Award No. 4464
Docket No. CL-4316

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

> All freight delivered to the Patterson Transfer Company (contract hauler) at the Memphis, Tennessee, freight station be handled (Trucked) from the point of storage in the warehouse to the tailgate of the vehicle of the contract hauler by freight handlers, employes of the carrier.

EMPLOYES' STATEMENT OF FACTS: Employes of the Patterson Transfer Company (contract hauler) employed by the carrier to perform the pick-up and delivery of LCL freight at Memphis, Tennessee, are permitted to come into the warehouse and handle (truck) the freight they are to deliver, from the point of storage in the warehouse to the tailgate or into the truck of the transfer company.

POSITION OF EMPLOYES: This dispute involves the application of the agreement between the Carrier and the Organization regarding the proper assignment of freight handling work, the Organization contending that by both its terms and intent contemplates that the freight handling work here involved should be performed by employes covered by the agreement, for whose benefit the agreement was written.

SCOPE—EMPLOYES AFFECTED—Rule 1—Group 5, of the Clerks' Agreement provides:

> "These rules shall govern the hours of service and working conditions of employes described in the following respective groups in general and district offices, and similar employes in offices and operations under the jurisdiction of other officers and subordinate officers in the various departments of each of the carriers named in the caption of this agreement."

GROUP 5.

> Laborers employed in and around offices, stations and warehouses (including baggage and parcel room employes other than those classified as clerk under these rules), elevator operators, porters, janitors (except Charwomen) and matrons, all as hereinafter defined in Rule 2.

announced in Awards 2812, 2819 and 3839 the Scope Rule of the agreement here in evidence does not include the work here claimed.

(7) The agreement being silent on the work in question, it is within the province of Management to have it performed in the manner described. (See Award 3992.)

(8) Settlements made in similar claims established precedents favorable to the Carrier and the Board has no authority to change these precedents.

(9) None of the awards cited by the employes to the Carrier are in point with the issue here involved and, therefore, lend no support whatever to the position the employes have taken.

(10) The employes are contending for an inefficient, uneconomical, unsatisfactory, featherbedding, make-work arrangement.

(11) All railroads are charged by law with operating in an efficient and economical manner. This the Carrier cannot do if the Board elects to assume jurisdiction and make an award favorable to the employes in this case. Furthermore, Article XIV of the agreement provides in part:

> "This agreement is subject to orders of regulatory commissions and/or any Federal, State of Municipal legislative enactments modifying its terms."

Thus, it is acknowledged that the provisions of the law take precedence over the agreement here in evidence.

(12) The claim was settled by the understanding contained in Assistant Personnel Officer Cox's letter to General Chairman Link of September 25, 1946, and the operation under that settlement is being carried on at the present time. (See Carrier's Exhibit G and H-20.)

(13) The employes have not presented to the Carrier any consistent theory, supported by facts, which would entitle them to prevail. They are, therefore, not entitled to prevail.

For all of the reasons given, the claim should in all things be denied, and the Carrier respectfully requests that the Board so decide.

(Exhibits not reproduced.)

OPINION OF BOARD: The full facts and contentions of the parties are fully set forth in their respective submissions to the Board. We will not detail them here but shall make reference to them in connection with our views with respect to the disposition of the claim presented.

Essentially this dispute, despite the extremely lengthy record presented, boils down to a determination of what work is encompassed in that portion of the Scope Rule, designated as Rule 2(h), contained in the Agreement between the Carrier and the Brotherhood of Railway and Steamship Clerks, effective October 1, 1938, which was reprinted as of March 1, 1944, to include all rules' changes, Memoranda of Understanding, amendments and interpretations subsequent to October 1, 1938. Rule 2(h) reads as follows:

> "Office and Station Laborers—Laborers employed in and around offices, stations and warehouses, including freight handlers (baggage and parcel room employes other than those classifying as clerks under these rules), elevator operators, porters, janitors and matrons, performing services of a character which do not require the use of skilled labor."

It will be noted that the Scope Rule does not contain any definition of the work to be performed by the classes of employes listed therein. That, of course, is not an unusual factor. That it was intended that certain work

does belong to the classifications of employes mentioned therein must be taken as an accepted fact, if the Agreement is to have any validity at all.

Carrier asserts that it has had a contract with Patterson Transfer Company since 1917 for the transfer of LCL freight at the Memphis freight house, which contract has been renewed and continued with certain amendments to this date. Carrier has set aside certain space in the Memphis warehouse for the exclusive use of the Patterson Transfer Company and the practice of having the Transfer Company's employes perform the work of trucking freight from that assigned space to its trucks has been in existence for those many years. Hence it is its contention that such trucking work cannot properly be said to come within the scope of the Agreement.

The record shows that the classes of employes set forth in Rule 2(h) of the instant Agreement were not included in any previous Agreements between the Carrier and the Organization. So far as appears from the record, such classes of employes were not represented by any Organization until the Clerks were certified as their representatives in September 1937, approximately one year prior to the date of the original Agreement.

As pointed out above, the Agreement does not describe work as such. However, work is an attribute of a position and in order to determine what work is subject to a Scope Rule we must determine what work was attributed or intended to be attributed to the positions listed at the time of entering into the Agreement or has been added thereto by subsequent negotiation, conduct or agreement between the parties. Primarily, the problem is one of determining the intention of the parties. In this respect, the practice existing before entering into the Agreement is very definitely a relevant factor, although in this case not too much weight can be attached thereto for the reason that the classification was not found in previous agreements and furthermore these employes were not represented by any Organization when the practice was established so that Carrier could generally add to and take away from the work of such positions in its own uncontrolled discretion. However, when such practice continues for any length of time after representation and negotiation of a collective bargaining agreement, more weight attaches to it. In any event, we believe that there is sufficient evidence in the record of conduct of the signatories to this Agreement, subsequent to its execution, which is sufficiently expressive of the intent of the parties and the construction which they themselves have placed upon the Agreement so that we can determine this question without considering the practice existing before October 1, 1938, as entirely controlling.

The record reveals that the first formal complaint to the Carrier about the manner in which the freight was being transferred at Memphis was on August 27, 1945, nearly seven years after the execution of the collective bargaining agreement. In the meantime, disputes had arisen in connection with similar arrangements for freight transfer; in 1941 at Augusta, Georgia, and Chattanooga, Tennessee, and in 1942 at Jacksonville, Florida, and Macon, Georgia, all of which were settled on a basis less than the putting into effect of so-called tailgate delivery to the contract hauler's truck. With respect to the instant dispute, we find that after considerable correspondence and conferences, the matter was composed, as evidenced by letter to the General Chairman from Carrier's Personnel Officer dated September 25, 1946:

> "I refer to our discussion in the Agent's office at Memphis, Tennessee, on September 21, with respect to the complaint about the manner in which freight has been delivered to the Patterson Transfer Company, the contract hauler, at that point.
>
> This will confirm the understanding reached that, in order to compose the matter, we will try out an arrangement whereby a section of the warehouse will be set aside in which freight to be delivered consignees by the Transfer Company under contract with the Railway will be placed. Delivery will be made to the Transfer Company in such section upon the floor of the warehouse, as at present, and employes of the Transfer Company will continue to

move the freight from the warehouse floor to the door and load it upon trucks of the Transfer Company. Should freight to be delivered by the Transfer Company under contract with the Railway Company be left in another section of the warehouse, it will be moved by Railway employes to the section of the warehouse designated for handling of freight to be delivered by the Transfer Company.

Instructions are being issued to put the above arrangement into effect as soon as practicable."

Now, there is nothing final about this letter and it evidences a commendable spirit of cooperation between the parties in attempting to solve a very difficult problem and we do not by any means view it as a complete bar to the Employes' case, but when considered in connection with the long existing practice and understanding with respect to freight handling with contract haulers at other stations and other factors in the record, we cannot come to any conclusion other than that it was not intended by the parties to the Agreement that the work of hauling freight from the point of storage to the tailgate of the vehicle of the contract hauler be included in the Scope Rule of the instant Agreement. Rather, it seems that the point or place of delivery to the contract hauler within a designated place on the floor of the warehouse was the dividing line.

Employes have placed considerable reliance on Award 1647 but the holding in that case did not go so far as to hold that tailgate delivery must be effectuated by Carrier's employes. Furthermore, Award 1647 was issued in December of 1941 and the Organization agreed to settlement of other disputes over handling of freight by contract haulers for something less than "tailgate delivery", after its adoption. The facts of record in Award 1647 were considerably different than those involved in the instant case. In holding that the claim as presented herein cannot be sustained, we are in no way expressing disagreement with the reasoning of the Board nor with the result reached in that Award. Rather, we feel that were we to sustain the claim as presented, we would in effect be writing a new rule for the parties here involved, something which this Board has no authority to do. It is to be hoped that the parties themselves by further negotiation can resolve their differences over the performance of the work involved. Judging from their past record with respect to this claim and the compromises reached at other stations on the property, that would seem to be a fair prospect.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of July, 1949.