Award No. 8496
Docket No. CL-8132

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Sempliner, Referee

PARTIES TO DISPUTE:

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

READING COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerical Agreement:

1. When on January 10, 1955, the Carrier permitted and required employes not within the purview of terms, provisions and rules of the Clerical Agreement, to perform duties in connection with tying down and untying of freight containers (vans and trailers) on freight cars, at 4th Street & Erie Avenue Freight Station, Philadelphia, Pa.

2. That the Carrier be required to compensate at punitive rate, the senior available employe or employes, under the Clerical Agreement for all time required in performing duties and work, outlined in claim No. 1.

3. That the Carrier be required to enter into a joint check for the purpose of developing the amount of time involved in performance of the duties and to negotiate the rate of pay to be applicable to duties involved, outlined in claim No. 1.

EMPLOYES' STATEMENT OF FACTS: On January 10, 1955, the Reading Company inaugurated truck-trailer service, between Philadelphia, Pa., Camden, N. J. and Chicago, Illinois. While this was initially scheduled to begin January 1, 1955 actual operations did not take place until January 10, 1955. The clerical employes having previously observed that it was apparent due to initial tests and conversations with local officers that other than clerical and related employes would be utilized in the performance of the operations, duties and work in connection with the newly established motor trailer service. The clerical employes contacted their representatives with the view of correcting and protesting the assignment of duties under the Clerical Agreement to other employes. The clerical employes contended that the duties assigned to other employes (Carmen) were and are within the scope and purview of the Clerical Agreement and such duties have been performed for years by employes within class and craft covered by the Clerical Agreement, the only change being in the method of performing the work.

ment of work necessary for its operation lies within the Carriers discretion."

To the same effect are Awards 2491, 5897, 6001, 6022, Third Division.

When the work in question is considered in the light of the facts, it is clear that the claim has no basis. The Board has consistently held that the burden of proof is upon the party making the claim. Mere assertion is not sufficient. The Board requires competent proof. Further, the Board is powerless to grant relief from alleged rules violations on pleas of extenuating circumstances. The Board made this clear in Award 6402 when it said:

> "It is therefore the opinion of the Board that no conclusive evidence has been produced to show any violation of the Agreement as alleged. **We again reiterate as we have said many times before, the burden of proof is upon the party making the claim, and where competent proof is lacking a sustaining award is improper.**" (Emphasis supplied.)

To the same effect are Awards 4274, 6001, 6002, 6018, 6075 and many others.

Part 2 of the Organization's claim is a request that Carrier be required to compensate at punitive rate the senior available employe or employes, whoever they may be, for all time required of carmen in tying down and untying trailers on flat cars. This, in Carrier's opinion, would be an unnecessary and unwarranted penalty payment which is directly opposed to Carrier's responsibility of operating efficiently and economically in the interest of its patrons, and has no basis under Carrier's agreement with the Clerks' Organization.

Part 3 of the Organization's claim, requesting a joint check as to the time involved and rate of pay applicable to performance of work of tying down and untying trailers on flat cars, likewise has no basis under the rules of the Carrier's agreement with the Clerks' Organization. As Carrier has pointed out hereinbefore, work in question has never been negotiated under the terms of the Clerks' Agreement.

For the reasons set forth hereinbefore, the Carrier requests the Board not to assume jurisdiction in this dispute but to dismiss same. However, should the Board assume jurisdiction, it is Carrier's position that the Organization's claim is, under the facts and circumstances surrounding this case, unwarranted and without merit and Carrier respectfully requests that the claim be denied in its entirety.

This claim has been discussed in conference and handled by correspondence with representatives of the Clerks' Brotherhood.

(Exhibits not reproduced.)

OPINION OF BOARD: This docket, CL-8132, involves a dispute (complaint filed October 18, 1955) between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Reading Company in regard to the so-called "piggy-back" operation. It was argued conjointly with docket CL-8162, which docket (complaint filed

October 21, 1955) involved the same parties, cited the same date of operation (January 10, 1955) in regard to the same "piggy-back" operation. This docket addresses itself to that part of the operation having to do with the tying down, bracing, blocking, as well as the de-blocking, de-bracing and untying the "piggy-back" equipment (trailers). Docket CL-8162 concerns itself to the physical loading of the "piggy-back" equipment (trailers) on the flat cars. Much of what will be said in this opinion will necessarily apply to CL-8162.

The facts are undisputed as follows:

A. Truck trailers loaded off the property by employes of the shipper are brought to the carrier premises by truck tractor driven by truck drivers (members of a non-railroad brotherhood—the Teamsters) employed by the owners of the truck tractor.

B. Before they unhitch their truck tractor, they propel the trailer up a loading ramp and drop it on a specially prepared flat car unaided by railroad personnel. They then unhitch their truck tractor and depart, leaving the trailer untied, unbraced and unblocked on the flat car. At this point the carrier takes over.

The problem as presented had a spinosity of character which on closer examination is not definitive of the real issues.

Motion to Add Necessary Parties. The first of these, found in both dockets, CL-8132 and CL-8162, is the motion of the carrier members to add necessary parties. This motion was dated March 6, 1956, and on which the division being deadlocked, it failed to carry. Considerable time and argument was spent on this question. In **Whitehouse v. Illinois Central R.R. Co.**, 349 U. S. 366 (June 6, 1955) the opinion, in reversing the action of the lower court, which it termed **in the nature of a mandamus**, held that no irreparable harm had been done, or would be likely, by the failure to join necessary parties, and that therefore the extra-ordinary remedy of mandamus would not lie. The question of whether alleged necessary parties should or should not be joined was not there decided.

Subsequently on January 10, 1956, the 8th Circuit Court of Appeals in the matter entitled **The Order of Railroad Telegraphers vs. New Orleans, Texas & Mexico R.R. Co., Debtor, Guy A. Thompson, Trustee**, gave an exhausting review on the subject, and affirmed the action of the lower court in refusing to enforce Award 4734 of the Third Division, National Railroad Adjustment Board. The award, on page 43, takes cognizance that in separate awards the same work because of overlapping contract provisions, may be awarded to other crafts, and goes on to say that relief from this conflict and overlapping does not lie within the purview of the National Railroad Adjustment Board. The 8th Circuit acting in a case where there are conflicting awards sustains the lower court in enjoining the enforcement of the award on the ground that necessary parties were not made a party to the proceeding. The motion of the carrier to add parties is necessary to preserve this right, and is not an idle gesture.

One of the difficulties appears to arise from Section 3, paragraph h, providing "The said Adjustment Board shall be composed of four divisions, whose proceedings shall be **independent** of one another, * * *." Where, as

here, the dispute lies between the Carrier, and the Clerks of one division, and the Carmen of another division, the problem seems to call for additional legislation by Congress unless the several divisions so interpret the Act that they can evolve rules to hear such matters jointly. This does not seem unreasonable, in that the awards of one division are cited as precedents on other divisions and so honored. It would also seem that the requirements of Section 3, paragraph j, providing "* * *, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them." are of equal value as paragraph (h). This being so, and in the absence of congressional definition, the problem is for the several boards to reconcile.

While being firmly of the opinion that notice should be given to all interested parties and being of equally firm opinion that once notice is properly given they would be bound by the award if they failed to appear, it is still recognized that here different divisions are involved, and that the Carmen would be unable to appear. We would therefore be bound by the doctrine of what cannot be done becomes a useless and idle gesture, and need not be done, and would pass on to the other issues.

However, the third party notice issue is not before us. The mere claim of third party interest by a litigant is not conclusive of that interest. The same is true if the third party had filed the original petition to intervene. The right to intervention and notice arises only when this board decrees there is a conflict. Award 7785 would also appear in point. The question of third party intervention, and notice not having been raised originally, has no place here.

L.C.L.—Less Than Carload Shipments. Much has been said in regard to less than carload shipments, the doctrine being advanced that if this could be construed as a less than carload shipment classification (based on the knowledge that usually two trailers were carried on one flat car) then the work would become per se work of the complainant. The L.C.L. argument was further expanded that the package freight inside the van was in reality the former L.C.L. freight that had passed across the platform and in essence the platform had merely been projected to the shipper's factory where the organization should place the freight on the van. The facts do not sustain the contention. Judicial notice is taken that railroads have suffered a declining patronage, losing freight shipments in all categories except those which because of weight and bulk cannot be otherwise shipped. Here the freight is loaded in a trailer and can be, per se, otherwise shipped. It is business potentially lost by the railroad, and therefore lost to all carriers and organizations alike, which has been reclaimed for the railroad by the "piggy-back" operation. The truckmen, store and stock room truckers, freight handlers, stowmen, and hookers-on referred to in the **Scope** section are basically handlers of freight. Here, whenever the carrier has freight to move, they move it,—they would move it (if moved by the carrier) in carload-lots, or in less-than-car-load-lots. They are experts that can move anything from grandma's fish bowl to what have you. The shipper will bring it to the Carrier, and they will move it. Being good craftsmen, when they have moved it, they will tie it down, brace it, and block it for transit. But the tying down, the bracing, and blocking is incidental to the moving of this freight. It is the handling and the moving which controls the work. If there is no handling or moving required, then this claimant has no claim to the incidental tying, bracing or blocking.

The same would be true of protecting a shipment from the weather. If the claimant were to load it, he would do what was necessary to make it ready for shipment and place tarps or other protective covering over the shipment. But the claimant not being in a position to have to move the shipment, he has no claim. He is in the same position as he would be with respect to any other large self-propelled equipment which is placed on the carrier by the owner. He does not have to move it, and therefore he has no claim. The job at which the claimant is skilled, namely moving and storing, has been done by the shipper. The trailer has been sealed prior to its being brought on the property and dropped on the freight car.

The over-the-road trucking is definitely not the work of the claimant, Brotherhood of Railway and Steamship Clerks, and the logical end of the over-the-road function is dropping the load where it will require the least effort for future shipment. If he drops the load on the property, for delivery to the Carrier, then it is the claimant's work to place that load (trailer) on the flat car and tie it down. But if, as here, it is the simplest and most economic procedure to drop the load (trailer) directly on the flat car, then there is no work for the claimant.

As to the number of vans on the flat car, this is immaterial, as they are not moved by the carrier. It is hoped that before long three will grow where two grew before and that both carriers and organizations will prosper. Improvements will change both size and character of equipment, but it is the nature of the work and responsibility that governs.

Seniority. The argument has been made regarding seniority, and application of rules 23, 24, 26. In view of the foregoing, these have no application.

Containers. The argument is made that the trailers used in "piggy-back" operations are in essence containers which come under claimant's jurisdiction. They are containers, as are freight cars, tank cars, and all other box type articles, but being a container has no magic. It is only when the container must be moved onto the cars, or off the cars, by the carrier, that the claimant gains jurisdiction.

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 claimant having failed to prove his case, the claim is dismissed in accordance with the Opinion. The question of notice need not now be decided.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of October, 1958.