NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22912
THIRD DIVISION Docket Number CL-22614

Richard R. Kasher, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8599) that:

(1) Carrier violated the Clerk-Telegrapher Agreement, when on December 23, 1975, it caused and permitted an employee not covered thereby to perform work in connection with the operation of a receiving teletype unit, including tearing off and separating a message report of cars at Ivorydale Yard Office, Cincinnati, Ohio and

(2) Carrier shall, as a result thereof, compensate Clerk Donald A. Emmerich, eight (8) hours' pay for the date of December 23, 1975.

OPINION OF BOARD: The claim, submitted by the Organization on behalf of Clerk Donald A. Emmerich, alleges that the Carrier violated the Clerk-Telegrapher Agreement, when, on December 23, 1975, it caused and permitted a yardmaster to perform work in connection with the operation of a receiving teletype unit. This work consisted of tearing off and separating a message report of cars at Ivorydale Yard Office, Cincinnati, Ohio. The relief sought is compensation of Clerk Emmerich with eight (8) hours' pay for the date of December 23, 1975.

The Carrier initially contended that the case involved an interested third party, the Railroad Yardmasters of America, because it was alleged that the Clerks' Organization was attempting to remove work from the Yardmaster Craft and assign it to clerical employes. The Yardmasters' Organization was given proper notice and elected not to participate in the case, and thus this issue has not been joined.

The dispute involves the parties' Scope Rule and Rule 67, Printing Telegraph Machines, which reads as follows:

"RULE 67

Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operation of printing telegraph machines or similar devices that are used for transmitting and receiving, either or both, information, or communications of record, irrespective of title by which designated or character of services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement.

Employees assigned as machine or device operators in relay offices shall not be required to punch or type longer than two (2) consecutive hours without a period of at least twenty (20) minutes on other work and not more than six (6) hours punching in any eight (8) hour period. Machines or device operators shall be allowed a short relief of ten (10) minutes in each four (4) hour period when requested. The remainder of the day may be assigned to other work under this Agreement.

None of the foregoing applies to the handling of train orders or Forms A or any communication with a train dispatcher."

(underscoring supplied by Organization)

The scope and jurisdiction of clerks under Rule 67 is clear. The Carrier argued, however, that while Rule 67 is the sole rule to be considered in the dispute, the origins of the rule should not be disregarded. The Carrier asserted that Rule 67 had its origin in Article 36, a former Telegraphers' Article dating back to 1945 (Memorandum of Understanding dated February 17, 1945, made between the Carrier and the former Telegraphers' Organization). Under Article 36 the instant claim would be barred by the fact that the communication in question was an intra-city communication. Therefore, according to the Carrier, a reading of Rule 67 in conjunction with its predecessor, Article 36, reveals that the instant claim is unsound.

The Carrier's historical argument lacks merit. Article 36 consisted of 18 paragraphs while Rule 67 consists of 4 paragraphs. It is clear that the Rule was not adopted unchanged on June 4, 1973. More importantly,

if the parties wished to preserve prior agreements they should have done so specifically. The provisions in Rule 67 are clear and we need not refer to any historical background of the rule to clarify its meaning in the case before us.

Thus, the claim is to be sustained. But what is the appropriate remedy? The Organization seeks eight (8) hours pay for work that took just a few seconds to perform. The Board is not inclined to find such a remedy appropriate. A more appropriate remedy is found in the parties' Call Rule - Rule 8. Under this rule Claimant should be compensated three hours since the work performed was two hours or less.

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

The Carrier violated the Clerk-Telegrapher Agreement by causing and permitting a Yardmaster to perform work in connection with the operation of a receiving teletype unit on December 23, 1975.

A W A R D

Claim sustained as set forth above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of July 1980.

LABOR MEMBER'S ANSWER
to
CARRIER MEMBERS' DISSENT
to
AWARD 22912, DOCKET CL-22614
(Referee Kasher)

Carrier Members' Dissent is insane. They accuse the majority of some sort of legerdemain and admit that Article 36, the genesis of Rule 67, was not adopted into the new agreement word for word, but then would have us believe it was adopted "unchanged." It will take more than slight of hand, tricks of a stage magician or even purposeful deceit to persuade even the uninformed that Article 36 was re-adopted unchanged as Rule 67 in the June 4, 1973 agreement. Rule 75, which preserved previous interpretations to rules that were continued into the new agreement unchanged does not qualify "unchanged" with such terms as major or slight. The rule simply uses "unchanged" without any qualifying terms. Therefore even "old rules" which were changed, whether revised for clarity or for elimination of obviously obsolete language, do not carry with them the umbrella of Rule 75. For this Board to so hold would be to change the agreement — a function the Carrier Member Dissentors know we are not allowed to do.

For the Carrier Member Dissentors to argue that the effect of the rule was not changed is not enough. If the Carrier and the Organization had the ability and the negotiating sophistication to reduce the text of former Article 36 to a mere four

paragraphs from its previous eighteen, then they surely had the ability to include within the new rule that they also wanted any previous interpretations to the old rule and its effect carried forward. The parties to the agreement did not do so and we cannot do so for them.

The Carrier Members argue that the rule only applied to intercity communications in the past and that the Board should now rule that it does not cover intra-city communications. If this was the intent of the negotiators it would have been quite simple to provide such an exclusion. But the negotiators did not do this and this Board cannot rightfully do so.

Carrier Members' Dissent also comments on the remedy provided in the award. They refer to Award 18804 involving these same parties. The reference to Award 18804 is without comment but one can assume that the Carrier Members are suggesting that a more appropriate remedy than the one established in Award 22912 would be one similar to that provided in Award 18804. The last paragraph of the Opinion of Board in Award 18804 stated:

> "A problem arises in this case as to the proper damages to be assessed. Those asked for in the claim itself are clearly excessive. We will award one hour's pay at the rate of a yard clerk at Moorefield Yard for each day the violations exist. This amount shall be divided among the Claimants."

In Award 18804 the Board allowed an hour's pay per day for each violation compared with a three hour call for each violation in the instant case. In 1937, the Devaney Emergency Board stated:

"The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation." (underscoring added)

In Award 18804, the Board assessed a penalty which they then believed would have a prophylactic effect against the Carrier turning clerks' work over to yardmasters. Award 18804 was adopted on November 12, 1971. It is apparent that the damages assessed in Award 18804 were insufficient. It is clear that the Carrier has not learned its lesson and is continuing to attempt to turn clerks' work over to yardmasters. In the instant case, the majority has required that three hours' compensation be allowed each time the agreement is violated. Perhaps the requirement to pay three hours' compensation in each instance where Carrier violates the agreement under these circumstances will be a better teacher. If it is not, who knows, maybe in the next case the Board will find that eight hours' compensation is necessary to prevent violation of rules.

This case can be considered akin to a progressive discipline dispute which this Carrier is quite familiar with. In other words, the Carrier progressively disciplined employes for violating Company rules. Now we have the Carrier being required to pay progressively greater compensation claims for continuing to violate the Clerks' Agreement.

J. C. Fletcher, Labor Member

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CARRIER MEMBERS' DISSENT TO AWARD NO. 22912 -
DOCKET NO. CL-22614 - REFEREE RICHARD P. KASHER

The majority in this case clearly and correctly recognized and conceded that:

> "* * * Under Article 36 the instant claim would be barred by the fact that the communication in question was an intra-city communication. * * *."

The majority erred when they played a "numbers game" and through some sort of legerdemain concluded that former Article 36 "was not adopted unchanged on June 4, 1973".

Obviously, the author of the Award gave no weight or serious consideration to Carrier's factual presentations relative to the history of Article 36 and the genesis of Rule 67. The Carrier thoroughly explained that the intent of Rule 75, which reads in pertinent part:

> "* * * Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement. * * *."

was to avoid new arguments arising under old rules. The fact that old rules were revised for clarity or to eliminate obvious obsolete language did not serve to change the impact or effect of the rule as carried over to the new contract.

Certainly Rule 67 is not word for word the same as Article 36. However, if the author of this Award had taken the time to read and compare the former Article 36 and the current Rule 67 and then if he had considered Carrier's presentation to the Board, he would have instantly discovered that the missing paragraphs had no place in the combined agreement. All of the deleted portions of former Article 36 were either "written out" by other negotiated agreements or became obsolete long ago with the demise of morse code. The size of the Article was reduced, but the effect of the Rule was not "changed".

The majority advised Carrier that:

> "* * * if the parties wished to preserve prior agreements they should have done so specifically. * * *."

The parties, in fact, did just that. What the author of the Award ignores is the fact that under the provisions of the National Agreement which provided for the consolidation of Clerk and Telegrapher schedule agreements, the organization alone had the right to "cherry-pick" the predecessor agreements. Carrier had no choice in that selection. Because of the obsolescence of 14 of the 18 paragraphs in former Article 36, and the organization's desire to retain Article 36 in the new agreement, the then valid parts of Article 36 became Rule 67 en toto by the organization's choice. Nothing was changed as far as the meaning, intent and applicability of Article 36 - now Rule 67 - was concerned - including the agreed upon application of the "tear off" function to only inter city communications, not to intra-city communications.

The inclusion of Rule 75 in the consolidated agreement was also done at the insistence of the organization to protect and preserve prior interpretations of the Rules that they (the organization) had selected to be included in the consolidated agreement. The only purpose to be served by Rule 75 was to emphasize the desire of the parties to continue applying rules that were kept in the same fashion as they had been. This misguided Award has completely misinterpreted the purpose and intent of Rule 75 and has made it appear that the rule was written to give the parties an opportunity to treat as completely new rules all of the rules of the new agreement that do not read exactly as they previously did.

There was absolutely no rule to be found in the former Clerk's Agreement that would have required the Carrier to use a clerical employe to "tear off" the switch list transmitted as an intra-city communication to yardmasters. The only rule in the former Telegrapher's Agreement dealing with this subject was Article 36 and it - from the very beginning - had nothing to do with intra-city communications. Obviously if neither of the former separate agreements contained a rule supporting a claim such as the one here involved, there could be no rule in the consolidated agreement to support such a claim.

The claim in this case was for eight (8) hours. The Award says en "appropriate remedy is found in the parties' Call Rule - Rule 8." and allowed three (3) hours pay for a de minimis action of tearing off a piece of paper which requires a fraction of a second. Such a gratuitous award is unconscionable. See Award No. 18804 involving these same parties.

This decision is so completely erroneous and excessive that it has no value as a matter of precedent.

We therefore vigorously dissent.

E. E. Mason

W. F. Euker

P. E. LaCosse

J. K. O'Connell

P. V. Varga