Award No. 18806
Docket No. CL-19182

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6899) that:

1. The Carrier violated and continues to violate the Clerks' Agreement when beginning on or about May 10, 1968, it removed the work of checking all trailers parked on the grounds at Settegast, maintaining seal records and checking piggyback ramps during the day, from the employes covered by the Clerks' Agreement at Houston, Texas, and assigned it to persons not covered thereby.

2. That the Carrier be required to restore the work that was formerly performed by employes at Houston, Texas, under the Scope of the Clerks' Agreement from which it was removed.

3. The Carrier shall be required to compensate G. S. McKay for eight (8) hours at pro rata rate each work day Monday through Friday from May 10, 1968 through July 1, 1968, and J. W. Mercado for eight (8) hours each work day Monday through Friday, beginning July 7, 1968 and continuing each day thereafter until violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to March 1, 1966 and during the time piggyback service was established, the Settegast Freight Station operation was under the jurisdiction of the Houston Belt & Terminal Railway. The work performed at that station was mainly in connection with Missouri Pacific Railroad LCL and piggyback business.

The clerical positions and work at Settegast Freight Station was under the Scope of the Agreement between this Brotherhood and the Houston Belt & Terminal Railway. One of those positions was that of Seal and Exception Clerk No. 403.

The duties of Seal and Exception Clerk No. 403 in connection with handling of piggybacks can best be outlined by the employes who were regularly assigned to such position.

sometimes made a check which listed trailer numbers on hand. When the latter check no longer served any useful purpose, it was discontinued. The check historically made by the Truck Company employes was a necessary and integral part of their duties and responsibilities.

18. Carrier representatives had given this dispute special attention in an effort to resolve the facts and/or grievances; however, after exhausting all efforts to dispose of the matter the dispute concerning the facts of the matter still existed. The Carrier concluded its handling of the dispute on the property by writing General Chairman Brown as follows under date of October 2, 1970:

"Please refer to your File G-3386 claim of G. C. McKay for eight (8) hours at the straight time rate Monday through Friday, May 10 to July 1, 1968, and claim of J. W. Mercado for eight (8) hours at the straight time rate Monday through Friday starting July 7, 1968, when it is alleged truck company employes checked piggyback ramps and secured seal records on piggyback trailers at Houston, Texas. Particular reference is made to the on-ground meeting held at Houston, Texas, Wednesday, September 23, 1970 in a further effort to determine the facts in this matter.

A representative of this office together with other Carrier officers made an on-ground check of this matter at Settegast facility at Houston on Monday, July 20, 1970, which resulted in the facts set forth in our letter of July 24, 1970, addressed to you. These facts were developed by Carrier officers who have been completely familiar with all phases of the operation at that point over a period of many years and we believe our statements in that respect are entirely correct.

In a further effort to reconcile our differences with respect to the facts in this matter we met with you and other members of your committee on Wednesday, September 23, 1970 to again discuss the matter, at which time we furnished you signed statements of Assistant Terminal Manager D. B. Smith, General Warehouse Foreman J. E. Moore, Assistant Terminal Manager R. B. Bailey and Assistant Terminal Manager B. N. Swarthout.

It is regrettable that we are no closer to agreement concerning the facts than when we started. We believe we have exhausted our efforts in the matter and there exists no basis for changing the decision given you in the first instance which denied the claims as presented."

(Exhibits not reproduced.)

OPINION OF BOARD: The basic contention of the Petitioner is that work reserved to clerical employes at Settegast Freight Station, Houston, Texas, has been transferred to and is performed by supervisors and employes of the Missouri Pacific Truck Lines, who are not covered by the Agreement.

The Carrier contends that some of the work complained of is being performed by clerical employes covered by the Agreement, and that some has been eliminated as not necessary to the operation of the Carrier. It denies, however, that work reserved to clerical employes has been transferred to employes of the Truck Lines not covered by the Agreement. The Carrier also contends that the claim was enlarged upon in appeal on the property and is

thus procedurally defective as to some of the items of work complained of. The record shows extensive handling of the dispute on the property; however, at no time in the handling on the property did the Carrier take any exception as to the manner in which the dispute was progressed. Its objection before the Board comes too late and is rejected.

The docket is voluminous and, as indicated the handling on the property was extensive. However, in the handling on the property the parties were unable to agree on how the work was handled prior to May 10, 1968, the date mentioned in the claim, or how it has been handled since that date. Each party has submitted statements which it contends supports its position, but were unable on the property to resolve the conflicts in the statements and evidence. The conflict continues throughout the docket. In fact, the evidence is so conflicting that it defies resolution of the issues presented on the merits. On the record as it exists, we have no alternative but to dismiss the claim. See Awards 17500, 17211, 17197, 16036.

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 Claim be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1971.

LABOR MEMBER'S DISSENT TO AWARD 18806 (CL-19182)
(Referee Devine)

The Majority in Award 18806 has exercised an abdication of its responsibility in dismissing this Claim. Simply put, the Award acknowledges that the Majority is unable to understand the "big case."

In the Award the voluminous "record" and conflict is discussed. The Award recognized that in the handling given the dispute on the property the parties were unable to settle the conflict or agree. This seems to be the basis of the dismissal Award. It is obvious to individuals with only sophomoric

ability that conflict on the property is equal to advocacy of position and failure to settle does not debar — why else would the case be adjudicated?

Fortunately, however, for the Petitioners the Award does not deny the Claim, instead, under questionable license, the Claim is dismissed. Inasmuch as the Claim involves a continuing violation there is nothing to prevent the Petitioner from reinstituting the Claim, at its normal beginning level, with the purpose in mind of having the matter properly adjudicated — Petitioner's right under the Railway Labor Act and existing rules.

Award 18806 in no way whatsoever addresses itself to the issue presented to the Board for adjudication. The Majority exercised questionable license in authoring a dismissal Award.

Therefore, I dissent.

/s/ J. C. Fletcher
J. C. Fletcher, Labor Member
December 10, 1971

CARRIER MEMBER'S ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 18806 (CL-19182)
(Referee Devine)

In the case involved in Award 18806, the organization was the moving party. This Board is committed to the proposition that the organization must prove every element of its claim and such proof must be supported by competent evidence. In the instant case the organization completely failed to observe this elementary procedure.

In addition to the foregoing, the record in this case contains an abundance of "conflict in fact" and since this Board is not empowered to resolve conflicts in facts and/or evidence for the parties the majority had no other valid recourse but to dismiss this claim. Accordingly, there was no abdication of responsibility on the part of the majority. The organization simply failed to prove its case.

For the Carrier Members:

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

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

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

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