Award No. 2226
Docket No. CL-2225

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of System Committee of the Brotherhood that Mr. Ben Scalzo, Laborer in Stores Department at Cedar Lake and Union Yard, Minneapolis, Minnesota, be paid at the rate of 59¢ per hour from July 5, 1941, to August 31, 1941, and from September 1, 1941, to November 30, 1941, at the rate of 68¢ per hour, and from December 1, 1941, at the rate of 69¢ per hour.

EMPLOYES' STATEMENT OF FACTS: Since July 5, 1941, Mr. Ben Scalzo, carried on the payrolls as a Laborer at the Laborer's rate of 49¢ per hour, is and has been actually performing the duties regularly assigned to employes receiving Material Handler's rate of 59¢ per hour.

POSITION OF EMPLOYES: The Employes base their claim on Rules 61, 62, 63 and 66.

"Rating Positions—Rule 61. Positions (not employes) shall be rated and the transfer of rates from one position to another shall not be permitted."

"Rates—Rule 62. Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

"Preservation of Rates—Rule 63. Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced.

A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work, irrespective of the presence of the regular employe. Assisting a higher-rated employe due to a temporary increase in the volume of work does not constitute a temporary assignment."

"New Positions—Rule 66. The wages for new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district where created."

December 10th and 11th was "assisted by another laborer." Here is the question raised as to the necessity for continuing and uninterrupted supervision in order that he remain a laborer, and apparently the inference that if two laborers work together, such joint service automatically makes a superior out of one of them. The report further states that he "counted and reported different kinds and sizes of lumber" as "Foreman was taking stock." In connection therewith, the Board's attention is directed to the Findings in its Award 2028, covering a similar case of counting material during annual inventory.

On December 12th, Scalzo is again reported as "unloading and putting away material," and "shoveling snow," again nothing but laborer's work, unless perchance the employes intend to infer that the foreman should have stood by and specifically directed him upon which side of the walk to deposit each shovelful.

The Board's attention is also called to the last sentence of this letter, reading: "Please advise if you will arrange to pay this employe at rate of 59¢ per hour **on dates he performs work of material handler.**" The claim at that time did not appear to be one for reclassification of a job, but rather one for payment of the higher rate **when higher rated work was performed.** The Carrier has no quarrel with a claim for payment at proper rates when employes are required to perform other than their properly assigned duties, but certainly there is no evidence of any such in the present instance. Exhibit C-1 is not a **joint** check, but an **employes'** check, and still it shows no evidence whatsoever of Scalzo having performed other than "unskilled manual work by direction of a superior," and in the absence of such evidence, the claim cannot properly be sustained.

OPINION OF BOARD: On July 5, 1941, the petitioner was employed as a laborer in the Stores Department of the Carrier, at Cedar Lake and Union Yard, Minneapolis, Minnesota, and had been so employed for some nine months previous to said date. This store is not a part of Minneapolis Junction Store, although located in the same seniority district. At that time the position of a laborer was rated, as to pay, at 49 cents per hour. On the same date the position of material handler in that seniority district was rated at 59 cents per hour. Petitioner contends that the work he was required to do was material handler's work, and he asks that he be paid as such, and relies on Agreement Rules Nos. 61, 62, 63 and 66 as sustaining his claim.

In October, 1937, the Brotherhood and the Carrier agreed upon a definition of the term "Stores Laborer" as follows:

> "An unskilled manual worker, engaged in the handling of material from point to point or to and from cars by direction of a supervisor or superior, and not requiring the checking, tallying, classifying, or recording of same; cleaning, sweeping, or shovel work; cutting grass or weeds or removing snow and ice; or other similar unskilled manual work not involving the performance of checking or clerical duties."

The petitioner, as illustrative of the work he was required to do, outlines the work he actually did for the week of December 6 to 12, 1941, both inclusive. During that week he worked six days of eight hours each, a total of forty-eight hours. For twenty-four hours at that time, according to his claim, he worked at "unloading, tallying and reporting lumber sizes and putting into stock," and for sixteen of said twenty-four hours had the assistance of a helper. He stresses the claim that he was engaged in "tallying," work which he contends, under the definition quoted above, took him out of the classification of "laborer." For the other twenty-four hours he, in our opinion, clearly did laborer's work as defined above, although it is claimed that unloading and putting material away is strictly material handler's work, and that no more than ten hours of the work he did during the week in question should be classed as laborer's work.

We find it difficult, if not impossible, to distinguish, in any satisfactory way, between the work a "material handler" does, and the work done by a "laborer." Viewing the matter from a common sense standpoint, and drawing upon knowledge common to all, we know that a material handler must do manual labor. He does some clerical work, and has responsibilities which laborers are not required to assume, and possibly therein lies the distinction, and on the basis of these distinctions, petitioner says that in reporting and tallying material he was doing the work of a material handler.

The petitioner says that much of the work he does is not supervised; that no material handlers work at Cedar Lake and Union Yard; that in fact only a foreman and himself work in the store at that point; and that, inasmuch as material is handled at that store, the work of a material handler is, necessarily, required. He also says that the foreman is often absent, by which we assume he means that the full responsibility for the material, and the handling of same, rests upon the laborer, and that by reason of these conditions, he should be classed as a material handler.

Some confusion arises from the fact that on December 20, 1941, Division Chairman Burns wrote the Carrier, calling its attention to the character of the work done by the petitioner from December 6 to 12, of that year, and ending with this request: "Please advise if you will arrange to pay this employe at the rate of 59¢ per hour on dates he performs work of material handler." The claim now being considered, filed December 18, 1942, a year later, is based on the contention that, inasmuch as the petitioner did some material handler's work, he should be paid full time at the rate applicable to that type of work. We think we are warranted in considering the claim as it was formally filed, and without regard to the letter of December 20, 1941.

Many awards, interpreting and applying Rules 61 and 62, hold, in effect, that, regardless of what an employe is called, he should be paid the wage applicable to the work he actually performs. Therefore, if petitioner did a substantial amount of material handler's work, he should have been classed as a material handler and paid as such, even though he may have done some of the work of a store laborer, and was classified as such. It is not possible to state just what amount of material handler's work a laborer should do to entitle him to be classified as a material handler. Each case will have to depend on its own circumstances.

Award 1516 of this Board was based on the claim of an employe who for a long period of time had been employed, off and on, as a lumber yard laborer. He claimed that he should be classified and paid as a working foreman. It was claimed that the work he did included that of assisting in, "* * * the unloading of material, and in doing so is the leader of a gang of four men, and checks the material (chiefly lumber) against invoices and makes sure that it is properly placed in the lumber yard. These duties require that he be able to grade and tally lumber in addition to being able to verify the count." There was a joint check of the work performed, after which the claim was denied, the Board holding:

> "The joint check shows that Lehman had no authority to issue instructions or delegate duties to men in the group; that the crew in which he works is supervised by lumbermen or lumber yard foremen; that he does not grade lumber; that he assists in unloading materials working with a gang of 4 men; that the checking of materials consists merely in counting the number of pieces of lumber unloaded from cars of mixed lumber or total number of pieces in cars of the same size."

Award 1517 covers a similar case and the same action was taken.

This Board's Award 2028 was based on a claim that:

"The Carrier violated the Clerks' Agreement in the Store Department at Kingsville, Texas, by requiring laborers to count, weigh, measure and record material during the taking of an annual inventory,"

and the claim was that the laborers involved should be paid the store helper's rate for each day they performed the above-mentioned work. The case was heard with the aid of a Referee. The claim was denied, and we quote from the Opinion:

"It seems from the record that during this ten day annual inventory period it is necessary that materials on hand in and about the storehouse in bins, containers, stock piles, etc., must be counted, weighed and measured, and that some kind of a tag or mark must be placed on or in each bin, container or pile properly designating the quantity, weight or measurement involved. The record is silent as to whether or not store helpers were used with the laborers in performing this work. The record is clear however that the laborers did nothing more than their usual work except to make some notation of their counts, weights and measurements. The record also shows that in the making of the inventory the laborers did not call off the materials for the purpose of recording, but that work was performed by store helpers calling off the notations to the stock clerk who made the permanent records in the stock book.

"The referee is of the opinion that a common sense interpretation of the rules must classify this claim as unsubstantial. A laborer does not cease to be a laborer if he learns to count, weigh, or measure, nor if he is sometimes called upon to exercise one of these simple functions. It is obvious that any person of ordinary intelligence could do these simple acts and that there never was any intention to reclassify these men or change their status by using them for parts of ten days under a roof instead of out in the yard. Taking material from a bin and counting it back into the same bin would be considered by the average person to be a very ordinary form of common labor requiring no more intelligence than to count and write down what had been counted. It does not appear from this record that anything was required of these men on these days other than what might have been incidentally required of them on any day without hardship to themselves or violation of any agreement. Their work was no more burdensome nor difficult of performance on these days than on any other and it would be unreasonable to give them a different classification and rate of pay for these days. The claim must be denied."

The only difference between the case discussed in Award 2028, and the case presently before us, is that the inventory work done was over a short period, and was special work done once a year; while in this case it is claimed that petitioner is habitually required to do material handler's work, as occasion may require, the year round; and the claim in 2028 was limited to the few days during which it was claimed laborers did store helper's work. Even so, we are of the opinion that the principle enunciated in Award 2028, and in Awards 1516 and 1517, are properly applicable to this case.

The definition of a store laborer, adopted by the parties, does not require us to treat him as an automaton who is not permitted to use his senses or his intelligence in the performance of his work. It is by the exercise of their mental faculties that laborers are often selected for advancement. Giving a rule a construction which would serve to prevent or discourage a laborer from taking advantage of opportunities to show ability in his work, and thereby

promote his advancement, would be unfortunate for laborers as a whole, however it might serve the interest of an individual. Petitioner may have done some work customarily done by material handlers, while in other cases material handlers must, necessarily, do work ordinarily performed by laborers. It is impossible to draw an exact line of demarkation between the two types of service. This being true, and so long as no bad faith is shown, on the part of the Carrier, in the classification of employes, and the line which separates different types of employment is not clear, in our opinion this Board would not be warranted in making a classification different from that made by the Carrier. In such a case the Carrier has a discretion, but of course, that discretion must not be abused. What the petitioner may have done in the line of material handler's work, was not, in our opinion, sufficient to take him out of the classification of a laborer, and entitle him to be classified and paid as a material handler. His claim will, therefore, be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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 type of work done by the petitioner did not entitle him to be classified and paid as a material handler.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1943.