Award No. 12905
Docket No. CL-13042

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, 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-5062) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope Rule, when it required and permitted Fireman T. F. Masterson, who is not covered by the Clerical Rules Agreement, to perform clerical work in the Crew Dispatcher's Office, 59th Street, Chicago, Illinois, former Chicago Division.

(b) The Claimant, Clerk-Crew Dispatcher F. A. Porter, should be allowed eight hours' pay a day for the period December 14, 1953, through January 9, 1954. [Docket W-974.]

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 the dates involved in this case Claimant F. A. Porter was the incumbent of a clerical position of Crew Dispatcher in the 59th Street Crew Dispatcher's Office, Chicago, Illinois, former Chicago Division, tour of duty 8:00 A. M. to 4:00 P. M., rest days Monday and Tuesday. He has a seniority date on the seniority roster of the Northwestern Region in Group 1. The former Chicago Division is now a part of the Northwestern Region.

Therefore, the Carrier respectfully requests your Honorable Board to deny the Employes' claim in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: Notice of the pendency of this dispute was given the Brotherhood of Locomotive Firemen and Enginemen in accordance with the requirements of Section 3, First (j) of the Railway Labor Act. That Organization declined to participate in this proceeding. The Board will, therefore, proceed to a consideration of the case on the merits.

A Joint Statement of Agreed Upon Facts is in evidence. It reads:

"**JOINT STATEMENT OF AGREED UPON FACTS:** On October 1, 1953, the Road Foreman of Engines issued a notice to All Enginemen, Firemen and Hostlers — Former Chicago Terminal Division Seniority District, requesting that they submit their choices for vacation period for the year 1954 to his office prior to January 1, 1954.

Yard Fireman T. F. Masterson was assigned as Special Duty Engineman during the period December 24, 1953, to January 9, 1954, inclusive, and on dates, other than December 25 and 27, 1953, January 1 and 3, 1954, assigned vacation periods to enginemen, firemen and hostlers in accordance with their seniority and choice, and prepared vacation schedule for the year 1954.

The claimant, who was regularly assigned as Crew Dispatcher, 59th Street, Chicago, tour of duty 8:00 A. M. to 4:00 P. M., rest days Monday and Tuesday, made claim as shown in the subject.

The vacation schedule for enginemen, firemen and hostlers has never been prepared by employes coming under the Clerical Agreement."

The Board has noted, as of special significance, the last sentence of the foregoing Agreed to Statement of Facts which says that employes of the Clerks' craft have never performed the work in dispute here. Against this admission, the Employes argue that it is the custom and practice at certain other, (but not all) terminals of this Carrier for Crew Dispatchers to perform the work. Conceding, arguendo, the validity of that statement, nevertheless a case establishing a consistent practice of sufficient duration systemwide on this property has not been made out. This is so particularly in view of Carrier's allegations, not denied, that throughout the system the assignment of vacation schedules has remained a managerial function properly and customarily delegable by supervisory personnel to employes of the departments affected, including, but not limited to, clerks.

A consistent practice of sustained duration not having been established by the Employes, there is no ground for holding that the work of preparing vacation schedules under the general Scope Rule of the Clerks' Agreement may properly be performed by no one other than employes covered by that Agreement.

The Employes also contend that this dispute was resolved by an alleged agreement of the parties to abide by the decision of this Board in Award 9678. The pertinent portion of this agreement reads:

"It was agreed this case would be held in abeyance, pending award from the Third Division, NRAB, in System Docket Case N-406, which is now before the Board. Upon receipt of such decision, the instant case, W-974, will be given further consideration.

The applicable time limits for the progression of this case are extended accordingly."

The Employes contend the foregoing constitutes a commitment by both parties to dispose of the instant claim on the basis of the decision handed down in Award 9678, which sustained the claim. The Carrier answers by emphasizing that the language of the agreement, "Upon receipt of such decision (Award 9678), the instant case (CL-13042), . . . **will be given further consideration.**" (Interpolations and emphasis ours), cannot be interpreted to mean the Carrier agreed to be bound by a sustaining award. The Employes assert, however, that had Award 9678 denied the claim, they would have withdrawn the instant case. Moreover, the Employes cite and rely on Award 12288 (Referee Kane) as having settled the matter of the proper meaning of the phrase "will be given further consideration." There it was said, among other things, that as a "practical" matter the language did show an intention by both parties to dispose of the claim in that case upon receipt of a decision in Award 8541. But the difficulty with the Employe's theory that these are precedential authorities controlling here is that Award 12288 was simply a claim brought to apply and enforce the findings of Award 8541. It did not constitute a new or different claim as is the case here. It was brought by the Brotherhood on behalf of a named employe and "all others affected" who sought but were denied payment by the Carrier under an application of Award 8541. Put another way, the Carrier after Award 8541 was handed down declined payment of compensation to those employes designated in that case as "various employes at various locations". The claim in Award 12288 sought (successfully) to have them paid. For example, the Board said in Award 12288, interalia, "We are of the opinion that the Award (8541) gave the employes in this Class (sic) **a right to wages rather than a claim**" (interpolations and emphasis ours.) Thus the distinguishing feature of Award 12288, is that there the Board found that the rights of unnamed Claimants under Award 8541 had become vested and payable when the latter decision was handed down, and then ordered payment to them of the amount claimed. There were no distinguishing factual or substantive differences between the two. And it seems to us the Referee there properly found that had Award 8541 been a denial award then, as a practical matter, a claim on behalf of unnamed Claimants for payment of damages based upon the same substantive merits as had been considered by the Board in the original claim would, of course, have been wiped out. No "further consideration" could possibly have been accorded it.

Here, however, the Board must deal with a case substantively and factually different than that in Award 9678. There the key finding leading to a sustaining award was the Carrier's failure to support its contention that past practice, system-wide, supported its action of using Passenger Trainmen to contact other trainmen to determine preferences for job assignments and to place their names on an assignment sheet. Here under the agreed-upon facts and on the evidence of record, there can be no finding that it was a long-established practice for clerks only to prepare vacation schedules for other crafts.

Accordingly, the claim will be denied.

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 17th day of September 1964.