Award No. 15821
Docket No. TE-14777

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Rock Island and Pacific Railroad, that:

1. Carrier violated the Agreement between the parties when on January 21, April 29, June 7 and September 3, 1963, it required D. M. Hendrickson, Agent-Telegrapher at Murdock, Nebraska, to unload grain doors and other coopering material at that station and failed and refused to compensate him for that service.

2. Carrier shall compensate D. M. Hendrickson $17.62 (the prevailing section laborer's rate of pay) for each date January 21, April 29, June 7 and September 3, 1963, in addition to the compensation allowed him for his regular assignment.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, effective August 1, 1947 (reprinted to include interpretations and special agreements to November 1, 1956), as amended and supplemented, is available to your Board and by this reference is made a part hereof.

Murdock, Nebraska, is a one-man station on Carrier's western division between Omaha and Fairbury, Nebraska. The position at Murdock is classified as Agent-Telegrapher and is assigned to work 6:45 A. M. to 3:45 P. M. (one hour off for lunch), Monday through Friday.

Throughout the years prior to January 21, 1963, grain doors and other coopering material used in preparing cars for grain loading have been unloaded by the section crew at Murdock or by outside labor. Car RI 142012, containing company grain doors and coopering material, arrived at Murdock, Nebraska, on January 14, 1963. In accordance with the practice of many years' standing, Agent-Telegrapher D. M. Hendrickson at Murdock wired former Superintendent B. L. Schoach as follows:

"Advise permission hire man unload coopering material from car RI 142012 at elevator paying $2.00 per hour for labor."

Separate claims for April 29, June 7 and September 3, 1963, were presented to the Chief Dispatcher and appealed in the usual manner. Carrier's highest officer took the position that his declination dated April 16, 1963, in the claim for January 21, 1963, would also stand as a declination of the claims for April 29 and June 7. The claim for September 3 was discussed in conference about November 18, 1963, and Carrier apparently considered its denial dated April 16, 1963 (some seven months prior to claim date) was sufficient.

Except as noted above, handling of the four separate claims was similar. Employes attach hereto and make a part hereof ORT Exhibits 1 through 5 which reflects the handling of the claim for January 21, 1963. ORT Exhibits 6 and 7 show additional pertinent correspondence relating to the four claims.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS:

1. There is an Agreement in effect between the Chicago, Rock Island and Pacific Railroad Company and the employes represented by The Order of Railroad Telegraphers, bearing an effective date of August 1, 1947 (reprinted to include Interpretations and Special Agreements to November 1, 1956), on file with your Board, and by this reference is made a part of this submission.

2. The Employes' position with respect to the January 21, 1963 claim is shown in Carrier's Exhibit A.

3. The Employes' position with respect to the April 29, 1963 claim is shown in Carrier's Exhibit B.

4. The Employes' position with respect to the June 7, 1963 claim is shown in Carrier's Exhibit C.

5. The Employes' position with respect to the September 3, 1963 claim is shown in Carrier's Exhibit D.

6. Each of the four claims was declined, finally appealed to Carrier's Vice President–Personnel for handling, and declined.

7. Carrier's position with respect to these claims is shown in Carrier's Exhibit E.

8. Carrier's instructions pertaining to the handling of coopering material as issued by Carrier's Superintendent at Fairbury, Nebraska, are shown in Carrier's Exhibit F.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim on behalf of D. M. Hendrickson, Agent-Telegrapher at Murdock, Nebraska, for eight hours at Section Laborer's rate of pay because he performed the work of unloading grain doors and coopering material at the Murdock one-man station on January 21, April 29, June 7 and September 3, 1963.

Brotherhood takes the position that the work in question does not belong to the Agent-Telegrapher under the scope of the Agreement and that in the past this heavy physical work was performed by Section Laborers or independent contractors. Therefore, it claims that Mr. Hendrickson is entitled to compensation in addition to that allowed him for his regular assignment.

Carrier denies the claim with the assertion that the work was incidental to the Agent's normal activity at a one-man agency. The material handled was company material for the use of the Agent at the Murdock station. It urges that the volume or physical nature of the work should not be regarded as a factor in resolving this issue. Carrier also denies that there is any basis in the Agreement for the claim for laborer's pay to an Agent-Telegrapher.

The record shows that the work of unloading grain doors and coopering material at Murdock had been performed by Section Laborers or outside forces. Although this work was not traditionally performed by the Agent, it is work that may be regarded as reasonably related to and incidental to the performance of his agency duties. The material was ordered by the Agent and placed around the doors of the loaded box cars to keep the grain from leaking out.

Although the scope of the Agreement does not delineate the work, the classifications which it establishes reflect the work performed by that craft as contemplated by the parties. The scope, however, does not preclude Carrier from assigning to the Agent duties related to his work.

We recognize that on occasion questions may arise as to the ability of an Agent at a one-man station to handle the physical work required in the unloading of grain doors, but this Board does not have the authority to set forth the rules as to the amount of this type of work which may be required of an Agent. This position has been expressed by Special Board of Adjustment No. 226 in Award No. 21, in these words:

> "It is not permissible or practical for us to promulgate rules for grain door handling between the Carrier and its agents. It would be unreasonable to hold, and we do not hold, that agents should never be required to unload and stack grain doors at their stations."

Furthermore, we find no basis in the Agreement for allowing compensation at Laborer's rate of pay for the work performed.

For the reasons stated, we hold the Agreement was not violated.

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 22nd day of September 1967.

DISSENT TO AWARD 15821, DOCKET TE-14777

This award represents serious error in at least three (3) respects: (1) Failure to observe a prior award concerning the work involved as performed on this railroad; (2) misrepresentation of the effect of Award No. 21, Special Board of Adjustment No. 226; and, (3) a specious and unnecessary comment concerning the remedy claimed.

First. Award 12390, in which this same Carrier was the respondent, the Board held that on the basis of custom and practice at a particular station the unloading of grain doors on this railroad belongs to Maintenance of Way employes. On this same basis, the work at Murdock, Nebraska, belongs to the same employes if not done by independent contractors. Failure of the majority to give attention to this award constitutes grave error. I take it that their failure to mention Award 12390 is evidence that they could not distinguish the principle or demonstrate any error in that award.

Second. The majority quoted a portion of Award No. 21, Special Board of Adjustment No. 226, in what appears to be a deliberate attempt to distort that award into support for denying a claim such as we had there. The quotation was dictum, pure and simple. Moreover, it was taken out of context. The "Findings and Opinion" (omitting narration of the fact situation) read as follows:

> 'It is not disputed that unloading grain doors has through past years been work generally assigned to the section crews. It has not been the practice to require agents to unload grain doors, at least in substantial quantities. Grain doors are reasonably heavy. The nature of the work required in unloading and stacking them is self-evident. At best, it is not a one-man job, especially for the older agents.
>
> Moreover, the past practice to have section men unload them was based upon the relation of the agent to the public. He was not expected to perform common labor in substantial amounts. At passenger train time when the waiting rooms and platforms were swarming with passengers and other members of the public, the Agent was expected to be dressed well and neatly, and even to don a nice looking cap with the word AGENT inscribed in gold letters. His duties at the station were, principally, to meet the public, solicit business, sell tickets, keep the books and records and do telegraph work. This work required a good personal appearance, with hands free of splinters, bruises and lacerations.

Time has changed many things on the railroads. The former concept of the term 'AGENT' has been all but obliterated at the smaller stations. Today, the agent is a mere shadow of his illustrious predecessor. Nevertheless, immediate and indiscriminate assignments of grain door unloading to the agents is not supported in the past relations between the Carrier and its agents.

It is not permissible or practical for us to promulgate rules for grain door handling between the Carrier and its agents. It would be unreasonable to hold, and we do not hold, that agents should never be required to unload and stack grain doors at their stations. The age and physical condition of the agent, the number and weight of the grain doors, the physical surroundings at each unloading and stacking job, and similar facts, should all be considered fairly by both the agent and the Carrier each time, without delay or partisanship.

It is our finding that the Agent at Savonburg should be reimbursed in the amount of $4.50 for hiring a man to unload the grain doors mentioned in the claim.

AWARD

Claim sustained, as per opinion."

Proper application of this award to the present dispute would have resulted in a sustaining decision here, too.

Third. Since the majority was quite obviously determined to deny the claim, despite the two (2) awards referred to above, its finding that it could not see any basis for allowing compensation at Laborer's rate of pay was unnecessary. It comes very close to being the addition of insult to injury. Moreover, it ignores a well established principle that where work outside the assignment of an employe is required of him there is thereby created a contract to pay the going rate for such work. Awards 4454, 4714, 4742 and 5095 were cited to the Referee as authority for such holding. A contrary holding, especially where it was not necessary, without attempting to impeach such authority is not in keeping with the purpose for which the Board was created.

For these reasons I am obliged to register vigorous dissent.

J. W. Whitehouse
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 15821, DOCKET TE-14777

Occasionally a dissent requires answer to place an award and the dissent in proper perspective. We submit this is such a situation.

The Claimant in this case was the agent at a one man station and claimed at "the prevailing section laborer's rate of pay" for each day he was required to handle certain company material for use at his station.

Petitioner admitted of record:

> "* * * the work here imposed * * * is not of a classification covered by the Agreement", but despite this fact "* * * Claimant * * * is entitled to be classified * * * as a 'laborer' or 'grain door unloader' and as such is entitled to * * * pay * * * by the terms of the Agreement applicable to such classification * * *."

In short, Petitioner admitted the disputed work was not within his contract, which was the only agreement directly relied upon by Petitioner before the Board. Petitioner then attempted to support his claim indirectly under the contract of an entirely separate craft. Petitioner spent the bulk of his energies attempting to establish the work was **not** within his agreement and for that reason Claimant was entitled to a rate again **not** within his contract, but under the agreement of some other craft. Nowhere are we told how the Board could possibly have jurisdiction over a claim in this posture.

Petitioner relied on Award 12390, and the dissent speculates as to why it was not mentioned in the Opinion. The probable reason is its obvious inapplicability. It held that at one point on the property Maintenance of Way employes had performed the disputed work. We are not enlightened as to how an award of another craft giving its workers the work at a given point, can possibly support a claim of this craft under its agreement. Petitioner openly admits:

> "* * * In some cases store **clerks** who are covered by the Clerks' Agreement unload **company material** such as this. However, as previously stated, this work is performed by section **laborers** or by **outside labor** at $2.00 per hour. Such was the case at Murdock, * * *" (Emphasis ours.)

It is most significant to note that Petitioner did not begin to establish an exclusive right to the disputed work in any particular craft either on the system or even at the point involved in the claim. On the contrary, the record reveals at least three (3) crafts and even outsiders have performed the disputed work. Therefore, it is self evident that the work belonged to no craft exclusively, and Carrier was free to assign it to agents as part of their assignment at a one man station.

Award 21, SBA No. 226, merely held in result that under its particular facts an older agent not in "robust health" should not have been used. However, the award also stated unequivocally that it was not prescribing an inflexible rule to be applied to all such cases, and that under other facts agents might well be required to perform the work. The instant award did not distort the earlier award in any sense, and is perfectly consistent therewith in finding it persuasive in principle, but not on the facts.

The dissent also cites awards in its final paragraph which beg the question by assuming that the work in our case could not be performed by Claimant without violating his contract. That was never proven. Furthermore, the principle of those awards was applied by Carrier since Claimant was paid the rate of agent for work performed which is higher than that of laborer. None of the awards cited allowed a second day as here claimed.

It is incontestable that Petitioner offered no provision under his contract either giving the work to agents or prohibiting its assignment to agents and requiring a second day at "section laborer's rate" if performed by agents. It is fundamental that the Board is limited to Petitioner's contract in deciding a dispute presented by Petitioner under his agreement.

Award 15821 is sound, and no other result could reasonably have been reached on the record. The dissent does not weaken the award as valid precedent.

T. F. Strunck
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