Award No. 16126
Docket No. CL-16450

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

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

THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6081) that:

1. The Carrier violated the established practice, understanding and provisions of the Clerks' Agreement, particularly, the Scope Rule, Rules 4-A-1 (b), 4-A-7, 5-C-1, 9-A-1, 9-A-2, among others, Memorandum of Understanding No. 2 and Agreement No. 47, when it assigned established Chauffeur work to an outside firm whose employes have no seniority rights and are not covered by the Scope of the Clerks' Agreement or the provisions of the Railway Labor Act.

2. This work shall be returned to the Employes covered by the Scope of the Clerks' Agreement upon whose behalf the Agreements were made in accordance with the provisions of the Railway Labor Act to perform this work.

3. The Carrier shall pay Chauffeur Buckley for each Monday of every week effective October 4, 1965, and Chauffeur Walker for each Wednesday of every week effective October 6, 1965, eight hours' pay at the rate of time and one half for each day thereafter this carting and chauffeuring work is performed by other than employes covered by the Clerks' Agreement until such time as the violations are corrected.

4. The Carrier shall pay the senior extra or furloughed employe, unable to work, a day's pay for each day the Chauffeuring and carting work is performed by an outside firm whose employes are not covered by the Scope of the Clerks' Agreement or the Railway Labor Act effective October 1, 1965 and each day thereafter until the violations are corrected.

EMPLOYES' STATEMENT OF FACTS: There is in effect Rules Agreement effective July 1, 1945 and a newly revised Agreement effective January 1, 1965 which the Carrier has filed with the National Mediation Board in

OPINION OF BOARD: Beginning on October 4, 1965, Carrier contracted out the work of chauffeuring and carting scrap shoes between Dunton Electric Car Shops and Holban Yards Scrap Docks, two points on the property. Brotherhood timely and properly filed this Claim that Carrier's action had violated the Scope and other rules of the Agreement. In its Ex Parte Submission Carrier took the position, and alleged facts to support that position, that the involved work did not belong exclusively to Brotherhood. From the record, however, we find that the work as described above was covered by the Scope Rule and under Paragraph (b) of that Rule, may not be removed from coverage of the Agreement except by agreement of the parties.

While no such agreement is alleged to have been reached, Carrier argues that because it tried to negotiate for it with Brotherhood and Brotherhood refused to negotiate, the monetary portions of the Claim are estopped; Carrier cites our Award No. 8382 in support of this argument. During the discussions of the Claim on the property, Carrier offered to pay claimants the actual time spent by contractor's employes if Brotherhood would agree thereafter to permit Carrier to contract the involved work out under Paragraph (b) of the Scope Rule. Brotherhood's refusal to settle the Claim on this basis was no more a refusal to negotiate than Carrier's refusal to settle the Claim on the basis claimed by Brotherhood; and the parties' failure to agree on a settlement of the dispute by negotiation on the property clearly does not mitigate Carrier's responsibility for the breach of the Agreement involved.

Since there is no proof in the record of such an agreement under Paragraph (b) of the Scope Rule to permit this contracting out of work, and no proof of any other proper reason for contracting out the work, we find that the contracting out here involved violated the Agreement.

The violation is a continuing one; and we cannot tell from the record how much time was and perhaps still is being used on the involved work. The identity of any claimants in addition to the two named can be determined from records of Carrier; and we think that it is made clear by Carrier's settlement offer, referred to above and related by Carrier on page 67 of the record in this case, to pay "all the claimants the actual time spent by the contractor's employes," that the actual times involved can also be determined from Carrier's records. We will modify the remedy claimed to take account of these conditions.

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, except that the remedy (paragraphs 2, 3 and 4 of the Claim as presented) is modified as follows:

> Beginning on October 4, 1965, and continuing for as long as the violations of the Agreement continue, for each day on which the involved work was or is performed by others than employes covered by the Agreement, Carrier shall pay to Claimants Buckley and Walker, incumbents of the involved Chauffeur Positions, or, in their absence, to the employe or employes who relieved or substituted for either of them in the position, each, pay at the rate of time and one-half of his pro-rata rate for one-half of the number of hours used by such others than those covered by the Agreement in the performance of the involved work.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1968.

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