Award No. 12363
Docket No. CL-14191

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, 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 (GL-5345) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 5-B-1, 6-A-1 (a) and 7-A-2, when it arbitrarily dismissed from service Clerk Udell L. Small, in the office of the Regional Comptroller, Indianapolis, Indiana, Southwestern Region, at the close of business August 2, 1961, without cause and without trial.

(b) The Claimant, Udell L. Small, should be allowed eight hours' pay a day for August 3, 1961 and all subsequent dates until the violation is corrected.

[Docket 1156]

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 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, except 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.

On September 19, 1961, Claimant U. L. Small submitted a written statement to the Division Chairman in which he set forth certain facts in connection with his employment as a clerk by the Carrier. We quote:

"On the 20th of March, 1961; I filled out an application, Employment Enquiries and Payroll Deduction for the Penn R.R. I was inter-

OPINION OF BOARD: Upon the record as a whole, the oral arguments and briefs of the parties we make the following:

I. FINDINGS OF FACTS

Carrier contracted with Peat, Marwick, Mitchell & Company to make a complete study of Carrier's accounting procedures and to make recommendation for improvements therein. One recommendation was for establishment of a Regional Comptroller's Office at Indianapolis, Indiana, with certain work then being performed in the Auditor of Expenditure's Office, Chicago, Illinois, to be transferred to the recommended office at Indianapolis. Carrier accepted the recommendation and proceeded to effectuate it. The target date for beginning operations at Indianapolis was May 1, 1961.

In accordance with Rule 3-E-1 of the Agreement, the parties entered into a Supplementary Agreement, executed December 21, 1960, which provided for the temporary or permanent assignment of Clerks from Chicago to Indianapolis and the rights of Clerks who chose not to follow the work to the new location. The Supplementary Agreement covered assignments to Indianapolis prior or subsequent to the effective date of the transfer of the work from Chicago. Assignments prior to the transfer of the work, which the Carrier deemed necessary to prepare the Indianapolis office for operation, are referred to in the Supplementary Agreement as assignments to "special duty".

In setting-up the Indianapolis office, the Carrier found it necessary to hire an employe to wire and test I.B.M. Control Panels. To fill this position, it hired Claimant who began work on March 27, 1961. Carrier's personnel records show that Claimant was hired as a "Clerk".

Effective May 26, 1961, Claimant was assigned to a B-5 position at Indianapolis. This position was unquestionably within the Scope of the Clerks' Agreement.

In a letter, under date of August 2, 1961, Carrier's Regional Comptroller informed Claimant that:

> "In accordance with Rule 5-B-1, your application for employment has been disapproved August 2, 1961."

August 2, 1961, was more than 90 days after the date on which Claimant began to work for Carrier.

II. THE ISSUE

The issue is whether Carrier violated the Agreement by dismissing Claimant from service without a fair and impartial trial.

III. PERTINENT PROVISIONS OF THE AGREEMENT

The following Rules of the Agreement are pertinent:

"RULE 5-B-1

> The application of new employes for employment shall be approved or disapproved within ninety days after applicants begin work."

"RULE 6-A-1

(a) Employes will not be suspended nor dismissed from service without a fair and impartial trial."

IV. CONTENTIONS OF PARTIES

Petitioner contends that inasmuch as Claimant was hired as a "Clerk" the 90 days probationary period, prescribed in Rule 5-B-1, began to run the day he first began to work for Carrier (March 27, 1961); the work which Claimant performed prior to his assignment to a B-5 position, effective, May 26, was work within the Scope of the Clerks' Agreement; and, therefore, Claimant's dismissal without a trial, in compliance with Rule 6-A-1, violated the Agreement.

Carrier contends that in the period from March 27 to May 26, Claimant was performing "special duty" which per se removed the work from the Scope of the Clerks' Agreement. It cites Awards Nos. 4027 and 6347 as supporting its contention. With this as a premise, it argues that Claimant was not entitled to the protection of the Rules of the Clerks' Agreement until he was assigned to the B-5 position; therefore, the 90 day probationary period, prescribed in Rule 5-B-1, as to Claimant did not begin to run until May 26; consequently, Claimant's dismissal from service on August 22 was within the 90 days contemplated in Rule 5-B-1. It admits the dismissal was more than 90 days after Claimant began to work.

V. RESOLUTION OF ISSUE

The Agreement is a collective bargaining contract. The Scope provision recognizes Petitioner as the collective bargaining agent for Carrier's "Clerks". The Agreement defines "Clerks". The collective bargaining unit includes all "Clerks" employed by Carrier. By its terms, the Agreement excepts specified Clerks' positions, in whole or in part, from its provisions. Changes in the exceptions can come into being only through the exhaustion of the collective bargaining process (Rule 9-A-2). The Agreement contains no exception for "Clerks" assigned to "special duty". Therefore, "Clerks" assigned to "special duty" remain in the collective bargaining unit and are covered by the terms of the Agreement.

This case is confused by a misapplication of a principle applicable to the interpretation of "general" scope provisions. When we are called upon to interpret a "general" scope provision in regard to the work reserved to those in the collective bargaining unit we have consistently held that the burden was on the Organization to prove that the work had been historically, traditionally, usually, customarily and exclusively performed by the employes in the unit. Here, Carrier argues that if that principle applies as to work reserved to those in the unit, then if those in the unit do work, at Carrier's bidding, other than work so reserved, they, while on such work, are divorced from their rights under the collective bargaining contract covering their job classification. We find it unnecessary to labor the apparent sophistry of such an equation. The potential ills which could flow from an endorsement of such an equation would be destructive of employes' collective bargaining rights protections guaranteed to them by The Railway Labor Act.

Next, we come to Carrier's citing of Awards Nos. 4027 and 6347 as authority for its proposition that an assignment to "special duty" deprives, per se, an employe of his rights vested by a collective bargaining contract in

which his job classification is included in the collective bargaining unit. We need only distinguish Award No. 4027 from the instant case. The parties therein were the same as in this case. The Agreement, however, preceded the Agreement here involved and the Rules interpreted and applied were relevant to a different subject matter.

In Award No. 4027, Brakemen were assigned to do work which Clerks claimed was reserved to them. The Opinion refers to the Brakemen as "Special Duty Men". Upon evidence of record in that case, it was found that, under the particular circumstances of that case, Carrier had not violated the Scope provision of the Clerks' Agreement. Note bene, in that case the issue here presented was not presented. Specifically, that case did not pass upon the issue of whether the Brakemen lost the protections of the collective bargaining contract covering Brakemen while they were engaged in the so-called "work of a special nature". Therefore, Award No. 4027 is inapposite. Further, Award No. 4027 makes no finding that assignment to "special duty" or "work of a special nature", per se, removes an employe from the protections of a collective bargaining contract in which his job classification is included in the collective bargaining unit.

The phrases "special duty" and "work of a special nature" are not words of art which through usage have an established meaning in the railroad industry. Ergo, it is not enough to quote them as sufficient to deprive an employe of his collective bargaining rights.

In the case before us, Carrier argues that Claimant's work from March 27 to May 26 was not within the Scope of the Clerks' Agreement. This is an affirmative defense. The burden of proving it is Carrier's. Assuming, arguendo, that this would be a defense, Carrier has failed to adduce, in the record, any evidence to support it.

Carrier is conclusively presumed to have knowledge of the Clerks' Agreement and the definition of "Clerks" therein. Also, it had knowledge of the work which it hired Claimant to perform. Possessed of this knowledge Carrier, of its own volition on its own personnel forms, classified Claimant as "Clerk". Such is persuasive in the absence of any other evidence in the record to the contrary.

VI. CONCLUSIONS

We find that: (1) Claimant began work as a "Clerk" for Carrier beginning March 27; (2) Claimant, at all times during the course of his employment was in the collective bargaining unit covered by the Agreement; (3) The running of Claimant's probationary period of 90 days, as prescribed in Rule 5-B-1 began to run on March 27; (4) Carrier's dismissal of Claimant more than 90 days after March 27, without "a fair and impartial trial" violated Rule 6-A-1.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1964.