Award No. 9633

Docket No. CL-8256

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

1. Carrier violated and continues to violate the Clerks' Rules Agreement when effective December 7, 1953, it arbitrarily and without conference, negotiation or agreement between the parties removed the work of handling "less carload freight" from the positions and employes in Seniority District No. 41 at Mason City, Iowa, and transferred and assigned that work to positions and employes in Seniority District No. 42 at Austin, Minnesota.

2. The "less carload freight" work transferred from Mason City, Iowa to Austin, Minnesota be returned to the positions and employes in Seniority District No. 41 at Mason City, Iowa.

3. Carrier shall be required to pay Employes C. L. Martin, G. Harmon, Willard Baugh, E. A. Parker, H. O. Maass and any and all other employes affected by Carrier's action an amount equal to what it would have paid each of those employes had the violation not existed.

EMPLOYES' STATEMENT OF FACTS: Mason City, Iowa is located on the Iowa & Dakota Division and is under the jurisdiction of Superintendent P. J. Weiland. Seniority District No. 41 is the established seniority district for Operating Department employes covered by the Clerks' Rules Agreement on that Division.

Austin, Minnesota, which is 40 miles distant from Mason City, Iowa, is located on the Iowa and Southern Minnesota Division and is under the jurisdiction of Superintendent W. J. Hotchkiss. Seniority District No. 42 is the established seniority district of Operating Department employes on that Division.

The work of handling "less carload freight" is work regularly assigned to positions and performed by employes holding seniority in their respective seniority districts in the Operating Departments.

handled by the truck operating between Mason City and Austin and the employes at Mason City handle all of this freight.

There are attached as Carrier's Exhibits "C", "D" and "E" copies of letters written by Mr. C. P. Downing to Mr. H. V. Gilligan, General Chairman, on April 16, 1954, February 25, 1955 and November 7, 1955.

The Carrier knows that with full consideration given to all the facts involved in this dispute the inevitable result must be a denial award and we sincerely and respectfully pray that the claim be declined as surely it cannot be expected that a common carrier can properly discharge its obligations under law if it were to be restricted in its rearrangement of transportation service as the employes are here seeking to do.

All data contained herein has been presented to the employes.

(Exhibits not reproduced)

OPINION OF BOARD: The claim is that the routing via Austin, Minnesota, on December 7, 1953, of intermediate LCL freight previously routed in the alternative via either Austin or Mason City, Iowa, constituted the improper transfer of work from one seniority district to another, and that it eliminated five positions at Mason City. Claimants contend that under Rules 2 (a) and 57, which established definite seniority districts and provided that the Agreement as adopted should continue until changed by the parties, such transfers cannot be made unilaterally by the Carrier.

The Carrier's position is that: (1) the elimination of the five positions resulted mainly from the consolidation of its freight and passenger establishments at Mason City; (2) that while it occasioned the transfer of some LCL work from Mason City, it resulted in no new positions at Austin; and (3) that in any event the transfer was not of work ever exclusively belonging to the Mason City seniority district.

The record shows that concurrently with the LCL freight rerouting complained of, the Carrier consolidated its freight and passenger facilities at Mason City, which had previously been a considerable distance apart, resulting in the combining of work. Apparently all of the Claimants bid in positions at the combined facility, with the exception of two, who left Carrier's employ.

It seems apparent that a substantial part of the position changes resulted from the consolidation of facilities, but that the elimination of some LCL freight work there must have had some effect also. But from the record we can only guess what, if any, of the eliminations of positions may have resulted from the latter. While the Carrier states, and the Employes do not deny, that the changes produced no new positions at Austin, the Employes allege, and the Carrier does not expressly deny, that "one reason why this could no doubt be done is that when the LCL work formerly performed at Mason City was moved to Austin, some LCL work formerly performed at Austin was transferred to La Crosse, Minneapolis and Galewood." (Emphasis added.)

The words emphasized in the above quotation indicate conjecture rather than a statement of actual fact. In any event, it is not sustained by the record. For the record shows the weekly LCL handling at both Mason City and Austin before the consolidation to have been 89 regular cars, 2 "when necessary" cars, and 13 trucks; it shows the handling at Austin after consolidation to have been 89 regular cars, 2 "when necessary" cars, and 10 trucks. Thus the

reduction was just three trucks per week, which certainly does not indicate any rerouting of LCL freight to avoid Austin. Furthermore, it is agreed that the rerouting at Mason City did not affect freight originating at or destined to Mason City and connecting lines; which may perhaps account for the other three trucks. Anyway it is clear that the absence of new positions at Austin did not result from the diversion of LCL work from there. While 36 of the 89 cars had formerly been scheduled for Mason City, the record shows without dispute that most of them "did not operate with regularity into Mason City" and were not regularly handled there, that "the LCL tonnage in many of the cars was very light", and that no substantial amount of LCL tonnage was contained in the Mason City cars with the possible exception of the Galewood car and one or two others.

There is nothing in the record from which we can determine how much of the LCL freight formerly handled at Mason City was freight not destined for Mason City and connecting lines, and therefore was lost by the change, or how many of Claimants' positions, if any, were thereby eliminated; or how much was freight destined for Mason City and connecting lines, and therefore was not affected by the change.

The record further shows without question that during a period involving several revisions of the Rules the routing of LCL freight has always been in a state of flux and change, because of a continually varying pattern of traffic due to inumerable elements, including changes in business conditions, volume and type of commodities, methods of handling, available equipment, competition, the elimination or reduction in frequency of trains, altered schedules, etc. Apparently in this instance there had been such a reduction of traffic that only one car was needed from such points as Dubuque, instead of one car to Austin and one to Mason City, as formerly. The record shows hundreds of such changes of LCL schedules during the preceding twenty-four years.

Under the circumstances, while LCL freight destined to Mason City and connecting lines admittedly belongs to that seniority district, it seems apparent, from the absence of prior objection to such changes, that LCL freight destined elsewhere has never been claimed as belonging exclusively to it or any other intermediate point, so as to require negotiated agreement before changes.

The Employes correctly contend that the absence of prior claims does not eliminate a right definitely accruing under the Rules; but that fact does not alter the equally well settled principles that the Carrier's authority over traffic is limited only by the Rules, and that usage, custom and practice are to be considered in the construction of indefinite or ambiguous provisions. Certainly such a long continued acquiescence in a well established unilateral Carrier practice is significant in face of this contention that such action is barred by a rule establishing seniority districts but not exclusively assigning to one of them the work in question. The Employes argue that Rule 2 (a) is unambiguous, and therefore that past practice is immaterial. It provides:

> "The following seniority districts are hereby established and shall remain in effect until changed by agreement * * *."

The rule is certainly unambiguous in what it says, namely, that definite territorial districts are established and that those territorial districts cannot be changed except by agreement. But it certainly does not state with equal clarity that there can be no rerouting of outside LCL freight as among those districts. Consequently past practice certainly has a bearing upon whether that additional point was intended, and it clearly negatives such intent.

The Employes contend further that three cited instances show that the Carrier has in the past recognized the necessity for prior negotiated agreements for such changes. One of them related to the diversion to Milwaukee of LCL freight billed to Galewood and obviously belonging there. The other two relate to situations in which the exclusive handling of forwarder car work, and the entire force by which it was handled, were transferred, first, from Harlowton, Montana, to Aberdeen, South Dakota, and second, from Aberdeen to Minneapolis. Obviously none of these examples is analogous to the present instance, where there was no exclusive allocation of the work, or of any definite part, amount or proportion of it, to the Claimants' seniority district.

The Employes cite Award 9193 as fully in point. But every docket must be considered on its own record. Award 9193 states that "the real question presented by this record is whether or not the changes under consideration amounted to a removal of work out of one seniority district and into another". If taken to mean that it was the only question, that statement is not applicable under the facts of this case. Nor is its statement applicable that the Agreement's provisions are entirely unambiguous concerning the point in controversy, and that therefore the consideration of past practice is not proper. It seems clear from past practice that no such intention can be read into the Rule.

The burden of proving the claim admittedly rests upon the Claimants. Upon the record we must conclude that no violation of the Agreement has been shown.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of November, 1960.