

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23847
Docket Number CL-23318

John B. LaRocco, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employees
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8959)
that:

CLAIM NO. 1:

(a) That the Carrier violates the terms of the Clerks' Agreement and Memoranda in connection therewith when it permits employes not covered by the Clerical Agreement to perform work regularly assigned to and performed by Clerical employes, and

(b) That R. E. Littleton, T-23 Operator, Rush, Kentucky, now be compensated for 5 hours and 20 minutes at punitive rate of pay account deprived of service on his rest day, Sunday, May 21, 1978.

CLAIM NO. 2:

(a) That the Carrier violates the terms of the Clerks' Agreement and Memoranda in connection therewith when it permits employes not covered by the Clerical Agreement to perform work regularly assigned to and performed by Clerical employes, and

(2) That M. L. Smith, T-6 2nd Operator, Martin, Kentucky, now be compensated for an additional day at pro rata rate of \$56.64 per day for May 19 and 20, 1978.

CLAIM NO. 3:

(a) That the Carrier violates the terms of the Clerks' Agreement and Memoranda in connection therewith when it permits employes not covered by the Clerical Agreement to perform work regularly assigned to and performed by Clerical employes, and

(b) That M. L. Smith, T-6 2nd Operator, Martin, Kentucky, now be compensated for an additional day at pro rata rate of \$56.64 per day for June 2 and 3, 1978.

CLAIM NO. 4:

(a) That the Carrier violates the terms of the Clerks' Agreement and Memoranda in connection therewith when it permits employes not covered by the

Clerical Agreement to perform work regularly assigned to and performed by Clerical employes, and

(b) That M. L. Smith, T-6 2nd Operator, Martin, Kentucky now be compensated for an additional day at pro rata rate of \$56.64 per day for June 23, 27, 28 and 29, 1978.

CLAIM NO. 5:

(a) That the Carrier violates the terms of the Clerks' Agreement and Memoranda in connection therewith when it permits employes not covered by the Clerical Agreement to perform work regularly assigned to and performed by Clerical employes, and

(b) That M. L. Smith, T-6 2nd Operator, Martin, Kentucky, now be compensated for an additional day at pro rata rate of \$56.64 for July 19, 1978.

OPINION OF BOARD: This case is the consolidation of five claims or groups of claims brought by two operators alleging that the Carrier, on sixteen occasions, allowed employes other than those covered by the Clerks' Agreement to perform work regularly assigned to and exclusively reserved to the Claimants. According to the Organization, the Carrier permitted employes other than clerks to handle messages which affected the movement of trains. The Organization argues that the handling of such communications is reserved exclusively to the Claimants under Rule 41 and The Scope Rule. The Carrier contends the sixteen messages contained information unrelated to the movement of trains and were not messages of record. Except for Claim No. 1, each Claimant was on duty at the time the alleged contract violations occurred.

Initially, the Carrier asserts that this Board lacks jurisdiction to hear this controversy on the merits because the Organization failed to specifically cite, on the property, which rule was allegedly violated. The record reveals, however, that the Organization referred to Rule 41 even before these disputes arose when it placed the Carrier on notice that the Carrier may be engaging in certain practices which violated Rule 41. Also, in each of the five claims, the Organization accused the Carrier of depriving the Claimants of work historically reserved to the Clerks. These references sufficiently apprised the Carrier of the nature of the claims and the portions of the Agreement which were purportedly violated so the Organization fulfilled the minimum requirements for specifying the alleged contract violations.

The issue is whether each of the sixteen communications was a train order or whether, as the Carrier asserts, the messages were conveyed for purposes of information only. From a long line of Third Division cases, a two part test has evolved to determine the character of a communication. To bring the conveyance of any of the messages within the exclusive province of the operators, the Organization must prove that: 1.) the primary purpose of the communication was to control or directly affect transportation, and 2.) the nature of the message inherently required that a record has been or should have been preserved. Third Division Awards No. 5181 (Boyd); No. 10454 (Wilson);

No. 12116 (Dolnick); No. 15738 (Kenan); No. 16685 (Dugan); No. 16898 (Franden); and No. 21858 (Scearce). This Board has given little credence to the label the Carrier places on the message but instead we have considered the functional attributes of the message. Also, those communications which only incidentally affect the movement of trains are not train orders. Third Division Awards No. 10699 (Hall); No. 14481 (Wolf).

In the absence of other probative evidence, we are confined to determining the character of each communication solely by looking at the messages on their face. Third Division Award No. 18297 (Dolnick). After carefully reviewing each communication, we find that only two of the sixteen messages conclusively satisfy both parts of the above test. The message on May 21, 1978 (Claim No. 1) changed the location where a train should set off cars and the message conveyed on May 20, 1978 (part of Claim No. 2) was a direct order to an engineer to run his train ahead of another train. The other fourteen messages concerning the location of trains, the condition of track, the method of moving cars onto a siding, track maintenance, and personnel matters were conveyed only for information purposes. Third Division Awards No. 11808 (O'Gallagher); No. 12607 (Dolnick); No. 13500 (Moore); and No. 15688 (Kenan). Thus, we must deny Claim Nos. 3, 4 and 5 as well as the May 19 portion of Claim No. 2.

Because Claimant Littleton (Claim No. 1) was on his rest day at the time the train order was communicated, Rule 34(c) expressly governs the amount of compensation due the Claimant and his claim is sustained to that extent.

In Claim No. 2, the Organization urges us to compensate the operator on duty for one day's pay for the violation which occurred on May 20, 1978. There is no specific provision in the applicable Agreement to justify such a remedy. The record does not disclose how much time it took to handle the train order. We cannot speculate how much time was consumed. In the alternative, Petitioner asks us to allow compensation for at least a call if not the full eight hours specified in the claim and they direct our attention to Award 23318 where such a payment was made by this Board. Therefore, on the basis of Award 23318, as well as the several on-property settlements involving similar situations which have been cited to us in this case, we will allow a "call" for the May 20th portion of Claim No. 2.

To recapitulate, Claim No. 1 is sustained as outlined above; Claim No. 2 is denied for May 19th and sustained for May 20th as outlined above; Claim Nos. 3, 4 and 5 are 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 Employees involved in this dispute are respectively Carrier and Employees 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.

A W A R D

Claim No. 1 is sustained in accordance with the Opinion.

Claim No. 2 is sustained in accordance with the Opinion.

Claim Nos. 3, 4 and 5 are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April 1982.

