Award No. 10690
Docket No. CL-9978

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated and continues to violate the Agreement at North Avenue Transfer, Atlanta, Georgia, when it required the Agent at Howell Stock Yards, an employe not covered by the Agreement, to come to North Avenue Transfer and assume certain duties, hereinafter described, covered by the Clerks' Agreement and previously performed by employes covered thereby.

(b) Mr. G. H. Whitlow, Clerk, North Avenue Transfer, his substitutes or successors, if any there be, shall be additionally compensated for one day's pay at pro rata rate for each working day, beginning July 16, 1956, and continuing as long as the violation exists.

EMPLOYES' STATEMENT OF FACTS: 1. Within the general confines of the metropolitan district of Atlanta, Georgia, the Carrier maintains Madison Avenue Transfer (adjacent to the Agents' offices), Howell Stock Yards, primarily for transfer and feeding of livestock, as the name indicates), and North Avenue Transfer (Terminal Freight Co-op Association Transfer, operated by the Carrier). The distances between these facilities are approximately as follows:

Howell Stock Yards — North Avenue	2 miles
Howell Stock Yards — Madison Avenue	1½ miles
North Avenue — Madison Avenue	1½ miles

2. Mr. M. W. Taylor is Carrier's Agent at Atlanta, Georgia. Mr. T. N. Curbow is Agent at Howell Stock Yards located, as aforesaid, within the corporate limits of Atlanta, Georgia. Mr. Taylor, presumably, is considered to be an officer of the Carrier. Whether Mr. Curbow is so considered, or whether he is "excepted" under the terms of the Telegraphers' Agreement

alleged, carrier cites a paragraph from the Local Chairman's letter of February 3, 1957 to Agent Taylor concerning another claim:

"Mr. Curbow is assigned to work from 8:30 a.m. to 5:30 p.m., meal period from 12:30 to 1:30 p.m., Monday through Friday, observing Saturday and Sunday as rest days. On each of the days enumerated above he reported for and actually began working at approximately 8:15 a.m. He was checking the laborer's list, writing out exception reports, lining up the days work with Agent T. N. Curbow and handing out cars to the check clerks."

(The dates listed in the above claim were December 5, 6, 7, 10, 11, 12 and 13, 1956)

The above letter was written by the Local Chairman after the employes had alleged that the assistant gang foreman had been relieved of these duties. It is evident that the assistant gang foreman continues to perform the duties of his position.

Carrier fails to see the relation between the alleged violation and the claim in behalf of regular assigned Check Clerk G. H. Whitlow. The employes have never alleged that Agent Curbow has performed any of the duties assigned to check clerks. Since checking freight is one of the preponderating duties of the higher rated assistant gang foreman's position, it is obvious that no check clerk could have a valid claim for any time that the assistant gang foreman devotes to checking freight.

In addition to the foregoing evidence that there has been no violation of the agreement, carrier respectfully points out that the claim for compensation asserted in part (b) of the statement of claim is not valid in any event. The claimant in this dispute is a regular assigned check clerk at North Avenue transfer who has worked his regular 8:30 A. M. to 5:30 P. M. assignment, five days a week. He has not been deprived of any work or compensation whatever, nor have the employes alleged the Agent Curbow has performed any of claimant's assigned duties. In the handling of claims involving money payments, it must be shown that there was a violation of some rule or provision of the agreement which caused claimant to lose compensation that he would otherwise have earned. In this case, there has been neither a violation of the agreement nor any loss of compensation by claimant. Claimant, as well as the assistant gang foreman at North Avenue, has always performed, and will continue to perform the assigned duties of his position.

For the reasons stated herein, this claim is clearly not supported by the rules and provisions of the effective agreement and should be denied in its entirety. Carrier respectfully requests that the Board so decide.

All pertinent facts and data used by carrier in this dispute have been made known to the employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier maintained two large freight-transfer stations located at Madison Avenue and North Avenue, two miles apart; operated under the jurisdiction of the Atlanta Freight Agent. The Howell Stock Yards, two miles distant from North Avenue and four miles

distant from Madison Avenue, operated under the jurisdiction of a separate Agent.

These two Agents and the Assistant Agent were supervisory employes not covered by the Clerks Agreement.

The Carrier maintained at North Avenue, the location involved in this dispute a position of General Clerk, subsequently, by Agreement, titled Assistant Gang Foreman, who was a member of the Clerks' Organization.

The bulletin covering this position shows the "Preponderating Duties" as:

> "Receiving, checking, loading, unloading and transferring of freight. Direct crews engaged in loading and stowing freight in cars. Apply and remove seals from outbound and inbound cars, keeping record of same. Direct unloading of automobiles, securing Order-Notify bills of lading when necessary, and preparing inspection reports when damage is found. Inspect damage in connection with Terminal Freight Cooperative Association shipments. Maintain tonnage records and prepare tonnage and other reports in connection with Terminal Freight Cooperative Association operations. Answer telephone. Knowledge of typing required to prepare reports. Bonded position."

This dispute arose at North Avenue, in 1956, following a change in the Howell Agent, on the premises that the new Agent (a non-Agreement employe) was required to progressively take over and perform the duties and responsibilities of the position of the Assistant Gang Foreman Mr. M. E. Curbow. It was the contention of the Carrier that Agent T. N. Curbow performed no clerical work at North Avenue Transfer, and that his duties were entirely supervisory.

The dispute was progressed on the property to Carrier's highest officer, who declined same. It is now properly before this Board.

The record shows that there was a change in the Supervision of Operation at North Avenue Yards, in a letter to Local Chairman dated September 24, 1956, Mr. Taylor wrote:

> "Mr. T. N. Curbow, Agent at Howell Stock Yards, has been given the responsibility of directly supervising the operation of the North Avenue transfer in addition to his duties at Howell Stock Yard agency. —"

In regard to the amount of the supervision and work performed by Agent Curbow at North Avenue, the employes set forth their positions in a letter to Agent Taylor dated September 8, 1956, and written by the Local Chairman:

> "Since the inception of the Transfer at North Avenue at the Terminal Freight Coop Association the Assistant Gang Foreman was in direct charge of the operation of the transfer, assuming the responsibilities of operating same, supervising the employees working there, issuing instructions to the employees, performing certain office duties, acting as liaison man with Terminal Freight Coop

Association, etc. This continued until recent months. In or about June 1954 Mr. Wingard, Agent at Howell Stock Yards began to spend some time at the Transfer, but assured the writer that he was not there for the purpose of performing any duties previously performed by schedule clerks. He did not do so to my knowledge. When Mr. Wingard left the Howell Stock Yard Agency he was succeeded by Mr. T. N. Curbow, who began to devote more and more time at North Avenue Transfer and taking over more and more duties of the schedule clerks, especially the Assistant Gang Foreman, until he is now performing all the duties previously performed by said Assistant Gang Foreman and the Assistant Gang Foreman (M. E. Curbow) at present, is devoting all his time to checking freight."

We quote from the brief submitted by Carrier member to this Referee:

"In this case, the Carrier felt more supervision was necessary to the efficient operation of its North Ave. station and required the Howell Agent to furnish closer on-the-ground supervision. In furnishing such supervision the Agent supervised the Assistant Gang Foreman and, in some instances, the other station employes as was necessary and incident to the efficient performance of the station duties.

"There is no question here but that the Agent properly supervised the Assistant Gang Foreman. The Agent's supervision of the lesser station employes is questioned."

It is the supervision of Agent Curbow of the "lesser station employes" that convinces us that there was a violation of the Agreement. Agent Curbow was at North Avenue almost daily, true not all day, but at different times during the day. It was the removal of work previously assigned to the Assistant Gang Foreman and the giving of it to those not covered by the Agreement that is a violation of the Scope Rule.

In Award 6284 this Division said:

"We find the following, announced in Awards 5526 and 5973 of this Division, applicable: As to scope rules similar to that here involved, we have held that while they do not purport to describe work encompassed but merely set forth the class of positions to which they are applicable, yet the traditional and customary work assigned exclusively to those positions constitute work falling within the Scope of the Agreement and it is a violation of the Agreement for the Carrier to permit persons not covered by the Agreement to perform it. See Award 6101."

We come now to claim "B". The claim has been progressed on behalf of Check Clerk Whitlow, and the Carrier contends that since he has suffered no monetary loss or been damaged in any way by the Carrier Agreement violation he cannot recover and claim "B" must be dismissed.

With this we do not agree. The violation of the Agreement is the important thing and it is no concern of the Carrier, whom the Organization names as Claimant. There are many awards of this Division which sustain the above statement. We will cite only a few.

In Award 685 — This Division said: (Referee Spencer)

"The objection of the carrier to the payment of overtime under Rule 37 must also be overruled. It is true, as the carrier points out, that the claimant 'was not required to work regularly in excess of eight hours.' The Division, however, has found that the carrier made an improper assignment in this case. Accordingly, the claim, although it may be described as a penalty, is meritorious and should be sustained. The Division quotes with approval this statement from the Report of the Emergency Board created by the President of the United States on February 8, 1957:

> 'The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation.'"

In Award 1646 — This Division said: (Referee Blake)

"The Carrier contends, however, that, under the rule as interpreted North was not entitled to be called. The essence of the claim is by the Organization for violation of the agreement. The claim for the penalty on behalf of North is merely an incident. That the claim might have been urged in behalf of others having, as between themselves and North, a prior right to make it, is of no concern to the Carrier. Awards 571, 1058, and 1605. That does not relieve it of the obligation to pay the rate stipulated for call. The others are making no claim; and if they should the Carrier would not be required to pay more than once."

In Award 2838, Referee Youngdahl after citing Award 685 and Report of the Emergency Board, said:

"This is sound doctrine and it is reaffirmed by this Board. Surely the parties to the Agreement did not engage in the idle ceremony of setting up comprehensive rules for the settlement of disputes without proper and adequate penalty in the event of a violation thereof. To so conclude would be to impair, if not completely destroy, the effectiveness of the rules."

In Award 3376 — Referee Tipton, this Division said:

"The Carrier makes the further contention that the Claimant was junior in service to W. H. Nelson who was working the second shift and was available for the work, and further states that the Claimant had indicated that he did not wish to 'double on two shifts except on infrequent occasions'. However, the fact remains that neither he nor Nelson were offered this work. But this claim is for a penalty and this Board has ruled that the Petitioner may make the claim for compensation in the name of any employe, as it is only incident to the violation of the Agreement. See Awards Nos. 1646 and 2282."

In Award 5266 — Referee Robertson, this Division said:

"Carrier's contention that Mr. Lauck is not a proper Claimant because he was not the senior man on September 1, 1948, has been passed upon before by this Board. The fact that the claim presented may have been made by another who had a prior right to it is no proper concern of the Carrier. (Award 4022.) It can only be required to pay once."

In Award 6465 — Referee Sharpe, this Division said:

"It is the position of the Carrier that Beals worked full time during the period in question, and lost no time and that an employe has no right to fine or to penalize the Carrier where the claimant has suffered no monetary loss.

"The claim before us is in the nature of a penalty against the Carrier for having violated the Agreement. The Carrier relies upon a number of decisions of the First Division of the National Railroad Adjustment Board to the effect that where claimant was otherwise employed on the day, or days, in question, he was not available for the services in question and not entitled to an Award. The Employes likewise rely upon decisions of the Third Division of the National Railroad Adjustment Board to the effect that proof of wage loss is not controlling where the Carrier deliberately violated the Agreement. In the case at bar there was a violation of the Agreement by the Carrier for the reason that the shop foreman used employes to perform work that properly belonged to the B & B Gang.

"The case is controlled by Awards 4869, 4921 and 3375."

On the merits of this claim, Claim (A) should be sustained in accordance with our previous awards.

In the matter of Claim (B) it is not clear as to the amount of monetary loss, sustained by Claimant. Claimant is only entitled to be compensated for the time actual worked which was removed by Agent Curbow, from the assignment of the Assistant Gang Foreman at North Avenue. The record shows that Agent Curbow spent part of the day at North Avenue, and while there he performed work other than that assigned to Assistant Gang Foreman. It is only the actual time that Agent Curbow spent performing work that was assigned to Assistant Gang Foreman, that Claimant is to be compensated for. Claim (B) to be remanded to the property to ascertain the facts.

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 Carrier violated the Agreement.

AWARD

Claim A — Sustained.

Claim B — To be remanded to the property as set out in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of July 1962.

DISSENT TO AWARD NO. 10690, DOCKET NO. CL-9978

Award 10690 is erroneous and we must register our dissent thereto.

There is no dispute in the docket that the only work performed by Agent Curbow while at the North Avenue transfer station was supervisory. The majority has erroneously concluded that the supervision by the Agent of the "lesser station employes," that is, employes below the rank of Assistant Gang Foreman, was a violation of the applicable Agreement. The Agreement may be searched in vain for any provision giving the supervision of the employes at North Avenue station to the Assistant Gang Foreman. Since the Agreement did not give any, hence not all, supervision of the employes to the Assistant Gang Foreman, it follows that such supervision as was exercised over them by the Agent did not constitute a violation of the Agreement. It is a Carrier's prerogative to determine and supply the amount of supervision essential to a proper performance of its work. (Awards 4992, 5149, 9777, among others.) Moreover, there is no evidence in the record that Agent Curbow, who replaced former Agent Wingard, took over any supervisory duties of the Assistant Gang Foreman. In fact, it was Carrier's basic position that the Assistant Gang Foreman was **not** relieved of any of his duties and that he continued to function in the same manner irrespective of the presence or absence of Agent Curbow at the transfer.

The error of the majority is compounded by sustaining the claim for monetary payment to an employe who suffered no monetary loss whatever, and who was unable to show that he was damaged in any way by the alleged Agreement violation. A claim in behalf of such person can only be one for a penalty or fine against the Carrier, which the Board is without authority to impose. The Board can only consider the Agreement as written, and penalties may only be awarded when provided for by the Agreement. (Awards 3651, 5186, 7309, 8673, 8674, among others.) For a damage claim to be sustained, the employe must show that a loss has been suffered. (Awards 6299, 8531, 8673, 8500, 8205, 7241, 6949, 6818, among others.) No such loss was shown in the docket.

The error of the majority is further compounded in remanding claim (b) to the property to ascertain the facts. This Board is committed to the burden-of-proof theory, and it is axiomatic that the burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance and, where that burden is not met, a denial Award is required. The Railway Labor Act contemplates not merely general con-

clusions, but precise and definite findings of fact and final and definite Awards.

/s/ **P. C. Carter**

/s/ **R. A. Carroll**

/s/ **W. H. Castle**

/s/ **D. S. Dugan**

/s/ **T. F. Strunck**

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 10690, DOCKET NO. CL-9978

The "Dissent" is a reiteration of arguments presented in panel argument by Carrier Member and properly rejected by the Referee. It is nothing more than an attempt to relitigate the controversy on rejected trivia and unsupported and threadbare arguments.

The second paragraph of the "Dissent" is based on the false premises that the agreement did not reserve to the Assistant Gang Foreman the immediate supervision of the "lesser station employes" and that there was no evidence in the record that the Agent took over any supervisory duties of the former. The erroneous conclusion is then reached that "such supervision as was exercised over them (lesser station employes) by the Agent did not constitute a violation of the Agreement" and "that the Assistant Foreman was **not** relieved of any of his duties". These conclusions are not only erroneous, but inconsistent as well. On one hand, we have a flat denial that the Agent performed any of the work in dispute, while on the other, we have an admission that he did perform such work.

Award 10690 properly held that the work of supervising the "lesser station employes" at North Avenue Transfer was covered by the clerical Agreement and that the Agreement was violated by the removal thereof from the Assistant Gang Foreman and giving it to those not covered by the Clerks' Agreement. This conclusion is well supported by the facts of record and Awards of this Division. Awards 3192, 3375, 4345, 6790 among others.

A review of Awards 4992, 5149, 9777, relied upon by the Dissenter, will show that they involve situations where a supervisory position was abolished because of a decrease in business. In Award 5149 the work in dispute was reassigned to other employes under the Agreement, in the same seniority district. In the instant dispute the Assistant Gang Foreman's position was not abolished, nor is there any evidence in the record that there was any need for a decrease in supervision. In fact, the Agent came to North Avenue Transfer from an unrelated point (Awards 636, 4288, 7622) to perform immediate supervision over the "lesser station employes", thereby relieving Claimant of part of his regular assigned duties.

The antiquated and obsolete arguments contained in the third paragraph, that the Board has no authority to assess damages that penalize a Carrier, except where it can be shown that the employe suffered monetary loss, apparently wage loss during regular hours, has been rejected so many times that it is not necessary to cite the long line of Awards that have so held.

However, for a dissertation on the subject, see my "Answer to Carrier Members' Reply To Labor Member's Answer to Carrier Members' Dissent to Award 9546" and my answer to their Dissent to Award 9811.

The Dissenters further disapprove the remanding of claim (b) for the purpose of determining the extent of the violation and the amount of damages due claimant. Apparently, they would have been much happier had the Referee sustained the Employes' claim for a pro rata day's pay from date of violation until the condition was corrected.

It should be noted that it was the remedial part of the Employes' claim that was remanded after the substantive part of the claim, i.e., the alleged violation of the Agreement in claim (a), had been sustained in accordance with the evidence of record, which conclusively proved that the Carrier violated the Agreement. Therefore, the Employes did meet the burden of proof necessary in proving that Carrier violated the Agreement. After such a determination had been made, it was proper for the Board to remand the remedial part of the claim to the parties for determination. This Division has previously done so in a large number of cases under similar circumstances. See, among others, Awards 9507, 9975, 10326, 10736.

Award 10690 is based on precise and definite findings of fact and properly disposes of the dispute. See Kirby et. al. v. Penna., Court of Appeals, Third Circuit, 188 Fed. 2nd 793.

/s/ **J. B. Haines**

J. B. Haines
Labor Member