Award No. 7816
Docket No. CL-6857

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILROAD COMPANY

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

(1) That, the Carrier violated an continues to violate the Rules of the Clerks' Agreement, when, on August 18, 1951, it arbitrarily and unilaterally removed work, that for many years had been assigned to and performed by AAR Clerk's positions, from such positions and assigned it to and required and/or permitted it to be performed by employes not covered by said Agreement, and as a penalty for the violation,

(2) That Clerk M. J. Arrighi and/or his successor(s) at Richmond, Virginia, be compensated for five hours and forty minutes at the time and one-half rate of his position, plus subsequent general wage increases, for December 1, 1951, and the same number of hours and minutes for each working day subsequent thereto until the violation is corrected by returning the work to an employe covered by the Clerks' Agreement.

That all other employes adversely affected, at Richmond, Virginia, be compensated for all losses sustained account of this violation for December 1, 1951, and subsequent thereto, until the violation is corrected.

(3) That Clerk W. H. Powers and/or his successor(s) at Hamlet, North Carolina, be compensated for eight hours at the time and one-half rate of his position for Saturday, August 18, 1951, and the same for all Saturdays subsequent thereto and, for four hours at the time and one-half rate of said position for August 20, 1951, and the same for all subsequent assigned work days until this violation is corrected by returning this work to a position covered by the scope of the Clerks' Agreement.

That all losses sustained by all employes affected or who may become affected at Hamlet, North Carolina, be paid for August 18, 1951, and subsequent thereto, until the violation is corrected.

(4) That Clerk O. L. Braswell and/or his successor(s) at Monroe, North Carolina be compensated for four hours at the time and one-half rate of his position for August 20, 1951, and subsequent thereto, until the violation

is corrected by returning this work to a position covered by the Clerks' Agreement.

That all losses sustained by all employes affected or who may become affected at Monroe, North Carolina, be paid for August 20, 1951, and subsequent thereto, until the violation is corrected.

(5) That Clerk C. R. Virnelson and/or his successor(s) at Savannah, Georgia, be compensated for eight hours at the time and one-half rate of his position for October 25, 1951, and subsequent thereto, until this work is returned to an employe covered by the Clerks' Agreement.

(6) That Clerk J. D. Burfoot and/or his successor(s) at Jacksonville, Florida, he compensated for four hours at the time and one-half of his position, plus subsequent general wage increases, for January 7, 1952, and the same number of hours for each working day subsequent thereto, until the violation is corrected by returning the work to an employe covered by the Clerks' Agreement.

That all employes adversely affected at Jacksonville, Florida, be compensated for all losses sustained account of this violation for January 7, 1951, and subsequent thereto, until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Several days prior to August 18, 1951, the following letter was sent to the AAR Clerks at Richmond, Virginia; Hamlet, North Carolina; Monroe, North Carolina; Savannah, Georgia and Jacksonville, Florida, by their superiors,

> "Effective August 18, 1951 you will discontinue going to the car for the purpose of performing A.A.R. write-up repair card work."

This was a duty which had been assigned to and performed by AAR Clerks for years. This required the AAR Clerk to go to the car in the repair yard and write the original record of material used in making the repairs as well as the labor hours required to perform the work. Such was in accordance with the provisions of Rule 7 of the Code of Rules governing the condition of, and repairs to freight and passenger cars adopted by the Association of American Railroads, which states:

> "When repairs are made to a foreign car (except as otherwise provided in Rule 108), or to any car on the authority of a defect card, the original record of repairs shall be written at the car on billing repair card, * * *."

The above quoted letter evidences the fact that this duty was assigned to and performed by Claimants. In advertising these positions for bid the duties shown on the bulletins would require the applicant to be familiar with the AAR Code of Rules and write up of AAR repair bills, checking and recording cars on repair tracks.

Richmond (Hermitage), Virginia. Records indicate that this work was assigned to and performed by Clerks since 1941. On January 26, 1949, the Clerk who had occupied the AAR Clerk's position for approximately fifteen years vacated it and it was advertised for bid on Superintendent's bulletin 11 of that date showing as the duties thereon: "Writing up repairs to equipment." Claim is presently pending covering the performance of the advertised duties on Sundays, holidays and before and after assigned hours of the AAR Clerk's position by employes without the Scope of the Clerks' Agreement prior to August 18, 1951. Since that date these duties have been performed by foremen, supervisors and carmen.

Hamlet, North Carolina. This is a major car repair point and we quote the following letter to show just how and by whom this work was performed at that point.

OPINION OF BOARD: The locale of this dispute covers five locations, namely, Richmond, Virginia, Hamlet, North Carolina, Monroe, North Carolina, Savannah, Georgia, and Jacksonville, Florida. Claim is presented in behalf of named individuals, their successors, and others affected at each of the above named points. Reparations are sought for each allegedly affected to the extent of eight hours, punitive rate. The work involved concerns the preparation of "billing repair cards" by A. A. R. Clerks.

The Organization asserts that the work in question has, at the five locations in question, been assigned to and performed by A.A.R. Clerks for many years. It was pointed out that this condition or practice came into being prior to the execution of the effective agreement, said practice being in existence at Jacksonville, Florida in 1925, and at other points at later dates. It was asserted that this fact was admitted by the Carrier when prior to August 18, 1951 the claimants were notified that as of that date they were to discontinue going to the car for the purpose of performing write-up repair card work. It was further contended that Rule 7 of the Association of American Railroads required this work to be done at car side, and that this work having been in the past assigned to, and performed by A. A. R. Clerks; could not now be removed from their assignments and performed by Mechanical Department employes, not covered by the confronting agreement.

The Respondent denied that there existed a universal custom and practice relative to the performance of this work, pointing out that the Organization was alleging the existence of such practice at only five locations, while at 42 other points this work was being performed by others than clerks and that the effective agreement should be here interpreted on a system wide basis. It was asserted that the making out of the initial cars repair card was properly a function that could be performed by Mechanical employes incidentally with their other duties; with all subsequent handling thereof by Clerks. It was further asserted that the inclusion of this work in advertising the positions here involved was not indicative that the same (work) belonged to clerks to the exclusion of all other crafts. It was pointed out that the exclusive performance of this work would not result in the increase of clerical forces, that no existing position would be deprived of overtime by its (work) performance by other personnel than clerks; nor would such performance result in the abolishment of any clerical position.

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 the 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 only necessary parties to this proceeding and over the subject matter hereof.

The confronting Scope Rule is ambiguous. It does not specifically enumerate the work encompassed thereby. This Board has held in numerous decisions that a determination must be made as to whether or not the work involved is of the type that has been ordinarily and traditionally performed by any particular craft, using as the criteria, past custom and practice, which can in the premises, indicate the parties interpretation and application of such rule.

It is noted that the Respondent asserts, without denial by the Organization, that Mechanical employes have performed this work at some 42 locations on the property. In this connection it is likewise noted that the Organization asserts that while this is true, preparation of the cards concerning repair work to foreign equipment, had, at the named major repair points, been continuously and historically performed by A.A.R. Clerks. Thus we are confronted with the question whether or not different customs and

practices, if found to exist at different points on a property can be said to properly exist at these points. We think that they can.

The facts of record are that A.A.R. Clerks have performed this work at the points in question for a number of years, dating back as far as 1925 at Jacksonville, Florida and slightly more recent dates at other points at issue. At Savannah, Georgia the work was returned to the A.R.A. Clerks upon protest as to its improper removal in 1946, 1949, and 1950. The record further indicates that numerous claims have been allowed where this work was involved at more than one of these locations.

The individual named in claim 6 above was likewise involved in the claim upon which Award 6298 was based. The identical work was likewise involved. Therein in the Respondent stated that it had been determined that claimant had in truth and in fact performed the work of preparing cards prior to July, 1949, and had issued instructions that such (overtime) work should in the future be returned to claimant to perform.

Thus we conclude that the work in question had, at the locations with which we are concerned, been placed within the scope of the controlling agreement and that it (work) belongs to the employes covered thereby.

The Respondent asserts that even though a violation exists claimants here are not entitled to reparations because no time was lost. The confronting claim was brought, in the main, to enforce the scope rule of the Agreement. In finding that the work was encompassed by the scope rule, reparations are justified. Otherwise the sanctity of the agreement cannot be maintained and violation thereof discouraged.

Having found that reparations are justified we note that same are sought at the punitive rate. This Board has on numerous occasions found that the pro-rata rate is all that is warranted where no work is performed. None was performed here, so only the pro-rata rate can be allowed.

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 Agreement was violated to the extent indicated in the above opinion.

AWARD

Claims sustained in accordance with the above opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 22nd day of April, 1957.

DISSENT TO AWARD NO. 7816, DOCKET NO. CL-6857

In **Dissent to Award 7311,** Docket CL-7214, we showed that the United States District Courts uniformly hold that awards rendered without regard to the mandatory provisions of Section 3, First (j) of the Railway Labor Act are illegal and void. That Dissent is equally applicable here since the record shows that Mechanical Department employes perform the type of

work involved in this dispute and may be affected by the award. The flagrant disregard of our statutory duty to give the mechanical employes involved "due notice" and an opportunity to be heard flouts the decisions of the Courts and nullifies the purpose for which the Board was established and creates disharmony in the industry.

Not content with the foregoing error, the conclusion on the merits compounds the error. The majority first finds that the "Scope Rule is ambiguous" and that "It does not specifically enumerate the work encompassed thereby." In this connection, they then state:—

> "* * * This Board has held in numerous decisions that a determination must be made as to whether or not the work involved is of the type that has been **ordinarily and traditionally performed by any particular craft,** using as the criteria, past custom and practice, which can in the premises, indicate the parties' interpretation and application of such rule." (Emphasis added.)

It becomes quite obvious, then, that the particular work involved could not have been and was not assigned to clerical employes by specific reference in the Agreement. Therefore, it was incumbent upon the claimant to establish that the particular work he is claiming to be exclusively his under the Agreement, has traditionally and customarily been performed on the property involved exclusively by employes of the class or craft to which he belongs. **(Award 7387.)** The record does not show that work of the nature here involved has traditionally and customarily been performed by clerical employes to the exclusion of all others. The record does show, however, and the majority freely admit it, that clerical employes have not heretofore performed such work to the exclusion of all others. As a matter of fact, the record shows that the preponderance of such work is overwhelmingly performed by other than clerical employes. Nevertheless, the majority concludes:—

> "Thus we conclude that the work in question had, at the locations with which we are concerned, been placed within the scope of the controlling agreement and that it (work) belongs to the employes covered thereby."

The fundamental error in the conclusion lies with the fact that the Agreement is a system-wide agreement and system-wide in application. Nonetheless, the Award relegates the Agreement to the status of a sectional or point Agreement, having a roving or different application as to the same work at different points on the property. The error in such a conclusion is adequately demonstrated in recent **Award 7784,** which was adopted on March 13, 1957. In that award we said:—

> "In summary, then, we must conclude that despite the acknowledged fact that car heater service was performed at Westbound Yard, Marion, Ohio by Roster 'B' employes for 22 years,
>
> "(1) this work is not assigned to them by specific reference in the Agreement;
>
> "(2) Organization has failed to prove that this work belongs to its members to the exclusion of all other classes or crafts on Carrier's system;
>
> "(3) there is no definite knowledge or proof that claimants have 'lost', have been 'injured';
>
> "(4) the Agreement here applicable is not a sectional, but is a system-wide agreement; and
>
> "(5) the evidence of record would indicate that a prior Award of this Division, 7031, (Carter) covers the issue here before us;

"* * * Where work may properly be assigned to two or more crafts, an assignment to one does not have the effect of making it the exclusive work of that craft in the absence of a plain language indicating such an intent. Nor is the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement. We conclude that the work here in question was not the exclusive work of Clerks on this Carrier. * * *.'

"A denial Award is, therefore, indicated."

Most impressive is the fact that **Award 7031** cited above, **involved the same parties as the instant case.**

Assuming non-compliance with the Agreement, the majority admit claimants were not damaged. Accordingly, that portion of the Award sustaining claim for employes who were on duty and under pay at the time the disputed work was performed, and suffering no damage, has no validity. Nevertheless, the Referee purports to order that claimants coming before this Board with no showing of damages shall be paid money apparently in the form of a penalty. 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 of recovery. There is no provision for penalty in the Agreement even in the form of 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 are Awards on this and other Divisions of this Board adhering to this basic legal concept. **Second Division Award 1638** enunciated 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." That 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. **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,** the same sound principle is expressed 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 added.)

The Award also purports to sustain claims for "all other employes adversely affected" notwithstanding the fact that there is no showing in the record that any other employes were adversely affected. This Award does not even follow **Award 6348,** wherein this same Referee said:—

"* * * we conclude, and so find and hold, that the claim before us is limited to * * * the compensation of Clerk O'Connor, and that the claims for 'all employes adversely affected' should be and the same are hereby dismissed without prejudice."

For the reasons stated, we dissent.

/s/ J. F. Mullen
/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp