Award No. 7203
Docket No. CL-7221

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) Carrier violated and continues to violate the Rules of the Clerks' Agreement at the System Maintenance of Way Shop, West Oakland, California, when it assigned the clerical work of ordering parts and/or material, and duties incidental thereto, to a Machinist, an employe not covered by the Clerks' Agreement; and,

(b) That the involved clerical work shall be restored to the scope and operation of the Clerks' Agreement and Mr. Edwin N. Harty, and/or his successors, Roadway Equipment Clerk, be compensated eight (8) hours at the rate of time and one-half for June 27, 1951, the day and date the Division Chairman formally presented the dispute to the Superintendent, and for each and every date thereafter until the Agreement violation is corrected.

EMPLOYES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its Employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, bearing effective date of October 1, 1940, which Agreement, reprinted January 1, 1953, including revisions (hereinafter referred to as the Agreement) was in effect on the dates involved in the instant claim. A copy of the Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

2. The Carrier's property consists of a General Office located at San Francisco, California, and ten (10) Operating Divisions with headquarters as follows: Portland Division at Portland, Oregon; Salt Lake Division at Ogden, Utah; Shasta Division at Dunsmuir, California; Sacramento Division at Sacramento, California; Western Division at Oakland, California; Coast Division at San Francisco, California; San Joaquin Division at Bakersfield, California; Los Angeles Division at Los Angeles, California; Tucson Division at Tucson, Arizona, and Rio Grande Division at El Paso, Texas.

For many years prior to sometime during 1936, all types of repairs to Carrier's equipment were performed on each respective Operating Division where shops were established at particular locations to meet the requirements

Rule 6 of the current agreement provides the established position shall not be discontinued and new ones created under a different title covering the relatively same class of work for the purpose of reducing the rate of pay or evading the application of these rules. The positions that existed in the office of the System Maintenance of Way Shop prior to November 1, 1944, were still in existence when the claimant returned from leave of absence. Obviously Rule 6 is of no value to the petitioner.

Rule 20 of the current agreement, known as the overtime rule, provides for the compensation of employes covered by the current agreement who are required to work in excess of 8 hours on any day, or more than five days in a work week. The claimant has been compensated for all overtime worked in accordance with Rule 20, obviously it lends no support to the instant claim.

Rule 21 of the current agreement outlines the method of compensating employes coming within the scope of the current agreement, when they are notified or called to perform work not continuous with regular work period; or when said employes are required, after completion of their regular tour of duty and subsequent to the time released therefrom, to return for further service; or when required to report for duty in advance but continuous with regular work period; or to perform service on Sundays, week-day off days, or holidays. This rule does not in any manner support the claim in this docket, since none of the conditions described in the rule are here involved.

Rule 26 of the current agreement provides for the establishment and termination of seniority; clearly it does not support the claim in this docket.

Rule 33 provides for the advertising and assigning of new and vacant positions coming within the scope of the current agreement. There is no dispute here with respect to advertising positions or assignment thereto, obviously, Rule 33 is not involved in the instant dispute.

CONCLUSION

Carrier asserts it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support; therefore requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Before considering this dispute on its merits, it is necessary to dispose of a Motion in this docket to the effect that action be withheld pending the giving of notice of hearing to other parties involved.

In view of a number of Awards of this Board and the Decision of the Supreme Court of the United States in the case of Whitehouse vs. Illinois Central Railroad, and the finality of this matter (No. 131 October Term of U. S. Sup. Ct., 1954), followed by the dismissal of the cause of action by the United States District Court, the Board now has jurisdiction over the necessary parties to this proceeding and over the subject matter hereof. Prior Award 5759 of this Board was ill advised.

There exists no conflict between the parties as to the essential facts of this dispute.

In essence this claim concerns the allegation of the petitioners that the respondent assigned (in violation of the effective Agreement) clerical work to a machinist not covered by said Agreement; together with a request that such improperly assigned work be restored to the Clerks' Agreement, with reparations to Edwin N. Harty, and his successors, at the punitive rate, retroactive to the date of presentment of this claim, namely June 27, 1951.

The locale of this dispute in the Division Maintenance of Way Shop at West Oakland, California, where major and minor repairs are performed on both roadway work and automotive equipment.

The record indicates that in June 1937 a clerical position was established and awarded to the Claimant here. In addition to clerical work, the duty of ordering all parts and materials was assigned to this position. Due to an increase in the over-all work load at this location, the clerical position of Materials Accounts Clerk was established in 1941. Claimant Harty was assigned thereto with the duty of requisitioning parts and materials from the Stores Department maintained by the respondent or from outside suppliers. Due undoubtedly to a still greater increase in the over-all work load in 1942, the position of Roadway Equipment Clerk was created, with the duties thereof being likewise assigned to Claimant Harty. In addition to various clerical work, the duties of Roadway Equipment Clerk included the ordering of parts from various sources and the keeping of all necessary records pertaining thereto in connection with both roadway work and automotive equipment. Subsequent thereto a Machinists' position was bulletined (No. 114), with assigned duties of:

> "Qualifications: Must be familiar with automotive and engine parts; should be proficient in the use of catalogs pertaining to the identifying of such parts and have a general knowledge of system used in obtaining parts through parts firms."

The record indicates at this time six clerical positions (one vacant) existed at the location in question.

It is the performance of the above duties by a machinist which the Organization contends had the effect of removing work, clearly clerical, from the scope of the Clerks' Agreement and in contravention thereof.

The respondent asserts that the work of ordering of parts for automotive and roadway equipment from the Stores Department and outside suppliers via telephone or otherwise and the negligible paper work in connection therewith has never been work belonging exclusively within the province of clerical positions, having been historically performed by machinists as incidental to their other duties, and that it was not until such work increased that clerical positions were established to requisition parts and keep records pertaining thereto as part of their (clerks') duties.

It is further asserted that the machinist on the position in question performs no clerical work in connection with his duties, but that in truth and in fact, the few purely clerical duties existing or arising from the said position were performed by clerks. The respondent further contended that the claimant suffered no loss in view of the fact that he worked at all times in question on his regular assignment.

We are of the opinion that the work with which we are here concerned is clerical in nature and comes within the scope of the effective Agreement. The work of ordering parts, materials and supplies, together with the necessary clerical work of maintaining records, accounts statements and requisitions, had for a long period of time been performed by Clerks. We think that the respondent recognized the work as being clerical in nature by its own actions. It did so when it established the position of "Clerk" and assigned Harty, whose name was on the Clerks' Roster, thereto on July 1, 1937; it continued this recognition when it bulletined the position of Materials Accounts Clerk in 1941 and Roadway Equipment Clerk in 1942, in each instance permitting the said Harty, who still was carried on the Clerks' Seniority, to bid.

Further, in each instance, these positions were bulletined as "Clerks' positions", with assigned duties including:

> ". . . Including requisitioning and following up of delivery of equipment repair parts. Necessitating knowledge of parts, catalogues,

method of requisitioning material and handling of same with Stores Department."

They were further and more conclusively recognized as clerical positions with clerical duties when, on January 16, 1945, and again on May 3, 1946, the position of Roadway Equipment Clerk became vacant and, receiving no bids on the bulletined vacancy from employes off the Clerks' Roster, accepted bids from and filled the vacancies with the brothers Middlekauff, both machinists, and both of whom were granted a seniority date on, and transferred to, the Clerks' Seniority Roster.

Bulletin No. 114, under which the questioned duties were assigned to a machinist, set forth duties that are largely comparable with, if not identical to, those required of the Roadway Equipment Clerk. They are in no way comparable to the duties ordinarily expected of a machinist or those contained in Bulletin No. 121 for a vacant machinist position.

The respondent, in asserting that the ordering of parts and materials was and is incidental to the machinist position, admitted that in the past a clerical position was established to handle the general requisitions of parts when the work had increased to a point where machinists could not handle the maintaining of records and the requisitioning of parts.

We are of the opinion that this is the condition here.

If the duties of ordering parts and materials are merely incidental to the position of machinist, they would, and could be performed by them individually at all times under normal conditions. When all employes classified as machinists do not perform a particular function and the said function (in its sum total) is performed by one individual, it ceases to be a function that is incidental to the position, as here used and applied.

We, therefore, conclude that the effective Agreement was violated.

We thus proceed to that portion of the claim pertaining to what reparations, if any, are due in the premises. We have found and held that the work here was clerical work coming within the Scope Rule of the effective Agreement and was improperly assigned to a class and craft not covered thereby.

We think what the Board said in Award 6063 properly applies here:

> "Carrier contends that the claim should be disallowed because none of the claimants lost any time as a result of this company doing the work. This claim is primarily to enforce the scope of the agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the carrier is concerned for if the agreement is violated, it must pay the penalty therefor in any event."

However, that portion of the claim which seeks reparations at the punitive rate is denied. The claim is valid only at the pro rata rate for innumerable awards of this Division hold that the extent of penalty for work lost is the pro rata rate. Awards 6852, 6853, 6854.

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 thereon;

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.

AWARD

Claim (a) sustained.

Claim (b) sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of December, 1955.

DISSENT TO AWARD NO. 7203, DOCKET NO. CL-7221

This award is error compounded on error.

First: The referee states that there exists no conflict between the parties as to the essential facts of this dispue. But—there is serious conflict in the Record as to the essential facts in this dispute, and, such conflict had to be resolved in order to reach a determinative award. This was not done.

Second: The issue before the referee was—the use of a mechanic in the Carrier's System Maintenance of Way Shop, to verify parts requested by mechanics and to telephone outside firms with which the Carrier has standing orders for the parts.

The referee conceded that such work when incidental to position of machinist could be performed by them individually at all times under normal conditions.

It is an accepted principle that such work is treated as excluded from the Clerks' Agreement and is treated as the work of a machinist. Whether performed by fifteen machinists or by one machinist such work remains in the category of machinists' work and remains in the category of work excluded from the Clerks' Agreement.

Third: The clear showing in the Record that the disputed work was not work reserved exclusively to clerks and had, by **practice** over a term of years, become machinists' work, was given no consideration in reaching a determinative award.

Fourth: Assuming non-compliance of the provisions of the Agreement by the Carrier, that portion of the award sustaining a claim for an employe who was on duty and working at the times the disputed work was performed and who suffered no damages has no validity.

Therefore, by a finding of admitted fact in the Record, the Claimant here suffered no loss of earnings for the simple reason that he was on duty and under pay during and at the time of the violation alleged in this docket. Nevertheless, the referee purports to order that such a Claimant coming before this Board with no showing of damage shall be paid money apparently in the form of a penalty. This referee cites **Award No. 6063** as authority for such unconscionable action. That award is itself, like the within award, a most erroneous misapplication of sound principles. There is no authority in this administrative field for ignoring the basic legal concept that damage must be shown in order to make out a case for recovery. There is no provision for penalty in this contract even in the form of a liquidated damage. Even if

there were, we would be bound to the long-standing legal proposition that a penalty provision which is disproportionate to the proved damage is unenforceable.

There is a wealth of awards on this and other Divisions of this Board both before and since the one chosen by this referee. It is outstandingly coincidental that on January 30, 1953, when Award 6063 was entered by this Division, **Award 1638** was entered by the Second Division, enunciating the sounder view in this language: "the purposes of the Board are remedial and not punitive; . . . its purpose is to enforce agreements as made and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterrents against future violations." The award observes that the Supreme Court of the United States recognizes the rule and cites **Republic Steel Corp. v. Labor Board,** 311 U. S. 7, and **N.L.R.B. v. Seven-Up Bottling Co.,** 73 S. Ct. 287. That award (1638) goes on to express the truism: "The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

In our Award 5186 by Referee Boyd the same sound principle is stated in this language: "It is also well established by the precedents of previous awards that the Board will not impose a penalty where none has been specified in the Agreement. **This is sound doctrine.**" (Emphasis supplied.)

Our attempted deviation here from such sound legal principles is entirely forceless, having no effect, persuasive or otherwise.

We repeat, even though we assume non-compliance of the provisions of the Agreement, no valid basis exists for sustaining that portion of the claim on behalf of an employe on duty and working, and who suffered no damages.

For the reasons stated, we dissent.

/s/ **J. E. Kemp**
/s/ **E. T. Horsley**
/s/ **R. M. Butler**
/s/ **W. H. Castle**
/s/ **C. P. Dugan**