Award No. 13478

Docket No. CL-13626

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, 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-5209) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 3-C-2, when it abolished regular clerical positions Symbol Numbers B-177-G, B-176-G, B-208-G and relief clerical position, at Bradford, Ohio, Buckeye Region, effective August 23, 1959.

(b) The positions should be restored in order to terminate this claim and R. D. Sargent, G. R. Thomas, C. G. Shahan, Ralph Stoler, Jr., and all other employes affected by the abolishment of these positions should be restored to their former status (including Vacations) and be compensated for any monetary loss sustained by working at a lesser rate of pay; be compensated for any loss sustained under Rule 4-A-1 and Rule 4-C-1; be compensated in accordance with Rule 4-A-2 (a) and (b) for work performed on Holidays, or for Holiday pay lost, or on the rest days of their former positions; be compensated in accordance with Rule 4-A-3 if their working days were reduced below the guarantee provided in this rule; be compensated in accordance with Rule 4-A-6 for all work performed in between the tour of duty of their former position; be reimbursed for all expenses sustained in accordance with Rule 4-G-1 (b); that the total monetary loss sustained, including expenses, under this claim be ascertained jointly by the parties at time of settlement (Award 7287). All monies due as a result of disposition of this claim to accrue interest at the rate of one-half of one per cent a month. (Docket 1065)

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 Claimants in this case held positions 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.

It would be difficult to find any clearer expression by this Board of what they intend when they sustain a claim for "monetary loss". It certainly does not comprehend holiday pay lost or rest day pay lost or any of the other matters which are stated in the Employes' claim. The term comprehends only the difference in the wages earned and what Claimant would have earned but for Carrier's actions where such are found to be violative of the Agreement. See Second Division Award 1638, Referee Carter, and Fourth Division Award 937, Referee Carey, in support of the Carrier's position as related above.

Finally, the Carrier desires to take exception to the Employes' request for interest at the rate of one half of one percent a month on "all monies due." The Carrier would point out that Awards on the specific question of interest, although few in number, seem to depend upon whether the Agreement provides for such payments. In this regard, your attention is invited to Third Division Award 6962, Referee Rader, wherein the Board upon sustaining the claim made the following comment with respect to interest:

> ". . . B (4) denied for the reason that the agreement makes no provision for interest payments in such cases."

On the basis of this Award and the fact that the Agreement is silent on payments of interest on money due or alleged to be due, we request that the Employes' claim for interest be denied in any event.

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, which constitutes the applicable Agreement between the parties, 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 cut 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 in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to the Agreement. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement in the instant case and that the Claimants are not entitled to the compensation which they claim.

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

(Exhibits not reproduced).

OPINION OF BOARD: Up until August 16, 1959 the Carrier had main-

tained for many years at its engine house in Bradford, Ohio a bunk room for the convenience of certain of its train and engine service employes. It also had retained there on a seven day-around-the-clock basis, four regular clerical positions: B-176-G with a tour of duty from 8:00 A. M. to 4:00 P. M.; B-177-G with a tour of duty from 4:00 P. M. to 12 Midnight; B-208-G from 12:00 Midnight to 8:00 A. M., and a regular relief clerk with various substitute tours of duty. The named Claimants were the incumbents of these four clerical positions. Among other primary duties of their positions were those in connection with crew dispatching, maintaining bunk room records, and handling and calling crews. In addition the other principal duties of the positions were those of preparing switch lists, checking tracks, maintaining employes' bulletin boards, and checking etc. train and engine service employes' time slips.

Effective August 16, 1959, the Carrier discontinued the use of the bunk room and supplanted it by a contract with a private individual to provide meals and lodging for the crews at another location in town. Simultaneously the four named incumbents of the clerical positions described were relieved of all duties in connection with crew dispatching and handling and calling crews. The crew dispatching work was transferred to Crew Dispatchers at Richmond, Indiana, some 35 miles from Bradford (but part of the same seniority district as that of the clerks in Bradford, and the positions at Richmond being also covered by this Clerical Rules Agreement). For this purpose a direct telephone line was installed between the Richmond office and the lodging house in Bradford, with an extension line to the restaurant contiguous to it. Thus when the services of train or engine service employes located in Bradford are required the Richmond Crew Dispatcher uses this direct line to call the lodging house or restaurant. According to the Carrier's contract with the proprietor of these accommodations, the latter is required to "arrange to answer such telephone or extension and to summon our employes to the telephone upon request".

Some five days later, effective at the close of duty August 22, 1959, the four clerical positions in question were abolished altogether. The work of the abolished positions then remaining was assigned, either in whole or in largest part, to the Agent in Bradford, an employe not covered by the Clerical Rules Agreement (the Organization contends that a minor portion of this remaining work, that relating to train and engine service employe's time slips, was assigned directly to the train and engine service employes, but there is protest by the Carrier that this contention was not timely raised by the Organization in progressing this claim on the property).

The Organization argues, in effect, that the Carrier, in first fragmenting piecemeal and soon thereafter abolishing the four clerical positions in dispute, improperly circumvented and violated the Rules Agreement, and particularly Rule 3-C-2 thereof. In any event it argues vigorously that so much of the remaining work as was assigned to the Agent at Bradford was neither "less than 4 hours' work per day of the abolished position or positions" nor work "incident to the duties of an Agent", both as provided by subdivision (2) of Rule 3-C-2.

The Carrier dismisses the first argument of the Organization by pointing out that until the jobs were actually abolished it had a right (a) to transfer, as it did, some of their duties to other existing clerical positions in the same seniority district, and (b) to relieve itself of the onus of maintaining a bunk room by contracting it out to an independent operator. It is well to note, however, that in its submission to this Board the Carrier revealed that at the very outset it had already decided to abolish the jobs in question since it considered to begin with "that the work required of the four (4) clerks at Bradford did

not justify their being retained in service", and it was mindful of "satisfying the three problems at the one time" (i.e., abolishing the jobs, transferring all the Bradford switching duties to the Agent there and replacing the bunk room).

The Carrier counters the second principal argument of the Organization by maintaining (a) that the Organization never proved, as it was burdened to, that the work remaining from the abolished jobs and assigned to the Bradford Agent amounted to as much as 4 hours per day, and (b) in fact such work was much less than 4 hours a day and, of course, was incident to the Agent's duties and responsibilities for the Bradford switching operation.

While there is much to commend the first basic argument of the Organization, the difficulty with it in terms strictly of the Clerical Rules Agreement is that Rule 3-C-2(a) does not come into operation until "a position covered by this Agreement is abolished". In other words, even though the Carrier seems here to have deliberately delayed the abolishmnt of the positions in order first to whittle down some of their essential tasks, among other things, by transfer to clerks in Richmond, it remains that in terms of the Agreement there was nothing to prevent it from doing so. Thus in recent precedents of this Board it has been established under this Agreement that until the positions are abolished the Carrier has the right to transfer or apportion the work among existing clerical positions. See Awards 12420 (Coburn), 13060, 13061 (Engelstein), 12809 (Dolnick), 12289, 12285 (Kane), 12108 (Seff), 13089 (Ables). So, too, the right of the Carrier to contract out bunk-room facilities has been affirmed. Award No. 40 of Special Board of Adjustment No. 374 (Chairman Lynch); See also this Board's Awards 7784 (Lynch), 7031 (Carter), 8001 (Bailer).

What then remained of the duties of the positions after they were designedly pared down and when they were abolished? This is the major question in this dispute and it also poses several collateral procedural issues.

It is clear, of course, that when all four positions were simultaneously abolished by the one directive of the Carrier there were no clerical positions under Rule 3-C-2(a) (1) remaining in existence "at the location where the work of the abolished position is to be performed". This brought into operation Rule 3-C-2(a) (2) which provides:

> "(2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yard Master, Foreman, or other supervisory employe, provided that less than 4 hours' work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of an Agent, Yard Master, Foreman, or other supervisory employe."

It is plain that the work comprehended by Rule 3-C-2 (a) does not depend upon the operation of any "exclusivity theory", i.e. proof that the work involved, either by past practice or Agreement, belonged to and could be performed solely and only by employes covered by the Clerical Rules Agreement. See Award 12903 (Coburn). It is enough that it be proved that the work which remains from the abolished position was "previously assigned" to such positions. See Awards 12901 (Coburn), 4045 (Fox).

On this score there is no dispute in this matter but that (a) there was work remaining from the abolished positions, (b) it was work "previously

assigned" to those positions, and (c) the bulk of this remaining work was transferred to and thereafter performed by an Agent at Bradford. The contentious issue is whether this work constituted "less than 4 hours' work per day of the abolished position or positions" as provided in Rule 3-C-2 (a) (2). And as to this it will be noted that, taking the language of the Rule literally, a possible interpretation is not how long it takes the successor employe, the transferee, to perform the remaining work, but whether that work comprised "less than 4 hours work per day of the abolished position or positions".

In any event, Carrier maintains that the burden of proving the actual amount of the remaining work transferred to the Agent is upon the Claimant and, further, that certain of the proof now offered by the Organization cannot be taken into consideration by the Board because it was not first offered on the property. There is no question but that the overall burden of establishing a claim is upon the party who asserts it, but there is substantial precedent that an "exception" to a Scope Rule, invoked by the Carrier for its benefit, is a matter of defense which the Carrier must plead and prove. See e.g., Awards 2737 (Shake), 4538 (Carter), 5136 (Coffey), 5304 (Wyckoff), 5457 (Parker), 8148 (Bakke). This construction is perhaps better expressed in terms of the "burden of going forward" rather than the "burden of proof", as indicated, in effect, in Award 9545 (Berstein):

> "The first sentence of Rule 59 (e) sustains the claim prima facie. The language of the third sentence which the Carrier refers to is an exception to the general rule for the benefit of the Carrier. **Once the Claimant has established the essential elements of his case, it is up to the Carrier to negate the showing by proof that its action came within the exception it asserts is applicable." (Emphasis ours.)**

Prima facie the Organization established the elements of this claim by the undisputed fact that each job in question was bulletined and scheduled for 8 hours daily throughout the work week. It then became the burden of the Carrier, and we so hold, to go forward to prove, among other things, that the work actually remaining from all four jobs (in reality only three of the four jobs since one was a regular relief job) could either be performed by the Agent in "less than 4 hours' work per day" or, if the more strict interpretation of the Rule were to be applied, such combined work constituted "less than 4 hours' work per day of the abolished position or positions".

The item of proof to which the Carrier objects as not properly before the Board are the 3 questionnaire time studies of each of the 3 regular (as distinct from relief) positions involved and which are together annexed as a single exhibit to the Organization's submission to the Board. The Carrier argues that this material was not produced or adverted to when this claim was being considered on the property. But it cannot be denied that right from the outset the Organization maintained that the work remaining from the abolished positions exceeded 4 hours per day and, in this context, the production of these time studies conducted under the Carrier's auspices could have come as no surprise to it. Indeed, in its submission to this Board the Carrier acknowledged that, "In arguing their claim on the property, the Employes contended that the Carrier violated Rule 3-C-2 (a) (2) on the basis that the work assigned to the Agent was not incident to the Agent's duties and that the work assigned exceeded four (4) hours". The Carrier's objection to the admissibility of the time studies is therefore overruled, just as is the Organization's objection to the Carrier's submission to the Board, by three substitute or relief Agents obtained some months after the disputed jobs were abolished.

On the merits the Carrier, in support of its contention that the duties remaining from the abolished jobs came within the exception of Rule 3-C-2 (a) (2), asserts categorically that "not to exceed two (2) hours per day is being consumed by the Bradford Agent in performing the remaining work". At the same time it alleges that these two hours of additional duties are being accomplished by the Bradford Agent within his regular four hours per day allotted to Bradford, the same as before August 16, 1959, and without any diminution of his previously assigned duties as an Agent.

But the only proof offered by the Carrier in support of its assertion were the three unsworn statements of the substitute or relief Agents referred to above. And it is to be observed that in one of the three statements the putative Agent admits that for the first 12 days of his assignment at Bradford, and because of unfamiliarity, he "spent on an average of (6) six hours daily at Bradford, Ohio doing the necessary duties that were assigned".

The Organization listed the daily time spent by the Agent at Bradford from September 11, 1959 to September 29, 1959 inclusive (erroneously listed as "1958" in the submission, but amended at the hearing herein before the Referee on February 10, 1965, to read "1959"). This daily listing shows that on no single day in that period did the Agent spend less than 6 hours at Bradford and the average daily time spent by him at Bradford was just short of 7 hours. In addition on Friday and Saturday of that week, September 18 and 19, 1959, one of the named Claimants, C. J. Shahan, formerly occupant of abolished position B-176-G, was called in to work extra time.

In sum, the proof in this record that more than "4 hours' work per day of the abolished positions" remained to be performed and was thereafter performed by a Bradford Agent is much more convincing than the essentially unsupported assertion of the Carrier that this work amounted to less than 4 hours per day. The Board finds, therefore, that the Carrier has violated Rule 3-C-2 (a) (2) of the Clerical Rules Agreement in this respect. In view of this finding it becomes unnecessary to pass upon the Organization's additional contention that the work in question was not incident to the duties of an Agent as also provided in that Rule.

As for the remedy for the violation found, the Board rules that it shall be limited to the extent that the Carrier shall pay to each of the named Claimants such amounts as will make them whole for any loss of wages they may have suffered by reason only of the violation of Rule 3-C-2 (a) (2) for the period commencing on and after August 23, 1959. See e. g. **Awards 11586, 11942** (Dorsey), **11489, 12934, 12962** (Hall), **12024** (O'Gallagher), **12131** (Sempliner), and **12286** (Kane). In all other respect Item (b) of the claim herein is hereby denied, including so much thereof as requests (1) relief in behalf of unnamed "all other employes affected" (See **Awards 10167** Gray, **11211**—Miller, **11368**—Dorsey, **11450**—Coburn, **11490**—Hall); (2) restoration of the abolished positions (See **Awards 12336**—Engelstein, **11753, 11489**—Hall, **11586**—Dorsey, **10867**—Kramer, **10743**—Miller); (3) the allowance of interest on any monies due (See **Awards 6962**—Rader, **8088**—Lynch, **11172**—Coburn).

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

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 Rule 3-C-2 (a) (2) of the Agreement was violated.

AWARD

The claim is sustained to the limited extent described in the Opinion herewith and in all other respects the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of April 1965.