Award No. 15907
Docket No. CL-16275

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

BROOKLYN EASTERN DISTRICT TERMINAL

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5996) that:

1. The Carrier violated the established practice, understanding and provisions of the Clerks' Agreement, particularly Article 1, Rule 1 of the Scope Rule, Rules 21, 48 and 50, among others, when it failed to assign the regular incumbents, Freight Handlers L. Davis and G. Graham to work their positions on February 22nd, 1965, and instead assigned the work to employes of another craft outside the Scope of the Clerks' Agreement.

2. The Carrier shall pay incumbents L. Davis and G. Graham a day's pay (8 hours) each, at the rate of time and one half, for each day they are not assigned to work and perform their regular duties on rest days and holidays starting February 22nd, 1965 and for each day thereafter until the violations are corrected and Freight Handlers L. Davis and G. Graham, or their successors, are properly assigned to perform the duties and work the positions.

3. The Clerks' Agreement was further violated when the Carrier's highest officer failed to deny the Appeal of Claim within sixty (60) days in accordance with Article V of the August 21, 1954 National Agreement.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective April 1, 1938, and revisions of September 1, 1949 and July 7, 1955, and the National Agreements signed at Chicago, Illinois on August 21, 1954, August 19, 1960 and June 5, 1962 and November 20, 1964, covering Clerks, Chauffeurs, Watchmen, Freight Handlers, etc., between this Carrier and this Brotherhood. The Rules Agreement will be considered a part of this statement of facts. Various Rules and Memorandums may be referred to from time to time without quoting in full.

The American Sugar Company (for reasons of their own) decided to work February 22, 1965, and Carrier in normal routine manner furnished the American Sugar Company with a carfloat loaded with empty box cars.

The American Sugar Company with their own employes and equipment, loaded some cars on the float. This was no different than what had taken place many, many times before on holidays and rest days.

At no time prior to this occasion did the Organization protest or file a claim alleging violation of the Agreement.

The Carrier's plant closed for the holiday (F'ebruary 22, 1965); Carrier paid the Freight Handlers in question for the holiday in accordance wtih the current Agreement.

This, in effect, is the background of the dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this case are rather unique. Claimants perform work for the Carrier Monday through Friday by loading and unloading cars for the American Sugar Company on the latter's property. They perform this work in conjunction with several employes of the Sugar Company, employes who do not come within the purview of the Agreement between the Carrier and the Organization. The Carrier maintains that this assignment of the two Claimants involved is simply an accommodation to the Sugar Company, and, in effect, constitutes work controlled by and belonging to the Sugar Company. As such, therefore, it cannot be said to comprise work envisioned by the collective bargaining agreement of the parties.

The Organization specifically enters a complaint demanding that inasmuch as the Claimants were not called to work February 22, 1965, a holiday, they be compensated for a day's pay at the time and a half rate. They further demand that the Claimants be paid at the same rate for each holiday and rest day beginning with February 22, 1965, when work was required to be performed.

Essentially, Claimants are saying that since they load and unload cars at the Sugar Company Monday through Friday, when such work is required on holidays and rest days, they are entitled to it. Carrier enters retort to the effect that its employes are on the American Sugar Company's property only by sufferance; hence, the work is outside the Agreement.

Petitioner relies principally on the Scope Rule which reads as follows:

"ARTICLE 1. RULE 1
SCOPE AND WORK OF EMPLOYES AFFECTED
(Effective July 7, 1955)

These rules shall govern the hours of service and working conditions of all employes engaged in the work of the craft or class of clerical, office, station and storehouse employes. **Positions or work coming within the scope of this agreement belong to the employes covered thereby, and nothing in this agreement shall be**

construed to permit the removal of positions or work from the application of these rules, nor shall any officer or employe not covered by this agreement be permitted to perform any clerical, office, station or storehouse work which is not incident to his regular duties, except by agreement between the parties signatory hereto." (Emphasis ours.)

In furtherance of its reliance on the Scope Rule, the Petitioner argues that the general rule this Board has often followed in deciding Scope Rule cases, that is, a required showing of exclusive performance of the work claimed, is inapplicable where a special Scope Rule is involved, and that this special Rule expressly forbids the removal of positions or work without an agreement to that effect.

We are inclined to agree with the Petitioner's arguments propounded with reference to the Special Scope Rule; however, before such a rule becomes operative, it is axiomatic that Carrier must be responsible for and in control of the execution of the work involved. As we view this record before us, we are convinced that the American Sugar Company could at any time call an official of the Carrier and discontinue the work of the Claimants. This could be done by the Sugar Company with impunity. There is no privity of contract between the Sugar Company and the Claimants; nor, indeed, is there any privity of contract insofar as the work involved is concerned between the Carrier and the Claimants. These positions which they are filling are outside the Scope Rule. The positions could be abolished by the Sugar Company, and Claimants would have no recourse. Hence, we will deny that portion of the Claim.

In Part 3 of this claim, the Organization alleges that the Carrier violated the provisions of Article V of the August 21, 1954 Agreement pertaining to the Time Limit Rules. A review of the record reveals that this procedural defect was not raised on the property. The issue of non-compliance, therefore, with the requirement of Article V may not now be raised before this Board.

Decision 5 of the National Disputes Committee held as follows:

"The National Disputes Committee rules that inasmuch as the Carrier did not raise the contention that Article V of the August 21, 1954 Agreement was not complied with in the handling on the property, it may not raise such contention before the Third Division.

If the issue of non-compliance with the requirements of Article V is raised by either party with the other at any time before the filing of a notice of intent to submit the dispute to the Third Division, it is held to have been raised during handling on the property."

Since this issue was not raised prior to the notice of intent to file, we will deny the claim. By way of addendum, we have examined the evidence, including the exhibits pertinent to this phase of the claim. The General Chairman's appeal to the highest officer of the Carrier was dated October 13, 1965, and received on October 15, 1965. The Post Office stamp containing the October 13th letter, was dated "Brooklyn, N. Y., October 14, 1965" and the received stamp of Carrier was dated October 15, 1965. This highest officer of the Carrier denied the appeal on December 13, 1965. There is no

evidence in this record as to when the December 13th letter was received by the General Chairman. It would appear to us that this is an essential element of proof which should have been submitted to this Board. The record is silent on this point. The onus rests upon the party making the allegation. We need not pursue this matter further since we have already ruled that it is not properly before the Board. For the foregoing reasons, we will deny that portion of the claim as submitted.

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 31st day of October 1967.

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