yard Office in Chicago, where such machinery was installed in 1948, and subsequently replaced by computers in 1966 and Kleinschmidt Receive Only Printers and Data Fax machines in 1971 and 1972, and where Yardmasters tore off and separated switch lists, there was no similar, long standing history at other Carrier Terminals prior to the Consolidated Clerk-Telegrapher Agreement, effective June 4, 1973.

While the Board is not persuaded that merely because Article 36 had 18 paragraphs and Rule 67 only had 4, that Article 36 was not adopted unchanged. The Board is persuaded that, when read in conjunction with Rule 75, the failure of the parties to specifically adopt in Rule 67 the distinction between "inter-city" and "intra-city" communications evidenced by the 1945 Memorandum of Understandin undermines the Carrier's contractual argument. While the Board can accept that certain obsolete provisions pertaining to Morse telegraph and restrictions which conflicted with other rules were deleted in Rule 67 without changing the meaning of Article 36, the Board cannot conclude that the failure to continue to identify a specific distinction between "intra-city" and "inter-city" communications means that Rule 67 was unchanged from Article 36.

Rule 75 states specifically that the new Agreement supersedes interpretations of previous Agreements, and cancels existing Memorandum of Agreement "unless otherwise agreed between parties." (Emphasis added). It then goes to say that "Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreement continue to apply ..." (Emphasis added). It is apparent to the Board that, based upon the history between the Clerks and the Telegraphers, and the intent of Rule 67 and Rule 75, unless Rule 67 specifically adopted within its provisions the alleged distinction between "intra-city" and "inter-city" communications, which was previously adopted and existed as a 1945 Memorandum of Understanding - a supplement to Article 36 - Rule 67 did not adopt that distinction, and thus, contrary to the Carrier's argument, Article 36 was not adopted unchanged as regards the issue in dispute.

Finally, in this regard, the Board does not accept the Carrier's further argument that the history and practice since 1948 of allowing Yardmasters in the Barr Yard to tear off and separate these switch lists without any claims by the Clerks until after 1973, constitutes an unabated, unchallenged practice, which Rule 75 cannot negate. As evidenced by the number of claims filed after the merger in 1973 and after the Carrier, in 1974, began to open Terminal Service Centers, resulting in the use of Kleinschmidt Receive Only Printers in the yardmaster offices, for their receipt of switch lists, this Board cannot conclude that, based upon the experience at one terminal which existed prior to the 1973 Agreement, that the parties intended to contractually sanction this work assignment, even though minimal, to yardmasters. Indeed, this conclusion becomes all the more compelling when the language in Rule 67 is considered in the total context of the prior history: "Work in connection with the operation of ... receiving units, including tearing off and separating messages, and reports ... shall be performed by employees covered by this Agreement." (Emphasis added). Such express and unambiguous language, with no stated exception comporting with the Carrier's argument, constitutes a clear intent to this Board that any alleged distinction between "intra-city" and "inter-city" communications which would otherwise allow Yardmasters' to "tear-off" and "separate" switch list cannot be read into Rule 67.

Nor can the Board agree that the case involves an interested third party, the Railroad Yardmasters of America, because the Carrier alleged that the Clerks' Organization was attempting to remove work from the Yardmaster Craft and assign it to clerical employes. The Yardmaster's Organization was given proper notice and elected not to participate in the case. Thus, this issue had not been joined.

Having found that the claims are to be sustained, the question arises as to what is the appropriate remedy. As in Award 22912, the Organization seeks eight (8) hours pay for work that took just a few seconds to perform, albeit on repeated occasions. This Board agrees with Referee Kasher in Award 22912 that such a remedy is inappropriate. This Board further concludes that, as in Award 22912: "A more appropriate remedy is found in the parties' Call Rule - Rule 8. Under this rule Claimant(s) should be compensated three hours since the work performed was two hours or less." While the Board realizes that some may regard such payment as excessive, the Board must remind the parties;

"... the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved," (Footnotes omitted). Elkouri and Elkouri, How Arbitration Works, 3rd ed. BNS, 1973, p. 304.

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 28th day of June, 1984

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT
TO AWARDS 24861, 24862, 24863, 24864, 24865 and 24866,
DOCKETS CL-24005, CL-24007, CL-24012,
CL-24017, CL-24018 and CL-24019
(Referee Fishgold)

The minority opinion (dissent), in this instance to Referee Herbert Fishgold's decisions in these cases, indicates a continuance on the part of the Carrier Members to extol an erroneous position which the Referee recognized as being palpably wrong.

William R. Miller

William R. Miller, Labor Member

Date 8-20-84

The Majority, in this case, clearly implied that under Article 36 the instant claim would be barred because the communication in question was an intra-city communication.

The Majority erred when they played a "numbers game" and through some sort of legerdemain concluded that former Article 36 "was not adopted unchanged on June 4, 1973".

Obviously, the Majority gave no weight or serious consideration to Carrier's factual presentations relative to the history of Article 36 and the genesis of Rule 67. The Carrier thoroughly explained that the intent of Rule 75, which reads in pertinent part:

> " * * * Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement * * *."

was to avoid new arguments arising under old rules. The fact that old rules were revised for clarity or to eliminate obvious obsolete language did not serve to change the impact or effect of the rule as carried over to the new contract.

Certainly Rule 67 is not word for word the same as Article 36. However, if the Majority had taken the time to read and compare the former Article 36 and the

current Rule 67 and then if they had considered Carrier's presentation to the Board, they would have instantly discovered that the missing paragraphs had no place in the combined agreement. All of the deleted portions of former Article 36 were either "written out" by other negotiated agreements or became obsolete long ago with the demise of Morse code. The size of the Article was reduced, but the effect of the Rule was not "changed".

The Majority advised that it could not:

> " * * * conclude that the failure to continue to identify a specific distinction between 'intra-city' and 'inter-city communications means that Rule 67 was unchanged from Article 36."

What the Majority ignores is the fact that under the provisions of the National Agreement which provided for the consolidation of Clerk and Telegrapher schedule agreements, the Organization alone had the right to "cherry-pick" the predecessor agreements. Carrier had no choice in that selection. Because of the obsolescence of 14 of the 18 paragraphs in former Article 36, and the Organization's desire to retain Article 36 in the new agreement, the then valid parts of Article 36 became Rule 67 en toto by the Organization's choice. Nothing was changed as far as the meaning, intent and applicability of Article 36 - now Rule 67 - was concerned - including the agreed upon application of the "tear off" function to only inter city communications, not to intra-city communications.

The inclusion of Rule 75 in the consolidated agreement was also done at the insistence of the Organization to protect and preserve prior interpretations of the Rules that they (the Organization) had selected to be included in the consolidated agreement. The only purpose to be served by Rule 75 was to emphasize the desire of the parties to continue applying rules that were kept in the same fashion as they had been. This misguided Award has completely misinterpreted the purpose and intent of Rule 75 and has made it appear that the rule was written to give the parties an opportunity

to treat as completely new rules all of the rules of the new agreement that do not read exactly as they previously did.

There was absolutely no rule to be found in the former Clerk's Agreement that would have required the Carrier to use a clerical employe to "tear off" the switch list transmitted as an intra-city communication to Yardmasters. The only rule in the former Telegrapher's Agreement dealing with this subject was Article 36 and it - from the very beginning - had nothing to do with intra-city communications. Obviously if neither of the former separate agreements contained a rule supporting a claim such as the one here involved, there could be no rule in the consolidated agreement to support such a claim.

We also point out that in Docket CL-24747 involving the same parties and the same agreement as here, the Board with Referee Silagi in Award No. 24881 had no problem concluding that:

> "The origin of Rule 67 may not be disregarded. Said rule derived from the 1945 memorandum of understanding between B&O and Order of Railroad Telegraphers as later elucidated by the 1947 interpretation. It surfaced as Article 36 in the Telegraphers' agreement and then metamorphosed into Rule 67 in the 1973 Clerk-Telegrapher agreement. To be sure Article 36 consisted of 18 paragraphs while Rule 67 has but 4 paragraphs. Therefore Award 22912 held that the rule was not adopted unchanged on June 4, 1973. Yet a careful comparison of Article 36 with Rule 67 shows that the essential parts of the former are retained in the latter. As noted earlier, obsolete portions and those parts which were in conflict with other rules were deleted. That being the case we are compelled to construe Rule 67 in the light of Rule 75 which enjoins upon the parties the obligation to continue to apply previous interpretations in existence prior to June 4, 1973. In contract construction a reasonable interpretation should prevail over one which leads to harsh and unjust consequences, Public Law Board No. 2895. Award No. 2 (Lieberman)."

The claim in this case was for eight (8) hours. The Award says an appropriate remedy is found in the parties' Call Rule - Rule 8 and allowed three (3) hours pay for a de minimis action of tearing off a piece of paper which requires a fraction of a second. Such a gratuitous award is unconscionable. See Award No. 18804 involving

these same parties.

In addition, we must point out that the Majority committed serious error in sustaining claims involving East and Westbound Retarder Towers and East and Westbound Hump Yard Shanties for the simple reason that Kleinschmidt receive only printers were never installed at those locations. (Award 24861)

Facsimile machines are used in those locations. Clerical employees in the Willard Terminal Service Center send single copies of the switch list to those offices. The copies drop into a basket direct from the facsimile machine and are merely picked up by the Retarder operators and Hump Foreman. There is nothing to "tear off" or "separate" and no Rule of agreement supports those claims. Moreover, fifty percent (50%) of the time the facsimile machines were inoperative.

This decision is so completely erroneous and excessive that it has no value as a matter of precedent.

We, therefore, vigorously dissent.

J. E. Yost, Carrier Member

W. F. Euker, Carrier Member

T. F. Strunck, Carrier Member

J. R. O'Connell, Carrier Member

P. V. Varga, Carrier Member

CARRIER MEMBERS' DISSENT
TO
AWARD 24874 (DOCKET TD-24185)
(Referee Scheinman)

Dissent to this Award is required because it inverts and confounds the facts of record.

There is no dispute that the written notice of the investigation was not received by the Claimant. However, the Carrier did mail the notice, via certified mail, on March 31, 1980. In any event, Claimant was personally apprised, was prepared and did proceed to defend his actions at the hearing.

At pages 2 and 4 of the Award it is pointed out that Claimant, through his representative, was afforded the opportunity to postpone the hearing due to the late notice and it was their election to proceed. The hearing then proceeded to amass 45 pages of testimony concerning the incident of March 28, 1980.

It is self-evident from the record that Claimant and his representativ were not in any degree disadvantaged in the preparation of Claimant's defense. And this Board has recognized that in such matters it is substance rather than form that governs. (Third Division Awards 20682, 20571, 20238, 10547, 15579, 20423; Second Division Award 9260; Fourth Division Awards 3088, 2922, 2705, 2566).

Further, Claimant having elected to waive the postponement, it is not proper to conclude that the Carrier has acted improperly. This Board has held that such action by Claimant estopped him from later contending a grievous impropriety. (Third Division Awards 23455, 23155, 24368).

By this decision, the Board has placed the Carrier at the mercy of the Postal Service. It has previously been held that the Carrier, under its agreement with the ATDA, is not free to unilaterally postpone a hearing. What, then, is the Carrier to do if it, in good faith, mails a timely notice of hearing, but for reasons beyond the control of either the Carrier or the employee, the notice is not received until after the date of hearing? The employee and the representative came to the hearing with full knowledge of the nature of the investigation, although they had not received the formal written notice prescribed by the agreement. By declining the proffer of a postponement, the employee has successfully voided the discipline. Such a result is absurd.

Yet this is the result of the Majority's actions in this case. Claimant was found guilty of omission and such finding should not be wholly overturned on an action which has not been shown to have been detrimental to the Claimant's ability to defend himself.

We dissent.

P. V. Varga

W. F. Euker

J. R. O'Connell

T. F. Strunck

J. E. Yost