Award No. 8855
Docket No. CL-8192

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, 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 Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope, when it permitted employes of Patapsco Stevedoring Company, who are not covered by the Clerks' Rules Agreement to unload 107 carloads of freight at Canton Piers, Baltimore, Maryland, Maryland Division, in violation of the Rules Agreement.

(b) B. B. Schmidt and seventy-seven other named Claimants should be allowed twelve hours' pay as a penalty, for each of freight unloaded (total 107 cars) in violation of the Rules Agreement at Canton Piers on May 25, 26, 27 and 28, 1954, the total to be divided equally among the Claimants. (Docket E-1017)

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 in which the Claimants in this case hold positions 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, as amended, covering Clerical, Other Office, Station, and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

Award No. 4763—(Referee Charles S. Connell):

"This Board is without authority to revise or expand the Agreement between the parties, but must construe and apply agreements as the parties enter into them, and it has no authority to change them to avoid inequitable results. Awards 1248, 2612, 2765, 4259. This Agreement does not restrict the assignment of the employes as set forth in this claim, and it will be denied."

As to the second part of the claim, paragraph (b), which involves a request that B. B. Schmidt and seventy-seven other named Claimants be allowed twelve hours' pay for each car of freight unloaded (total 107 cars) as a penalty, the Carrier submits that it has shown that no Rule of the applicable Agreement was violated in this case. It follows, therefore, monetary claim is without foundation.

III. **Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of 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 Agreement between the parties to it. To grant the claims 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 no work was performed on the Apron Track at Canton Piers on the dates involved that accrued to truckers and the Statement of the Employes to the contrary is unfounded and not supported by concrete evidence.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

All data contained herein have been presented to the employes involved or to their duly authorized representatives.

(Exhibits not Reproduced.)

OPINION OF BOARD: Claimants, under the Scope rule of the agreement, are asking penalty payment for Carrier's allowing stevedores not under the agreement to unload 107 carloads of butter on the apron track at No. I Canton Pier in Baltimore. They were paid for unloading the 75 cars that were on the track under the covered portion of the pier.

Carrier declined payment on the ground that under past practice these employes did not have right to the work on the apron track while the employes are contending to the contrary. Since the burden is always on the claimants to prove their case we must consider the evidence submitted by them in support of the claim.

The only evidence tendered by the employes aside from the Scope rule itself is a statement to the effect that fourteen Group 2 employes, naming them, (there are at least fifty different categories of Group 2 employes) "have placed their personal signatures on statements to the effect that they have handled, and/or unloaded various commodities from freight cars on the apron of No. 1, Open Pier." with the comment "This evidence is available to the Carrier in its own records."

The fact that these statements may be in the Carrier's records does not help us in trying to resolve this issue. These statements were made by the employes and it would seem at least that copies could have been made of them. There is no date when they were filed, no suggestion that they were sworn to, what commodities were handled nor that any request or demand was made on the Carrier to produce them. In the absence of a demand, the Carrier would have a right to assume that the employes would have copies, or if a demand had been made and the Carrier had refused, we would be inclined to give further consideration, but since this is a claim for penalty payment, the Carrier cannot be blamed for not volunteering these statements. See Award 1983.

We are not overlooking Award 4743 in this connection where we said that it was up to the Carrier to come forward with its payroll records (concededly within the exclusive control of and being original records of the Carrier). In our case, as already noted, the statements were prepared by the employes and constructively in their possession. Nor are we overlooking Award 5973 which quotes from Award 4821 as follows:

> "* * * A Carrier will not ordinarily be required to search its records to develop claims against itself. But when a claim has been established and the dates of the violations are determined, the Carrier can be required to supply the names or permit a representative of the Organization to search them out.* * *"

Here the employes are asking the Carrier to produce the very evidence that is essential to the proof of their claim, evidence peculiarly within the knowledge of the Group 2 employes who signed the statements.

As to Carrier's request that it be permitted to use stevedores in helping with the unloading of the butter, the Carrier offers the following explanation:

> "When the Carrier became aware of the fact that there would be approximately 190 carloads of freight (butter) under refrigeration to be loaded into a ship at Canton Piers, it was the local supervision's understanding that all of the cars would be placed on tracks on the covered portion of the Pier. With this in mind, together with the fact that the cars had to be unloaded quickly to avoid deterioration, the Carrier contacted the Division Chairman to obtain permission to have the Patapsco Stevedoring Company assist in the unloading of the cars. * * *"

This request, as noted, was limited to the unloading of the cars "on tracks on its covered section of the Pier," and the denial of the request is not a foreclosure of Carrier's right on the apron track.

Anyone having lived in the Baltimore area for a period of years, as this referee has, knows the kind of hot and humid weather that frequently is present during the last week in May. The above precaution was very reasonable. As to the Carrier's settlement of the claims in Awards 4705 and 5344, we had no such clear cut issue as the use of the apron track on Pier No. 1 as in the instant case. Employes here are not complaining of using the apron track as a dividing line as such. They take the position there was no dividing line separating the work that they were entitled to and that of the stevedores. We think there was. Even assuming that the Scope rule gives exclusive right to the employes to the work ordinarily comprehended thereby, we note in passing that Group 2 in the current agreement does not include "piers."

Our conclusion is that the Carrier did not violate the Agreement and the claim must be denied.

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. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June, 1959.