Award No. 10903

Docket No. CL-10571

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, 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 Rule, and Extra List Agreement No. 2, at Eleventh Street Freight Station, Pittsburgh, Pa., Pittsburgh Region, on November 21, 1956, when it permitted a truck driver employed by the Pennsylvania Truck Lines, Inc., to handle and truck freight from a zone in the Inbound House to P.T.L truck No. 1416, at door No. 44.

(b) The Claimant, L. J. Novak, the senior available Group 2 Extra List employe, should be allowed a four-hour call, at the truckers' rate of pay, for November 21, 1956. [Docket 184]

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representatives of the class or craft of employes in which the Claimant in this case held a position 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, 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.

On November 21, 1956, the Claimant in this case, L. J. Novak, was assigned to the Group 2 Extra List at Eleventh Street Freight Station, Pittsburgh, Pa., Pittsburgh Region, as the regular incumbent of Extra Trucker Position, Symbol No. XF-326. He has a seniority date on the seniority roster of the Pittsburgh Region in Group 2.

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 claim 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 that under the principles contained in Decision 209 and as interpreted and affirmed by Award 4388, the work of handling freight to and from the designated zones in the freight house to the tailboard of the trucks by drivers and helpers of the contract motor truck company is proper and is work which does not accrue to the Carrier's platform forces. The Employes have failed to produce any valid evidence to the contrary.

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

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employes, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all of the same.

All data contained herein have been presented to the employe involved or to his duly authorized representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts are not in dispute. On November 21, 1956, a truck driver of the Pennsylvania Trucking Lines, Inc. parked his truck adjacent to the Eleventh Street Freight Station in Pittsburgh, Pennsylvania and assisted the driver of another truck to handle freight from Zone 44 in the inbound house to the latter's truck backed up to door 44. After this truck, No. 1416, had been loaded, the assisting driver backed his own truck up to the platform, handled the freight from the appropriate zone and loaded his own truck. On November 23, 1956, the Local Chairman presented a claim on behalf of Claimant, the senior available Group 2 Extra List employe, for four hours pay on the theory that he was entitled to the work. The claim was denied at all stages on the property and is properly before this Board.

The Organization contends that the action of the truck driver in helping load a truck other than his own was a violation of the Scope Rule of the Clerks' Agreement. The Carrier takes the position that the work of handling freight from the zone in the freight house to the tailboard of the truck is not work coming within the Scope Rule of the Agreement, does not belong to the Clerks and, therefore, the trucker's action did not violate the Agreement. The fundamental issue presented is simple. Whether the trucking of freight by this truck driver from the zone to a truck of another driver constituted a violation of the Scope Rule of the Agreement. Strangely enough both parties rely upon Decision 209, issued in 1937 by "The Pennsylvania Clerical and Miscellaneous Forces Board of Adjustment".

The Scope Rule in the present Agreement is general in nature, listing positions without any specific designation of items of work accruing to the positions. Since the rule does not specifically define the work reserved to the positions covered, the burden is upon the Claimant to establish his right to the work claimed, by showing that by tradition or past practice, the particular work has been reserved to the position under which he asserts his claim. Numerous awards of this Board establish this principle. See especially Award 10425. The Organization has asserted a negative "that it has not been the past practice for P.T.L. drivers to assist in the loading of other driver's trucks". A careful review of record reveals that the Organization has failed to sustain its burden of showing that, due to past practice, this work belongs to Claimant. On the other hand, the Carrier's evidence tends to show that since 1933, it has been the practice to permit the work involved here to be done by truck drivers and to deny clerks the right to perform it. Decision 209 recognized (and this is admitted by the Organization) the right of truck drivers and helpers to move freight from the zone to the truck, but held that it was not proper for "trucking company platform employes" to perform this work. In other words, the limitation added by 209 was that the Carrier could not assign its own employes to the freight station for the sole purpose of trucking freight from zone to trucks. The practice followed by the Carrier seems to have gone unchallenged for many years since the present claim is the first since 1945.

The Organization seeks to distinguish the situation in this case from that where a truck driver and/or his helper trucks the freight to his truck. It argues that when the Carrier permits a driver to help another driver load his truck it is, in effect, assigning that employe as a regular platform employe in violation of Decision 209. In our judgment, this position is without merit. The truck driver who assisted in the loading in this case did not become a "platform employe" as that term was used in Decision 209. At most, this help to his fellow truck driver was only incidental to his full time job as truck driver. The Organization has not shown that the work in question was performed by a Company employe who was prohibited by Decision 209 from doing this work. It has not shown that Claimant was entitled to this work. Decision 209 and Award 4388 make it clear that this work does not belong to the Clerks. As long as it is being done by someone other than a trucking platform employe, the Clerks have no ground for complaint under Decision 209. For the foregoing reasons we hold that there was no violation of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 9th day of November 1962.

LABOR MEMBER'S DISSENT TO AWARD 10903, DOCKET CL-10571

This is another of a long line of awards that have sanctioned the piecemeal removal of the traditional and customary work of a craft from the Scope Rule of its Agreement with a Carrier by a group of referees, who are incapable of understanding the fundamentals involved. Not only have they ignored that the work of a craft is that which has historically and traditionally been performed by the members thereof, but they have, on some subterfuge or another, expanded on specified or historically implied exception thereto.

It is fundamental that the work of a craft or class is that which it has performed so long that "memory runeth not to the contrary". The Biblical adage that "by their words ye shall know them" applies to crafts or classes of employes as well as to individual employes. The confronting Agreement by its expressed terms governs the hours of service and working conditions of Group 2 callers, loaders, stowers, stevedores, truckers of freight and warehousemen. On numerous occasions this Division has ruled that trucking of freight into and out of a freight warehouse is within the scope of the Clerks' Agreement. In Award 4388, involving the same parties, Referee Carter recognized this cardinal principle by holding:

> "This Division seems to have determined that the checking, handling and trucking of freight into and out of a freight warehouse is within the scope of the Clerks' Agreement and that third parties may pick up or deliver freight only upon the platforms of the warehouse, or at the door thereof where no platform exists, without infringing upon the rights of Clerks under their Agreement. Awards 2686, 2387, 2006, 1649, 1647."

Therefore, it is clear that the work in dispute was recognized by this Division as that which had historically, traditionally and customarily been performed by employes of the craft or class covered by the confronting Clerical Agreement. Hence, it could only be removed therefrom by Agreement, or by an expressed or implied exception thereto. Award 615.

From this it is clear that the third paragraph of the "Opinion of Board" in Award 10903 is clearly erroneous, as it is based on a false premise and misunderstanding of fundamental principles. Having recognized that the trucking of freight into and out of Carrier's freight warehouse (Award 4388) was freight handlers' work covered by the confronting Scope Rule of the Clerks' Agreement, the burden was upon the Carrier to prove that its unilateral removal thereof came under an expressed or implied exception thereto. It is interesting to note, however, that the Referee shifts Carrier's burden onto the Claimant. That the burden is upon the Carrier of proving an exception to the Scope Rule, justifying the unilateral removal of work from the Agreement, is fully supported by universal principles and Awards 2819, 4538, 5136, 5457, 6063, 6109, 8794, 8798 and 9545. Carrier failed to prove that its action here came under the exception noted in Decision 209. While that Decision erroneously rejected tradition and custom in favor of a past practice of four years, the confronting parties are bound thereby and the instant dispute should have been decided on the principles enunciated therein.

Decision No. 209 held, in effect here pertinent, that the "movement of freight by the driver and helpers is merely incidental to their major task of loading **their** trucks and getting started upon their deliveries." The Board also held that the Agreement was violated when trucking company platform employes performed the same duties. Nowhere in the Decision was it held that truck drivers could perform the trucking of freight to a truck other than "their" trucks.

The statement that "Decision 209 recognized (and this is admitted by the Organization) the right of truck drivers and helpers to move freight from the zone to the truck" is misleading and not a true statement of fact. Decision 209 did not so hold and neither did the Organization so admit. In fact, that was the crux of the dispute and failure to grasp the significance thereof points up the fallaciousness of this Award.

It is hard to understand the basis for the assumption that: "At most, this help to his fellow truck driver was only incidental to his full time job as a truck driver" in view of the fact that he was not assigned to the truck that he was assisting to load. Therefore, the disputed work that he performed was not incidental or incident to the major task of loading **his** truck.

A review of the last paragraph of the Opinion shows that while the Referee has failed to strictly confine the exception to the Scope Rule contained in Decision 209, he has attempted to confine the covered work only to that performed by "trucking platform employes."

A review of this erroneous Award shows that the Referee has attempted to accord the exception contained in Decision 209 such extra-territoriality that the stream rises higher than its source, while confining the river to its smallest tributary, insofar as the work covered is concerned.

In Award 615, Referee Swacker ruled, here pertinent:

> "* * * It follows from this that in the absence of some definite exclusion, the contract must be deemed to embrace all of the field involved to be a valid contract at all. If it were purely optional with the Carrier to say how much or what of a definite kind of work was the subject matter of the contract, it could say

none and the consequence would be in the absence of a subject matter that there would be no contract. Whatever if any exceptions exists will fall into one or the other of two classes — (a) those directly expressed in the exceptions to the scope rule of the schedule and (b) those which may be definitely demonstrable extraneously. The latter class might be shown by definite evidence such as clearly provable agreement of the parties or by implication arising from the conditions surrounding the making of the agreement; **in the last class of cases, however, the Board should be extremely slow to find the existence of such exceptions and only upon unmistakable proof. Practice alone would be insufficient grounds because of the inequality of the relative status of the parties to make such practice. There must be definite evidence of actual acquiescence.**" (Emphasis ours.)

Also, see Labor Member's Dissent to Award 10014.

In Award 3825, involving the same parties, Referee Swaim stated the controlling principle thusly:

"One expressed exception to a provision in a contract negatives the intention of the parties that there should be any other exceptions implied. This rule of construction was recognized by this Board in Award No. 2009."

Also, see Award 4664.

There is only one exception stated in Decision 209. It cannot properly be extended to cover an entirely different situation, as was done here.

Award 10903 is palpably erroneous. For this reason, I dissent.

J. B. Haines
Labor Member