NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26318
THIRD DIVISION Docket Number CL-26028

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks
(Freight Handlers, Express and Station Employes
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9929) that:

1. Carrier violated the Agreement between the parties in particular but not limited to Rules 1, 34 and 37, as amended, when on November 16 and 17, 1981, it required or permitted Conductor Roy Mason to perform work reserved exclusively to employes covered by Clerical Agreement.

2. As a consequence of the above-stated violation Carrier shall now be required to compensate Clerk E. C. Davis, Jr., eight (8) hours pay at the time and one-half rate of pay for the stated date based on a monthly rate of $1724.82. (Organization File: 3213-E, Carrier File: CLK-LP-82-37)"

OPINION OF BOARD: Claimant was assigned to the position of Yard Clerk, 7 A.M. - 3 P.M., rest days Monday and Tuesday. On November 16 and 17, 1981, (Monday and Tuesday) Carrier elected not to fill Claimant's vacancy and instead assigned certain of its duties to a Conductor.

As a result, the Organization filed this Claim, seeking eight hours pay at the punitive rate for the days in question. Carrier timely denied the Claim. Thereafter, it was handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization contends that the Scope Rule specifically reserves the work of Yard Clerks to members of its craft. As such, it argues that it need not establish that the disputed work has been exclusively performed by its members. Accordingly, it asks that the Claim be sustained.

Carrier, on the other hand, asserts that the work does not belong to members of the complaining craft. Instead, it insists, a Yard Conductor simply reviewed or checked switch lists against the cars the yard crew had been assigned to classify on the days in question. Carrier maintains that Yard Conductors and Brakemen had performed this type of work many times in the past. As such, Carrier argues, the disputed tasks were simply incidental to Yard Conductor functions. Thus, it asks that the Claim be rejected.

The Board is convinced that the Organization has demonstrated its right to the work in dispute. In this context, we note Third Division, Award No. 20556 wherein the Neutral Referee stated:

"The issue of work on unassigned days has been before this Board on many occasions and the Awards have clearly established the regular incumbent's right to the work without the necessity of proving exclusivity (e.g. Awards 19439, 19267 and 20187)."

We find this Award controlling here. It is undisputed that Claimant's unassigned days are at issue here. On those days, work he performed was given to a Yard Conductor. While Conductors and Brakemen may have performed this work in the past, having occurred on an unassigned day, it need not be established that it was exclusively performed by members of the Organization.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of May 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 26318, DOCKET CL-26028
(Referee Martin F. Scheinman)

The claim involved in Award 26318 arose because the Carrier allegedly allowed Conductor Roy Mason to perform work reserved exclusively to BRAC employees.

In its Award, the Majority stated:

> "The Board is convinced that the Organization has demonstrated its right to the work in dispute. In this context, we note Third Division, Award No. 20556 wherein the Neutral Referee stated:
>
> > 'The issue of work on unassigned days has been before this Board on many occasions and the Awards have clearly established the regular incumbent's right to the work without the necessity of proving exclusivity (e.g. Awards 19439, 19267 and 20187).'
>
> "We find this Award controlling here. It is undisputed that Claimant's unassigned days are at issue here. On those days, work he performed was given to a Yard Conductor. While Conductors and Brakemen may have performed this work in the past, having occurred on an unassigned day, it need not be established that it was exclusively performed by members of the Organization."

Initially, exception is taken to the statement that "It is undisputed that Claimant's unassigned days are at issue here." The record of handling on the property reveals the instant claim was initiated account Carrier "...required or permitted Conductor Roy Mason to perform work reserved exclusively to employees covered by the Clerical Agreement." (Emphasis added). The Organization also alleged "...the Carrier arbitrarily "blanked" the Yard Clerk position at Government Yard and used an employee not covered by the clerical craft rules to perform the work and duties of such vacant clerical position." (Emphasis added). Carrier's statements that "...Relief Position No. 41 was under advertisement [and] the Carrier's decision to blank this position during the advertisement period was proper and in accordance

with Rule 12(h)..." was not refuted by the Organization and must be considered as fact. The claim dates were part of an assignment; they were not unassigned days. Regarding the exclusivity issue, statements from Conductor Mason and Carrier officers clearly demonstrate Conductor Mason was not given yard clerk work to perform on the claim dates. Conductor Mason's statement that the disputed duties were incidental to his yard conductor assignment "...for the past five years and probably longer" was not denied. The Organization has clearly failed to meet its burden of proof obligations. The Majority's decision, by recognizing no substantive evidence appears in the record to support the Organization's exclusivity allegations has exercised authority beyond its jurisdiction.

Second, yard conductors have always verified, corrected and updated switch lists of cars they handle. It is not understood how the principle enunciated by Public Law Board 1790, involving these same parties, in its Awards 77 and 78 can be ignored by the Board in this Award. Award 77 PLB 1790, reads in pertinent part:

> "On May 31, 1977, Carrier wrote to Employes as follows:
>
> "Yardmasters, conductors, brakemen and employes of other crafts do prepare track checks on this property. In this connection, Form CR-019 has been prepared by conductors or brakemen for many years on this property. A copy of such form is attached for your ready reference.
>
> "This is nowhere categorically challenged by Employes."

Third, the Majority ignores the decisions of Public Law Boards 1790 and 2668, involving these parties and the identical rules which have rejected the precedential value of Award 20556. In Award 98, Public Law Board 1790, the Board held:

"Nowhere in the record do Employes explicitly deny the unequivocal assertions by the Carrier that supervisors, trainmasters, road foremen of engines, general yardmasters as well as clerks and others have transported train crews in their own automobiles or in Carrier owned vehicles at Conneaut and other terminals. And the substance of these assertions has appeared in much of the correspondence stemming from the handling of the claim on the property. In the absence of a denial, and in the absence of allegations to the contrary in Employes' submission to this Board, the fact has been firmly established that transporting train crews is not exclusively the work of clerks.

* * * * *

"Employes rely on Third Division Awards 20556 and 21806 in support of this claim. The facts in Award 20556 are comparable. There, too, a supervisor (trainmaster) transported a yard crew from one area to another in the terminal on a rest day. And, there, too, the organization invoked the unassigned day rule.

"It is with considerable reluctance that this Board finds Award 20556 is not a binding precedent which should apply to the instant claim. The unassigned day rule - Rule 34(d) - reads, in part, as follows:

> 'Where work is required to be performed on a holiday which is not a part of any assignment the regular employes shall be used.'

"Before this unassigned day rule becomes operative, the task or tasks required to be performed on the holiday must be work which is normally totally performed by the regularly assigned employe. If May 26, 1975 had not been a holiday, a supervisor, by Employes' own admission, could have transported train crews without violating any rule in the Agreement. Claimant never performed all of the transporting necessary on any day of his regular assigned work week. He, as well as others, daily transported train crews. That being so, it follows that Claimant could not have complained; he would have had no basis for a claim."

Award 67, Public Law Board 2668 states:

"At about 9:00 A.M. on April 17, 1981, the Yellow Cab Company was called to transport a Sandusky District Crew to the Four Keys Motel. The Organization contends that Carrier violated the Agreement when it blanked Claimant's job and called the Cab Company to transport a crew (work normally performed by Claimant). Carrier contends that the work of hauling crews at Portsmouth, as well as at all other locations on the railroad, is shared work that is not nor has ever been performed exclusively by Clerks. It contends that the work of hauling crews has been done by Supervisors, other crafts, and by taxis. It argues that it is shared work and, as such, cannot be exclusively claimed by Clerks.

"A review of the record of this case reveals that the Organization has not demonstrated that the work of crew hauling belongs exclusively to clerks at Portsmouth nor has it demonstrated that crew hauling is totally performed by Claimant when he is regularly assigned. It is clear from the record that crews have been transported by Clerks, by Supervisors, and by taxis at Portsmouth for an extended period of time prior to the claim date.

"Petitioner in this instance has not supported its position that a violation of Rule 34 (d) has taken place. This Board has been presented with numerous awards by the parties in support of their respective positions in this case. Given the thrust of the organization's claim (a violation of Rule 34 (d)), however, we conclude that Awards 97 and 98 of Public Law Board No. 1790 are the pertinent awards and are on point in this instance. Those awards denied the Petitioner's claims. We see no reason in this instance to overturn those awards."

Award 26318 is in error and serves to exact a penalty from the Carrier which is not supported by the agreement or based upon precedent of this Board. Because of the gross error of the Majority's findings, the Award should be treated as an aberration and, therefore, fully lacking precedent value.

James E. Yost
J. E. Yost

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

P. V. Varga
P. V. Varga

Robert L. Hicks
R. L. Hicks