Award No. 4636
Docket No. CL-4561

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Management violated the provisions of the Rules Agreement, effective May 1, 1942, Freight Station, Van Wert, Ohio, Fort Wayne Division, on September 24, 1945, by using the Agent to perform Tallyman's duties.

(b) R. R. Gamble, Tallyman, be paid four hours and forty-five minutes pay at the rate of time and one-half on account of this violation. (Docket W-389)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes of which the claimant in this case is a part, and the Pennsylvania Railroad Company (hereinafter referred to as the Brotherhood and the Carrier, respectively).

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and the Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act, and which has also been filed with the National Railroad Adjustment Board.

The claimant, R. R. Gamble, is regularly assigned to position of Tallyman, Van Wert, Ohio, Freight Station, Fort Wayne Division, tour of duty 8:00 A.M. to 5:00 P.M., one hour for lunch, relief day Sunday, rate $167.96 per month.

On September 24, 1945, two cars of merchandise freight arrived at Van Wert, Ohio, Freight Station from Fort Wayne, Indiana, with a total tonnage of 29,861 lbs. In removing this freight from the cars onto the floor of the Freight House for delivery, the Agent and two clerks from the Ticket Office at the Passenger Station assisted in checking and unloading the cars for a period of four hours and forty-five minutes on this date. Tallyman Gamble is the only employe assigned to work at the Van Wert, Ohio, Freight Station, during the 24-hour period, and his duties consisted primarily in checking, trucking, delivering and receiving freight.

This dispute was progressed to the highest operating official of the Carrier designated to handle labor disputes by means of a joint submission. This joint submission will be considered a part of this statement of facts and is shown as Employes' Exhibit "A".

agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment, and obligations with reference thereto, not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that, under the applicable Agreement between the parties to this dispute, that the Claimant is not entitled to the compensation as claimed.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

Exhibits not reproduced.

OPINION OF BOARD: The facts in this case are not in dispute. They appear in the record in a Joint Statement of Agreed Upon Facts.

"On September 24, 1945, R. R. Gamble was assigned as Tallyman, Van Wert, Ohio, Freight Station, tour of duty 8:00 A.M. to 11:30 A.M. and 12:30 P.M. to 5:00 P.M., rate of pay $167.96 per month, relief day Sunday. On this date two merchandise cars arrived at Van Wert Station from Fort Wayne, with a total tonnage of 29,861 lbs. This was an unusual amount of freight for one day, and in order to get it onto the floor of the house for delivery, the Agent and two Clerks from the Ticket Office at the Passenger Station, assisted in checking and unloading the cars, covering a period of 4¾ hours, on this date.

"R. R. Gamble is the only employe working at the Freight Station during the 24-hour period, and his duties consisted primarily in checking, trucking, delivering and receiving freight.

"On November 2, 1945, the Division Chairman made claim for payment to R. R. Gamble for 4¾ hours at time and one-half, on account of Agent giving assistance as shown above."

In substances, the Carrier claims that the Agent as incidental to his supervisory duties was within his rights, in spite of the Clerks' Agreement, when he assisted the regularly assigned Tallyman to perform his work on this day.

The Organization maintains such action not only was an infringement on the rights of the Tallyman, by virtue of the Scope Rule and his seniority, to all of the work of his assigned position, but that such assistance had the effect of denying him overtime that he might have earned had the Agent and two Ticket Clerks not assisted him.

The record contains no detailed description of the Agent's duties, but the Carrier does say—"The Agent by virtue of his position as Chief Supervisory Officer of the Carrier at Van Wert, Ohio, is responsible for the conduct of the Carrier's business in this territory * * *." It would appear, therefore, to be part of his responsibility to take all reasonable and legitimate steps not only to satisfy patrons using the passenger facilities of the Carrier, but also those patrons who rely on the Carrier for freight service. This is one link in the chain of sound business management.

The Tallyman, in spite of his classification and his seniority rights under the Agreement, is not a free lance. He must in the nature of organization be responsible to some superior for conduct and performance on the job and have the right, too, to seek advice and assistance if he needs it. If the term

"Supervisory Agent" used by the Carrier means anything, it would seem to mean that the Agent, among other things, has a supervisory relationship to all of the employes of his station.

Does this relationship give this Agent the right, under the Agreement, to relieve the Tallyman, during his regular assigned hours, of all or any part of his work? It is not contended here that the Agent had a right to relieve the Tallyman of all of his work on September 24, 1945. How much of the Tallyman's duties, then, may the Agent assume without violating the Agreement? The Clerks say none; the Carrier says the equivalent of 4¾ hours, the total time spent by the Agent, who devoted 1½ hours of his time during the day to such assistance and 1½ hours and 1¾ hours, respectively, by two Ticket Clerks. This appears to have been the total number of man hours of assistance required to enable the Tallyman to complete the task within his regular assigned hours without overtime.

Supporting the Carrier position, Awards 1849, 2373, 3508, 4492, 4446, 4447 and 4559 have been cited. We have read these and others to which reference is made in these citations, going back to Awards 615, 616, 618 and 639. We have read with care the dissenting opinions attached to Awards that are cited in support of the Clerks' claim here.

The Clerks maintain that—"The Scope Rule is all embracing and contemplates that employees who are available and who have established themselves upon a seniority roster covered by the Rules Agreement shall have the right to perform work assigned to positions under this Agreement."

This is not disputed by the Carrier. What the Carrier does insist is that this rule does not give the exclusive right, in this case, to the Tallyman to all of the work. That is the question here. Does this rule give the Clerks the exclusive right to all of this work, to all the time required to handle the described shipment even if to do it meant overtime for the Tallyman? The Clerks say yes, "since the clerical duties performed by the Agent * * * are a component part of the duties assigned daily to the * * * position (Tallyman) * * * the Agent performed work reserved to Clerks under the current Rules Agreement." The Clerks refer specifically to Award 3877 but also cite nine additional Awards listed in their submission. In addition to these, thirty other Awards have been cited in their behalf for consideration in this case. Among these we find 2009, 2071, 2074, 2587, 2837 and 4197. Award 3877 is persuasive, but among the scores of cases we have read, those cited and others to which these referred, none seems to apply more directly to the case here than Award 4197; nor is the issue more squarely drawn or more boldly stated by any other. There the Agent was charged with "checking freight and handling freight * * * during the period (the Clerk) was off duty on his meal period." It differs from the present case, as we see it, only in the fact that in the case that resulted in Award 4197 there was a special "station forces" Memorandum of Agreement which the Carrier interpreted to mean that any member of the station forces, including the Agent, might perform any of the functions, including clerical or physical handling of freight. In the last paragraph of "Position of Carrier" in that case, immediately preceding "Opinion of Board" we find this statement: "The Agreement (referring to Memorandum of Agreement) was so worded that there would not be any dispute concerning the matter when any member of the station force, be the person an agent, agent-telegrapher, a telegraph-clerk or any other clerk, checked, received, delivered or handled freight at one of the railroad's warehouses."

This statement was before the Board when it made its Award in which it said among other things,—"Benton station was not a one-man station * * *. The checking and handling of freight is clerical work * * *. This (Memorandum of Agreement) is a provision of an Agreement made with the Clerks' Organization and deals only with work which belongs to Clerks." No such provision or special agreement is involved in the instant case. We cite it only to indicate that in spite of such special agreement the Board, in that case,

found for the Claimant. In that case also we find the Carrier's position stated as follows: "It is my contention that Agent Booton has a perfect right to perform any work at Benton station and assign any work to any clerk or telegrapher which will help him man this depot at Benton."

We conclude, in the case before us, that whatever the motive, the Agreement was violated when the Agent, outside this Agreement, spent one and one-half hours checking freight, work regularly assigned to the Tallyman. Awards 3877, 4197.

We come now to a consideration of the penalty. Award No. 4571 has been cited as controlling here. There is was said "We have consistently held that the penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the regular occupant of the position would have received if he had performed the work."

When this doctrine is applied to the facts in the instant case we can reach no other conclusion than that claimant is entitled to his claim as made. What are the facts? The Carrier maintained, and reinforced his submission by oral argument before the board, that because of the unusual volume of freight received on the day in question and the imperative necessity for getting it on the freight house floor ready for delivery the next day, it was necessary for the Agent and two ticket clerks to assist the claimant on that day. Their time totaled 4¾ hours. The claim is for 4¾ hours at the overtime rate. Unloading the freight was the Tallyman's work. Carrier insisted it be unloaded and put upon the freight house floor on the day it was received. If part of the work, to the extent of 4¾ hours, had not been taken away from claimant and given to others, we are entitled to assume it would have taken him an equivalent amount of time to do it. He worked his full 8 hours. The only alternative would have been an equivalent amount of overtime.

We perceive no conflict with the doctrine stated in Award 4571. That doctrine and our conclusion based on the facts here, are amply sustained by Awards 3271, 3288 and 3371.

In reaching our conclusion we have not overlooked another statement in Award 4571 that bears upon penalty rate: "Examination of our awards upon the subject show that we have adopted the theory of payment of a penalty by the Carrier for its violation of the Agreement instead of the theory of compensation to the claimant for his loss if he had worked."

Except as set forth in schedule agreements there seems to be no clearly defined penalty for violations except as they have been determined empirically and tempered by the wisdom of the Board. We perceive no conflict with that theory in our conclusion. The penalty, whether or not it happens to coincide with what the employe is justly entitled to under his Agreement (Awards surpra) should not be less than that. It might be more; that is a matter for the judgment of the Board in each such case. Claimant here asks only what was denied him by Carrier's action and only what the Board has allowed other claimants under precisely the same set of facts.

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 the Carrier violated the Agreement.

AWARD

Claim (a) sustained; claim (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of November, 1949.

DISSENT TO AWARD No. 4636—DOCKET CL-4561

The duties performed by the Station Agent in the circumstance of this case were those ordinarily performed by clerks under his supervision and were as well of the character which had been performed by Agents, who incidental to their duties on this and other railroads did such work when and as its performance was thus required many years before the Brotherhood of Railway Clerks, whose Agreement here is held to have been violated, had entered into any agreements with the Carrier.

The contractual situation in respect to the making of the Clerks' Agreement, here relied upon, in relation to the precedent right of Station Agents clearly evidenced as an exception to the Scope Rule of the Clerks' Agreement the work done by the Agent in the circumstance here involved.

The Agent on this occasion in the best interests of the Carrier and its patrons performed duties normally and precedently attached to his position when he assisted the tallyman, an employe coming under the scope of the Clerks' Agreement, in order that the merchandise at his station should be handled efficiently and without delay.

The work of the tallyman was clerical work covered by the Clerks' Agreement but when upon occasion as here required it is done by an Agent it became identified as work which, by the precedence of the Agent's right to its performance before the Clerks acquired their rights to such work, constituted no violation of the Clerks' Agreement.

There was no loss of work by the occupant of the position under the Clerks' Agreement regularly assigned thereto nor was there any deduction from the amount of the work of that character belonging exclusively under the Clerks' Agreement.

To declare that it was a violation of the Clerks' Agreement because the Agent performed the similar duties under his pre-existing right to do so and without transgressing upon the Clerks' rights thereby limited is but to attempt extension of the Scope of the Clerks' Agreement and represents error in decision.

In respect to the application of penalty, the statement in last paragraph of the Opinion reading:

> Except as set forth in schedule agreements there seems to be no clearly defined penalty for violations except as they have been determined empirically and tempered by the wisdom of the Board.
> * * *

is in error and contrary to that which is found in Award 4244 wherein many preceding awards were cited in showing the consistency (and not the empirical determination) of this Board in application of penalty on the basis stated in Award 4244, viz:

> * * * One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing that makes the higher rate applicable. One who has been deprived of work is not entitled to recover penalties accruing to the employe who actually performs the work where such penalties arise from the fact of his actually performing it. * * *

That consistency by the Division in its application of penalties has been followed in many awards succeeding Award 4244 including Award 4616 where again was quoted from Award 4244 the basis for consistent and proper application of penalty when due.

The instant award is in error both as to the proper application of the Agreement and in respect to the imposition of penalty.

/s/ C. C. Cook
/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. P. Dugan
/s/ J. E. Kemp