Award No. 17721
Docket No. CL-17879

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6471) that:

(a) The Southern Pacific Company violated the current Clerks' Agreement between the parties when on May 10, 1964, it required and/or permitted employes of the Pacific Motor Trucking Company, not covered by the Clerks' Agreement, to unload and check freight routed and moved via Southern Pacific Lines, and;

(b) The Southern Pacific Company shall now be required to return such work to Agreement covered employes, and;

(c) The Southern Pacific Company shall now be required to allow employes A. J. Dorney, J. F. Costa and A. B. Clement, their substitutes and/or successors, eight (8) hours' additional compensation each at the rate of their assigned positions May 10, 1964, and each date thereafter that similar violations occur, such dates to be determined by joint check of company records.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including subsequent revisions, (hereinafter referred to as the Agreement) between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employes represented by the Brotherhood of Railway Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Employes) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

At the time this dispute arose Claimant Dorney was assigned to Position No. 80 Warehouse Foreman; Costa to Position No. 84 Check Clerk, and Clement to Position No. 85 Check Clerk, Portland Freight Station. All had assigned hours 9 A.M.-6 P.M., rest days Saturday and Sunday. Their duties included loading, unloading, and checking freight routed and arriving at Portland Freight Station via Carrier's lines.

On Sunday, May 10, 1964, employes of the Pacific Motor Trucking Company unloaded and checked freight from Van No. 61 700498 (Carrier waybills 28914 through 28936) and Van REAZ 208383 (Carrier waybills 56991 through 57009). The freight in both vans moved under Carrier billing and over Carrier's lines to Portland.

OPINION OF BOARD: At the time that this dispute arose, Claimants were employes of Carrier as Warehouse Foreman (Dorney) and Check Clerks (Costa and Clement) at Carrier's Portland Freight Station. All had assigned hours 9 A.M.-6 P.M., rest days Saturday and Sunday.

It is undisputed that the regular duties of the Claimants included loading, unloading and checking freight routed and arriving at Portland Freight Station via Carrier's lines. The parties are in disagreement, however, whether certain particular work of this nature concededly done on May 10, 1964, was denied them in violation of their Agreement rights.

On May 10, 1964, a rest day of each Claimant, Vans 61 700498 and REAZ 208383 arrived at Portland Freight Station by trailer-flatcar service ("piggy-back"). They were removed at ramp by employes of Pacific Motor Trucking Company, a wholly owned subsidiary of Carrier, engaged in the business of common carriage of freight by motor truck.

The vans were then transferred to an area occupied by Pacific Motor Trucking Company (hereafter referred to as "PMT"), adjacent to Southern Pacific property. They were there unloaded, sorted and divided into delivery to various consignees, via truck-haulage equipment.

The Portland Freight Station building was erected in 1960 under the ownership of PMT on land leased from Carrier. Carrier in turn, leased the south portion of the station building from PMT for use of Carrier's personnel in handling freight shipments moving by rail in freight cars.

Carrier contends that the freight in question was at all times in the "custody" of PMT and the role of the latter in the pick-up from flat car and the ensuing transfer, sorting and relaying by PMT motor haulage delivery to consignees, was no different than that traditionally carried on by conventional truck handling concerns. In the latter case, individual shippers and motor common carriers using their own or leased vans, utilize other than Carrier's employes to unload the vans from the rail car and perform all physical labor necessary to move the freight to destination by truck haulage means.

In respect to Agreement Scope Rule rights claimed by Petitioner, the Carrier makes these arguments:

(1) The Scope Rule of the Clerks' Agreement lists positions which are to be the subject of the contract but does not describe the work to be performed. Therefore, an assertion of exclusive rights to perform given work must be supported by evidence that said work has been customarily confined to Claimants over a substantial period of time, in order to establish their right to it. Carrier contends that the practice here goes the other way for the work and circumstances involved, and has since 1955 when PMT established its own separate freight stations.

(2) Carrier also puts forward the following procedural positions:

(a) That portion of the claim presented with respect to unnamed claimants and unidentified dates does not meet the requirements of Article V, Section 1 (a) of the covering Agreement in respect to specificity of claimants and dates of alleged infractions.

(b) There has been no showing that Claimants suffered monetary loss as the result of the alleged violation and therefore if there should be a finding for the Claimants, they should nevertheless be

denied a money award, since the Agreement does not contain a specific penalty rule for such circumstances.

Petitioner (i.e. Claimants Organization) argues as follows:

(1) It is pointed out that the exchanges on the property on this controversy between the parties include admissions by Carrier that the duties of Claimants "include the unloading and checking of less than carload freight shipments, and do not include the unloading and checking of all freight routed and arriving via our line." (Emphasis in original)

Petitioner also quotes from Carrier: "Freight in the two vans listed by you as unloaded May 10, 1964 was not less than carload."

Petitioner contends that although these may have been fully loaded vans, "the contents thereof is made up of many less than carload shipments consigned to various and sundry consignees." Therefore, by Carrier's own criterion, — i.e. that "less than carloads" is work of the Claimants, it follows that Claimants should be sustained (Petitioner not, however, conceding that all freight billed by Carrier and routed over its lines, does not belong to covered employes).

(2) Petitioner denies that the work in question was in the "custody" of PMT. It contends that the custody of the involved shipments was transferred from PMT at the moment the vans were secured to the rail cars. From that point on, the freight, was rail-billed and moved on such rail-billing by rail to a destination "in Carrier's custody." The fact that the vans were taken off Carrier's rail cars by PMT equipment and spotted at the warehouse did not interrupt Carrier's custody and the freight did not pass to PMT" until applicable portions thereof were loaded into the Trucking Company's local delivery trucks."

The governing Scope Rule is one which is general in character and does not expressly assign to the contracting Organization specific work of a defined nature. It is now well settled by a long chain of Awards that under such circumstances, it is necessary to look to past practice, tradition and custom to ascertain whether the work in question is reserved exclusively to employes covered by the Agreement. Awards 13923, 14751, 16550, 17007 and many others.

Where the prevalence of such practice is challenged, the burden is on the Claimant to establish its existence. Awards 14944, 16371 and others.

We start with the agreement of the parties that in the past when freight cars arrived at Portland yard containing various components, each designated for a different destination, the unloading and checking was done by covered Southern Pacific Warehouse Foremen and Check Clerks before advancing the various shipments through their subsequent routes. This was the typical LCL (less than carload) pattern.

The parties disagree on the question of whether a "piggy-back" van addressed to a single designee in the Portland yard (in this case PMT) and moved intact to that receiver's facility in that yard, is nevertheless in the LCL classification (as claimed by Petitioner) because said receiver proceeds to separate the contents according to various containers and advances them to their various destinations. Carrier asserts that movements of this kind have always been properly regarded as in the "custody" of the receiver-distributor, and not of Southern Pacific. The subsequent breaking down into component shipments at the property of the receiver-distributor (whether in

the same yard or miles away, whether at or by PMT or at or by another company) cannot then be said to be a usurpation of work of Carrier's employes because neither the shipment nor the work is in Carrier's possession or control when this happens.

We believe the answer to this conflict must lie in the record of practice. Were such shipments customarily treated in the past as "LCL" movements for which the work in question was reserved exclusively to Claimants? The record is devoid of proof either way, either on the general treatment of such shipments or on the particular treatment when taken from Carrier car-side under a PMT bill of lading.

The record shows the dispute as to history to narrow down critically to the period from the advent of PMT as an entity on the Portland property (1960) to the date of the subject events (May, 1964).

Carrier maintains that during this period, it was practice at this yard for PMT to receive piggy-back vans bearing its bills of lading and move them intact from Carrier's cars to its facility in the Portland yard and there have PMT employes segment their contents according to ultimate destinations for further transportation by motor haulage. Petitioner maintains that during this period, such unloading and checking work has been uniformly done by Foremen and Check Clerks coming under its Agreement with Carrier.

In the face of this conflict in factual history, the burden of proof is on the Claimant. We do not find the necessary competent evidence in the record supporting said burden. It therefore cannot be found that the work in question has been assigned to and performed by covered employes consistently over so substantial and unbroken a period of time as to establish their right to continue to perform it to the exclusion of others.

The facts in the instant matter must be differentiated from those which this Board found to be present in a similar situation involving same Carrier and Organization at Los Angeles Freight Station, — Award 12981. In that case, we found evidence to support a conclusion that up to the point of the incidents there dealth with (March 1958) the work there in dispute had been reserved to the covered employes "on the basis of a consistent practice of long duration". Such practice has not been probatively established here.

The claims must thereby fall.

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

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 13th day of February 1970.

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