Award Number 17621
Docket Number CL-18129

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

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

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY NATIONAL RAILROAD ADJUSTMENT BOARD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6574) that:

(a) Carrier violated Rule No. 1 and related rules of the Clerks' Agreement, at its Diesel Storehouse and Storehouse No. 1, Elizabethport, N. J., when it allowed and/or required Mechanical Department employes to perform work assigned to employes covered by the scope of the Clerks' Agreement, and

(b) Carrier shall be required to compensate proper claimant and/or proper claimants a day's pay, for March 15, 1968 and each succeeding day violation is continued on the 4:00 P.M.-12 Midnight tour, and

(c) Carrier shall be required to compensate proper claimant and/or proper claimants a day's pay for March 15, 1968 and each succeeding day violation is continued on the 12 Midnight-8:00 A.M. tour, and

(d) Joint check of Carrier's records shall be made to determine proper claimants.

(e) Carrier further violated the Agreement between the parties dated August 21, 1954 (current Rule No. 35 of the Clerk's Agreement), when it failed to allow or timely deny the claim filed with the Purchasing Agent at Elizabethport, N. J., by the District Chairman on June 6, 1968, which claim should now be allowed as presented.

EMPLOYES' STATEMENT OF FACTS: On April 22, 1967 Carrier made effective a new operational system for its passenger trains, known as the Aldene Plan, resulting in the discontinuance of all passenger train operation into its terminal at Jersey City, N. J. This change decreased the amount of maintenance and repair formerly performed on diesel locomotives at the Jersey City, N. J. repair shops and consequently caused a reduction in Mechanical forces and Stores Dept. forces. The work of maintaining and repairing diesel locomotives at the Jersey City, N. J. shops was transferred to a new terminal at Raritan, N. J. and existing shops at Elizabethport, N.J.

To coincide with the inauguration of the Aldene Plan, Carrier in conference with and by Agreement of the Organization negotiated two (2) new 7 day Stores Helper positions to be located at Elizabethport, N. J. for the purpose of performing work which had been transferred from Jersey City, N. J.

By letter dated September 28, 1967 and Form "D" of the same date (Employes' Exhibits A & A-1) Carrier advised of the abolishment of the two new Helper positions and the relief cycle, showing that "material required by Mechanical Dept. forces will be drawn from stock during Stores Dept. tour of duty between 7:30 A.M. and 4:00 P.M."

Under date of May 8, 1968 the Local Chairman filed claim with the Supervisor of Stores based upon a violation of Rule No. 1 and related rules of the Clerks' Agreement. (Employes' Exhibit B) The Supervisor of Stores denied this claim to the Local Chairman by letter dated June 5, 1968. (Employes' Exhibit B-1)

Claim was next appealed on the Division level to the Purchasing Agent under date of June 6, 1968. (Employes' Exhibit C) Under date of June 13, 1968 the Purchasing Agent made reply to this appeal but did not render a denial decision (Employes' Exhibit C-2), but made reference to the Supervisor of Stores having complied with provisions of Rule 35 (a) when claim was denied on the local level.

The claim was referred to the General Chairman, by the District Chairman, for his consideration and decision for further handling on the System level. Under date of August 6, 1968 the General Chairman appealed the claim to the General Manager, the highest ranking officer of the Carrier authorized to handle claims on the property, and advised that the Purchasing Agent had failed to deny the claim. (Employes' Exhibit D)

Conference was held with the General Manager on August 19, 1968 and this claim was thoroughly discussed, but he would not agree to the merits of the case. By letter dated September 9, 1968, the General Manager rendered a denial decision. (Employes' Exhibit D-1)

All efforts to resolve this dispute on the property having failed, we are left with no other alternative except to file with your Honorable Board for a fair and just determination.

(Exhibits Not Reproduced)

CARRIER'S STATEMENT OF FACTS: The instant claim is based on the alleged violation of Rule 1 and related rules of Clerks Agreement when, it is alleged, Mechanical Department forces on the second and third trick were observed entering the storehouse to secure "such material as they required to permit them to continue work on repairs to engine" following the abolishments of second and third trick Store Helper positions #1176 and #1177, together with Relief Cycle 38 on October 6, 1967.

(Exhibits Not Reproduced)

OPINION OF BOARD: Carrier, by notice, abolished two Helper positions and a Helper relief position at Elizabethport, N. J., stating in said notice that these positions "are abolished account of material required by Mechanical Department forces will be drawn from stock during Stores Department tour of duty between 7:30 A.M. and 4:00 P.M., effective with tour of duty ending October 6, 1967."

The Organization contends that Carrier violated Rule No. 1 (g) of the Scope Rule when it abolished said positions and permitted non-scope employes to perform work of said abolished positions where clerk employes are assigned at the location of the abolished positions; that Carrier violated Articles 4 (a), 15 and 16, of the Implementing Agreement of April 24, 1967, between the parties when it abolished the positions in question and permitted Employes outside the Scope of the Clerk's Agreement to perform the work of the abolished positions; that Carrier violated Rule 9 (a-1) of the Agreement when it failed to advise the local and District Chairman of the detailed reassignment of the remaining duties of the abolished positions; that Mechanical Department Employes are taking away from Scope Employes the overtime work to which they are entitled under Rule 18 (d) of the Agreement; that Carrier violated Rule 35 when it failed to properly deny the claim.

Carrier's position is that the procurement of material by mechanical forces for their own use, especially to permit them to continue work on repairs to engines, a function incidental to their primary duties, is not work accruing exclusively to Clerical Employes; that prior to the establishment of the positions in question only one daytime storehouse position existed at said location and Mechanical Department Employes secured material from Storehouse on the 2nd and 3rd tricks and also on Saturday and Sunday on all three tricks; that paragraph (e) of the Claim is invalid because it was not part of the original claim.

In regard to the Organization's alleged procedural defect in that Carrier improperly denied the Claim by not giving the reasons for denying the claim, we find this contention to be without merit, inasmuch as Carrier's declining officer denied the Claim on the basis of the findings in Special Board of Adjustment No. 192, Dockets 85 and 97, which we find are as sufficient statement of reasons for said declination.

The pertinent provisions of the Scope Rule of the Agreement provide:

"Rule No. 1—Scope

(a) These rules shall constitute an agreement between The Central Railroad Company of New Jersey; Central Railroad Company of Pennsylvania; The New York and Long Branch Railroad Company, Wharton and Northern Railroad Company; Jersey Central Transportation Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and shall govern the hours of service, working conditions and rates of pay of employes in the following positions and those performing similar work for the Companies parties hereto; subject to exceptions specified in this rule:

* * * * * *

* * * * * *

* * * * * *

(g) Positions or work within the Scope of this Agreement belong to the employes covered herein as provided for in these rules and nothing in this Agreement shall be construed to permit assigning this work to other than employes covered by and as provided for in these rules or prevent the application of these rules to such position or work except as provided for in Rule 9 (a-4) or by

mutual agreement between the Management and the General Chairman."

The applicable provisions of Rule 9 are as follows:

"(a) Abolishing Positions—

(1) The employing officer or supervising official will notify the Local Chairman and the District Chairman, in writing, including detailed reassignment of remaining duties, at least five working days in advance of abolishing any position, except as provided in Rule 9 (a) (5) and will give the employes whose positions are to be abolished as much advance notice as possible and not less than five (5) days, using prescribed Form "D".

(4) When a position covered by this agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

(a) To another position or other positions covered by this agreement when such position or other positions remain in existence at the location where the work of the abolished position is to be performed."

Although it has been repeatedly held by the Board that Carrier has the prerogative to decide what positions are to be worked unless prohibited by the Agreement, we must therefore determine whether or not Carrier violated Rule 9 (a-4) of the Agreement herein. It is undisputed that a position remained in existence at the location where the work of the abolished position is to be performed. Therefore, we must decide if Carrier violated said Rule 9 (a-4) when it permitted Mechanical Employes to secure parts from the Stores Department. Carrier argues that petitioner must first prove that the work involved is exclusive to employes covered by the Agreement as a matter of system wide practice, custom and tradition. With this conclusion we would agree if we were dealing solely with the Scope Rule of the Agreement herein. But we are here dealing with the additional Rule 9 (a-4) of the Agreement. We do not agree with Carrier that petitioner must first prove "exclusivity" before applying said Rule 9 (a-4).

This Board in Award No. 11674, which considered a similar Rule as Rule 9 (a-4) and a similar Scope rule, in replying to Carrier's contention, a similar contention as raised in this instant dispute, that the work in question had been performed at one time by others than petitioner, said:

"Notwithstanding the Carrier's contention that some of the work involved has at one time been performed by local agents, the fact remains that when the detailed duties on work items were permanently assigned on May 8, 1957, the phoning of delinquent patrons was assigned to clerical positions. Thus that work automatically became subject to the Agreement and as long as the work subsisted, it could be removed therefrom only by agreement of the parties. . ."

Carrier in the notice of abolishment of said helper positions made it plain and clear that the duties of the helpers on the 4:00 P.M. to 12:00 midnight and 12:00 midnight to 8:00 A.M. shifts would be performed by the

helper on the 7:30 A.M. to 4:00 P.M. shift, and Carrier did not at that time claim the right to transfer the work of the helpers whose positions were abolished to the Mechanical Department employes.

We find that inasmuch as the work here in question remained from the abolished positions and was previously assigned to such positions, and that Carrier agreed by the adoption of Rule 9 that it would not transfer the work of Clerk Helpers Carroll, Allen and Bohannon to mechanical forces without agreement of the Organization, Carrier therefore violated Rule 9 (a-4) of the Agreement. See also Award No. 15140.

In regard to damages, Carrier's Member of this Board in his brief objects to Item (d) of the Statement of Claim as being unallowable because no rule in the Agreement requires a joint check of Carrier's record, and he also objects to Items (b) and (c) of the Statement of Claim as being indefinate and vague on account of requesting compensation for the "proper claimant and/or claimants".

However, a close perusal of the record in the regard of the handling on the property as well as the ex parte submissions and rebuttals of both parties to this Board failed to raise or even mention such objections to said items in the Statement of Claim. Therefore, following the repeated precedent of this Board that we can only consider contentions raised on the property, we are compelled to deny said objection to said items in the Statement of Claim as raised by Carrier's Member of this Board.

In the oral panel discussion reargument before this Board, Carrier's Member argued that Rule 9 cannot be considered by this Board inasmuch as the Statement of Claim does not refer to said Rule 9 and this Board cannot enlarge upon the claim from that referred to it. The Statement of Claim refers to Rule 1 and related rules of the Clerks' Agreement. Rule No. 9 is referred to in Rule No. 1 and thus Rule No. 9 is before this Board for consideration; and therefore Carrier's Member's contention in this regard is without merit and must 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 violated as indicated in the Opinion.

A W A R D

Claim sustained as to Paragraphs A, B, C and D.

Claim denied as to Paragraph E.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17621, DOCKET CL-18129

Award 17621 contains a statement reading, in part, as follows:

> "In the oral panel discussion reargument before this Board, Carrier's Member argued that Rule 9 cannot be considered by this Board inasmuch as the Statement of Claim does not refer to said Rule 9 and this Board cannot enlarge upon the claim from that referred to it. * * * *"

In making the above statement the Referee has completely overlooked the fact that the Carrier Member's objection to consideration of Rule 9 (Reducing Forces) was made in the initial discussion of the claim at which time a memorandum was furnished the Referee which, among other matters, fully outlined such objection. Since the Referee's first proposed award did not include any decision concerning the objection and the related argument that the Petitioner's Ex Parte Submission was not responsive to the Statement of Claim, a request was made for reargument. The Statement of Claim did not place in issue the abolishment of the positions. In his zeal to sustain the claim the Referee obviously overlooked this feature and also overlooked or ignored the statement in Petitioner's Ex Parte Submission reading:

> "The abolishment of subject positions was handled on the property by claim (which claim is not before your Honorable Board) taking the stand * * * * * *"

Thus it is clear that the Petitioner did not place the abolishment of the positions before this Board. However, the Referee and the majority of the Board decided the matter on the basis of the abolishment of the positions rather than upon the performance of certain work by Mechanical Department forces as alleged in the Statement of Claim. This Referee has previously recognized that the Board will not consider matters that are not placed in issue in the Statement of Claim. See Awards 17512 and 17525.

The importance of the issue here under discussion is readily apparent when it is noted that the Referee states his concurrence in Carrier's position that the Petitioner must first prove that the work involved is exclusive to employes covered by the Agreement as a matter of system wide practice if dealing solely with the Scope Rule of the Agreement. He then holds that we are also dealing with Rule 9 in addition to the Scope Rule. He then adds that he does not agree that Petitioner must first prove exclusivity before applying Rule 9 (a-4). By deciding the issue on the basis of abolishment of the positions instead of on the alleged violation of the Scope Rule by the performance of work by Mechanical Department forces as alleged in the Statement of Claim the Referee found a basis for sustaining the claim instead of denying it as he infers would have been the case had the issue been decided on the Scope Rule.

Since the decision is predicated on an issue that was not properly before the Board Award 17621 is invalid and of no force or effect.

/s/ G. C. WHITE
G. C. White

/s/ R. E. BLACK
R. E. Black

/s/ P. C. CARTER
P. C. Carter

/s/ W. B. JONES
W. B. Jones

/s/ G. L. NAYLOR
G. L. Naylor

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