Award No. 3311
Docket No. CL-3252

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

(a) The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company have violated and continue to violate Mediation Agreement, Case A-225, signed at Cleveland, Ohio, May 20, 1936 by failure and refusal to make effective the provisions of Section 6 of said agreement, and

(b) The carriers, The Chesapeake and Ohio Railway Company and The New York, Chicago and St. Louis Railroad Company, jointly, now be directed by appropriate order and award to assign and maintain the proper proportion of Chesapeake and Ohio employes in the consolidated offices, yard and freight house operations at Muncie, Indiana.

EMPLOYES' STATEMENT OF FACTS: On April 19, 1943, your Honorable Board rendered Award No. 2159 on Docket CL-2149 in the following stated claim:

"STATEMENT OF CLAIM: (a) Claim of the System Committee of the Brotherhood of Railway Clerks that Mediation Agreement, Case A-225, signed in Cleveland, Ohio, May 20, 1936 has been violated by the failure and refusal of the carriers to make effective the provision of Section 6 of said agreement; and

(b) That C. & O. employes be placed in the joint operation at Muncie, Indiana, in accordance with the provisions of Section 6 of the Mediation Agreement, and that all employes who have suffered wage loss by reason of the failure and refusal of the carriers to apply the provisions of the agreement be compensated for such wage loss."

The Opinion, Findings and Award of your Board in the above case follows:

"OPINION OF BOARD: This claim is predicated upon an alleged breach, by the carrier, of Item 6 of Mediation Agreement, Case No. A-225. That was

which covers all of the consolidated operations at Muncie except platform forces is still in effect and is being applied.

All the parties involved in connection with the Mediation Agreement, including Dr. Leiserson, had had considerable experience in matters of this kind. The method of apportioning the platform forces was discussed in considerable detail during the negotiations and if it had been intended to dispose of the yard and office clerical forces as was claimed by both the Grand Lodge and the C&O representatives at the hearing before the National Mediation Board, on the basis of tonnage, office items and cars handled without including such a provision in the Mediation Agreement it would have been, to say the least, very naive. We cannot conceive of the labor representative on either side "buying a pig in a poke" as innocently as that.

If this carrier was instructed by competent authority to apply Section 6 of the Mediation Agreement of May 20, 1936, to the freight office and yard forces at Muncie and Peru, it would not know how to go about it and neither would anyone else.

The foregoing completely disproves the petitioner's position since it must be obvious that only item (1) listed above was contemplated by Section 6 of the Mediation Agreement of May 20, 1936.

However, for the record and benefit of the Board, and as a part of this statement, an appendix is submitted which goes into considerable detail.

OPINION OF BOARD: The dispute here in its essence is this: Does Section 6 of the Mediation Agreement of May 20, 1936, apply to office and warehouse forces at Muncie, or does it apply only to the warehouse forces at that point?

For purposes of brevity, we will refer to The Chesapeake and Ohio Railway Company as the C & O; to The New York, Chicago and St. Louis Railroad Company as the Nickel Plate; and to the Brotherhood of Railway and Steamship Clerks on the C & O as C & O employes, and on the Nickel Plate as Nickel Plate employees.

It appears that early in the 1930's, the C & O and the Nickel Plate undertook to consolidate their freight business at Muncie, Indiana, Ccicago, and other points. These consolidations ivolved both physical plants and employes. This dispute involves employes.

The consolidation at Muncie was accomplished and accompanied by an agreement dated April 25, 1933, between the two carriers,(the Nickel Plate employes and the Railway Clerks' Association, then representing the employes on the C & O It is agreed that this agreement was applicable to clerks in the Agent's Office and Yard Offices, and does not cover platform forces. It is not contended that this agreement is being violated, but rather the C & O employes claim that it has been superseded by the Mediation Agreement of May 20, 1936, to which reference will presently be made.

The two carriers were unable to secure an agreement with the representatives of the employees for the operation in Chicago. After repeated conferences the Carriers advised the employes' representatives that, pending a formal agreement, they would follow a "temporary arrangement" as of June 4, 1934. That arrangement, as it will be called herein, is set out in the Carrier's submission and will be refrred to presently.

Negotiations continued without success and finally the Nickel Plate employe invoked mediation under the Railway Labor Act in February 1936.

The issue as stated by the National Mediation Board was this: "Refusal of carrier to negotiate an agreement to regulate working Nickel Plate platform forces engaged in the handling of Nickel Plate frieght at Chicago, Ill." Mediation followed.

Meanwhile the Railways Clerks' Association on C & O has been supplanted by the Brotherhood of Railway and Steamship Clerks as the representatives of the employes on that carrier. The C & O employes then intervened in the Mediation Agreement seeking to protect their interests. The result was the Mediation Agreement of May 20, 1936, singed by the two carriers and the representatives of the two organizations of employes. A dispute arose as to the construction and application of the Mediation Agreement and particularly paragraph 6 thereof.

The National Mediation Board was asked by the C & O for an interpretation of the Mediation Agreement. It declined, holding that, if not settled in conference, it was a matter to be submitted to th National Railroad Adjustment Board. The C & O employes then filed a claim here against the C & O . The Carrier took the position that no dispute existed between it and its employes and ehallenged our jurisdiction. We held that the Board had jurisdiction and that the claim should be heard on its merits. Award 2045. The matter came on for determination, and this Division, a referee participating, held that the C & O "has not violated Item 6 of the Mediation Agreement." Award 2159.

This claim then was filed joining both carriers, claiming that they had failed and refused to make the provisions of paragraph 6 effective, and asking an order and award that the carriers assign and maintain the proper proportion of C & O employees in the consolidated offices, yard and freight house operations at Muncie, Indiana.

The C & O responded here that its position was the same as that set forth in Award 2159.

The Nickel Plate responded taking the position that it has no dispute with its employes and that the Mediation Agreement calls for it to put into effect at Muncie a similar arrangement to that had at Chicago "with respect to the platform clerical and laboring forces". In short, the Nickel Plate position is that the Mediation Agreement covers only warehouse forces, so far as it is made applicable at Muncie. It appears that the C & O employes, claimants here, agree that for some time past the warehouse forces at Muncie have been allocated in substantial accord with the Mediation Agreement.

So we get finally down to this question: Does the Mediation Agreement and in particular paragraph 6 thereof require its application at Muncie to yard, office and warehouse forces, or to warehouse forces alone?

We are of the opinion that it is applicable only to warehouse forces.

Mediation was invoked in a dispute involving the Nickel Plate "platform forces" at Chicago. The C & O employes intervened for the purpose of protecting their rights. It is an established principle that he who interevenes in another's litigation takes the issues as he finds them. The intervener cannot reshape the issues. So we are clear that the issue submitted to mediation was limited to the "platform forces".

An analysis of the Mediation Agreement shows that it covers that issue only. Its opening statement so limits the agreement, by reciting that it is "in settlement of all matters in dispute as submitted to the National Mediation Board by the Brotherhood under date of February 8, 1936". The February 8, 1936, date refers to the request for mediation between the Nickel Plate and the Nickel Plate employees to govern th working of the Nickel Plate force "in the warehouse" in Chicago. (See letter of General Chairman Moore to Grand President Harrison, dated May 12, 1936, found in in submission CL-2149, Award 2159.) So that the agreement itself starts off with that limitation.

It is now to be remembered that the Mediation Agreement supplanted the Arrangement which the carriers put in force at Chicago on June 4, 1934. A

comparison of the Arrangement of June 4, 1934, and the Mediation Agreement becomes important.

Paragraph 1 of the Mediation Agreement continues in effect paragraph 1 of the Arrangement with reference to Nickel Plate freight office employes. Paragraph 2 of the Mediation Agreement continues in effect paragraph 2 of the Arrangement, with reference to the warehouse forces, with the addition that C & O employes will continue to be under the C & O Agreement. Paragraph 3 of the Mediation Agreement is again the same as paragraph 3 of the Arrangement with one addition. The addition is the provision which spells out the formula by which "the platform clerical and platform laboring force" to which each road is entitled is to be determined. A tonnage basis is provided. Paragraph 4 of the Arrangement provides for separate rosters in the consolidated warehouse. Paragraph 4 of the Mediation Agreement refers to the consolidated force and sets out the number of employees involved from each system. Paragrahp 5 of the Mediation Agreement makes provision as to the reduction of forces and protects employees listed as provided in paragraph 4 from being furloughed so long as men with seniority subsequent to June 4, 1934, are working. Up to this point there can be no question but that the Mediation Agreement covers and was intended to cover only "platform clerical and platform laboring" forces or warehouse forces.

But paragraph 6 of the Mediation Agreement provides "that at Muncie a similar arrangement to the above shall be made by building up the force of Cheasapeake and Ohio employes, as business may require, from this date until the proportion between the two roads is equitably based on the amount of work on each road. The C & O employes base their contention upon this provision and insist, as they have throughout, that it was intended to cover yard, office, and warehouse employes. It is true, as the C & O employes contend, that the Mediation Agreement does refer to office employes in paragraph 1. But as we have pointed out, that reference merely affirms what had already been done at Chicago about which there appears to have been no dispute.

The "a similar arrangement to the above" provision can only relate to the prvoisions of the agreement which dispose of the matter in dispute—and that was limited to warehouse forces. If we ask "similar" to what, the Agreement answers, similar "to the above". And what was the "above"? The arrangement for a division of the warehouse employes among the two roads upon a tonnage basis. Clearly, the language standing alone means that, but it does not stand alone. As has been pointed out, the materially new provision in the Mediation Agreement as against the arrangement of June 4, 1934, was the formula for determining the number of employes in the warehouse, to which each road was entitled, and who should initially be on that consolidated force as of June 4, 1934.

The Nickel Plate insists that that formula cannot be applied to either yard or office employes. The C & O employes in their submission in Award 2159 state that when the Mediation Agreement was signed it was understood and agreed that from that date on (May 20, 1936) all future vacancies in the entire Muncie joint operation would be filled by C & O employes until such time as they had their proportionate share of the work in the joint operation, and that in allocating the office positions, the "accounting item" basis would be used; that in allocating the work in the freight house a "tonnage" basis would be used, and in allocating yard work a "cars handled" basis would be used. This is repeated in effect in their submissions here. Here then were three different methods for allocating all the jobs at Muncie, on which the C & O employes say agreement was had. But only the tonnage basis method for allocating the work in the warehouse was spelled out in the Mediation Agreement. The other formulas were not written into the agreement nor mentioned therein. The men who signed this Mediation Agreement, including the Chairman of the Mediation Board who signed as a witness, are all men of experience in the drafting of these agreements. It is inconceivable that they would have overlooked two items of the agreement of such importance, re-

membering that the formula is the materially new provision in the Mediation Agreement.

We have no doubt but that in the discussions which took place prior to the Mediation Agreement, the C & O employes undertook to secure an agreement covering yard and office forces at Muncie. They did not get the job done. In a submission made to this Division by Mr. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, dated May 2, 1946, he states in settling disputes it is not uncommon "for the mediator to get written into the agreement the basic or fundamental provisions leaving the details to be governed by discussion in conferences leading to the making of the agreement". He comments on the difficulty involved in getting four parties together who were "not all of the same mind" and they (mediators) "worded the agreement based on what they had been able to persuade the parties to agree to, making it as brief as possible so as not to invoke unnecessary discussion over mere details". The tonnage basis formula for allocation of warehouse employes being "written into the agreement" must be classed as a "fundamental" provision. Formulas for the allocation of employes in the office and yard must rate the same classification. The one cannot be a "fundamental" provision and the others "details". The writing states what the parties had agreed to do. The matters upon which they were not able to reach an agreement were not details. The purpose of reducing an agreement to writing is to make certain as to what was agreed to. It cuts out the matters which were discussed but not agreed to. The writing states the bargain. In Award 3289 we said:

> "It is an established rule, founded on good reason, that where a written agreement has been entered into, all prior and contemporaneous negotiations and understandings are merged in the writing. The written agreement expresses the intention of the parties. Any other rule would destroy the benefits of a written agreement."

There is another test by which agreements are sometimes interpreted and that is to inquire as to what the parties have done under the contract as indicative of how they understood it. Here there is no question but that the Nickel Plate employes were at odds with the C & O employes, and likewise the carriers were on this question both before and after the Mediation Agreement. Had there been the understanding which the C & O employes say was had, it is but reasonable to have expected the parties to follow it in the beginning at least. They did not do so. We cannot escape the conclusion there was no meeting of minds on any matter, save that which was written in the agreement.

To sustain the position of the C & O employes here would require in effect a holding that the agreement of April 25, 1933, covering Muncie, was superseded by the Mediation Agreement. The agreement of April 25, 1933, was formally executed. It was not involved in the dispute that resulted in the Mediation Agreement. It was not referred to in that agreement. Such a formal agreement cannot be set aside and held for naught by implication under these circmstances.

As we see it, what the C & O employes are actually seeking here is a reformation of this contract so as to include both classes of work and formulas that are not there and were not put there by the parties. We have no authroity to write them into the Mediation Agreement, nor to change the agreement as written.

Obviously, as written, paragraph 6 does not entitle the C & O employes to a sustaining award.

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 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 for the reasons stated in the opinion, the claim is denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 22nd day of October, 1946.