PUBLIC LAW BOARD NO. 2281

Award No. 1
Case No. 1

PARTIES TO DISPUTE: The Atchison, Topeka and Santa Fe Railway Company
and
Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

STATEMENT OF CLAIM: "(a) Carrier violated the provisions of the current Clerks Agreement at Oklahoma City, Oklahoma on April 14, 1977 when it allowed and/or permitted mechanical department employees to physically check mechanical refrigerator TOFC trailer.

(b) Claimant, R.D. Lewis shall now be compensated three (3) hours pay at the rate of Car Clerk for April 14, 1977 in addition to any other compensation he may have received for that day."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has the jurisdiction of the parties and the subject matter.

Pursuant to information furnished by Carrier, the Board determined that there was possibl third party interest in this dispute. Consequently, notice of the dispute was provided to the following organizations: International Association of Machinists and Aerospace Workers, District 19; Sheet Metal Workers International Association, District 97; Brotherhood Railway Carmen of the United States and Canada; and International Brotherhood of Electrical Workers, System Council Number 20. The four organizations, having been notified of the pendency of the dispute, indicated a desire to participate. All four organizations submitted written third party briefs or submissions in the dispute and appeared at the hearing of this Board.

The specific incidents leading to the filing of the claim herein are relatively simple. Claimant Lewis, with a seniority date of October 31, 1951, was the regularly assigned occupant of a Car Clerk position at Oklahoma City assigned to work Friday through Tuesday with rest days of Wednesday and Thursday. Prior to the instant dispute,

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was ~~the~~ one SFRD Inspector assigned ~~in~~ at Oklahoma City. This position was abolished on April 1, 1977. On April 14, 1977 a mechanical refrigerator trailer arrived in the Oklahoma City yards. Instead of calling Claimant to check the trailer here involved, Carrier called mechanical department employees who checked and recorded the inside temperature of the trailer, the thermostat setting and the remaining fuel supplies for the unit. Petitioner initiated the claim herein contending that the work in question (supra) is work covered by the Agreement and hence, Carrier violated the Agreement by assigning it to employees not covered thereby.

The record indicates that when Carrier abolished the position of Inspector on April 1, 1977 at Oklahoma City, the duties of checking the inside temperature of the cars and refrigerator trailers, the thermostat settings and the remaining fuel supplies for the refrigerator unit, together with a visual inspection to see that the doors were sealed, was assigned to mechanical department employees as part of their regular assigned duties. The remaining work of the abolished position was assigned to station clerical employees.

The history of the servicing of refrigerated units is relevant to this dispute. In 1953 Carrier purchased several refrigerator mechanical temperature controlled cars on an experimental basis. Subsequently, starting in the 1960's Carrier began acquiring a fleet of such cars. In the same period, Carrier also began the purchase of a fleet of refrigerated truck trailers (hereinafter referred to as the TOFC). The record indicates that throughout Carrier's property whenever either of the two types of refrigerated cars are requested by a shipper, the car is thoroughly inspected by mechanical department employees who are also responsible for fueling the refrigeration unit. Prior to the car being sent to the shipper, the mechanical department employees start the refrigeration unit and set the thermostat setting as directed.

At Oklahoma City the only refrigerated cars are such that originate at Oklahoma City or whose final destination is Oklahoma City. There generally are approximately eight such refrigerated units per week at Oklahoma City. Prior to the instant dispute there was on

SFRD inspector assigned in Oklahoma City. There are ten other locations where such inspectors are assigned to inspect both types of refrigerated cars. In 1972 these eleven locations included fifty-eight such Inspectors. Their work generally included checking and recording the inside temperature of the cars, the thermostat setting, the remaining fuel supply for the unit and a visual inspection to see that the doors are sealed. During the inspection if any trouble was detected mechanical department employees were immediately called to determine the nature of the trouble and make the necessary repairs. Information furnished by Carrier indicates that there are at least twenty-three locations on the system where employees covered by mechanical department labor Agreements have performed the identical work involved in this dispute since the refrigerated cars were first placed in service more than twenty-five years ago. This inspection activity is an integral part of their regular assigned duties. In addition, according to the information from Carrier which was unrebutted, employees of the Quality Control Department who are not subject to any labor Agreement also performed the disputed work as part of their regular duties at all origin points on this property which are located in the states of California, Arizona, New Mexico and Texas. The Quality Control employees' inspection includes the recording of the inside temperature of the car or trailer, the thermostat setting and the remaining fuel supply for the unit.

Prior to 1972, the Inspector position involved in this dispute was an "excepted" position under the Agreement. On August 17, 1972, the parties signed an Agreement pursuant to a Section 6 Notice which had been filed in 1969 which established Supplement "A" of the Labor Agreement. Under that Agreement which included Inspectors and changed their status from that of "excepted" position to that of a "partially excepted" position and listed the position specified in Supplement "A" as being of the craft and class of clerical employees.

Two other undisputed facts bear notation. First, the record indicates that Carmen had also performed the disputed inspection work at Oklahoma City for many years before the Inspector position had been abolished in 1977. In addition, there were four other SFRD

Inspector positions abolished (identical to that at Oklahoma City) in the following locations on the dates indicated: Brentwood, Texas, May 1, 1975, Witchata, Kansas, January 1, 1975, Belen, New Mexico, April 1, 1975 and Winslow, Arizona on October 1, 1977. In each of the above instances the work in question, after the positions were abolished, was assigned to mechanical department employees and the remaining work of the Inspector was assigned to station and clerical employees similarily as at Oklahoma City. It must be noted that no claims or complaints were filed with respect to the four positions abolished above.

The rules in the Agreement dated November 1, 1972 which are most relevant to the instant dispute are as follows:

"RULE 1-SCOPE

1-A. These rules shall govern the hours, compensation, and working conditions of all employes engaged in the work of the craft or class of Clerical, Office, Station, Storehouse, Tower and Telegraph Service Employes as such craft is, or may be, defined by the National Mediation Board. Officers or employes not covered by this Agreement shall not be permitted to perform any work or function belonging to the craft or class here represented which is not directly and immediately linked to and an integral part of their regular duties, except by agreement between the parties signatory hereto.

1-B. Positions outlined below are generally representative of those within the craft or class:

Clerical workers and/or machine operators, station agents, manager-wire chiefs, wire chiefs, assistant wire chiefs, student wire chiefs, communication traffic controllers, towermen, levermen, block operators, car distributors, train order clerks, drawbridge-tenders and boat dispatchers.

Other office and station employes such as assorters, office boys, messengers, station helpers, baggage and parcel room employes, train and engine crew callers, switchboard operators and operators of certain office or station appliances.

Elevator operators, janitors, stations, platform, warehouse, transfer, storeroom, stock room material handlers or truckers, and other similarly employed.

1-E. Other employes within the craft or class who are not fully covered by the rules of this Agreement are as indicated in Supplement "A"."

"SUPPLEMENT "A"

MEMORANDUM OF UNDERSTANDING between The Atchison, Topeka and Santa Fe Railway Company and its employes represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes regarding

disposition of Section 6 Notice dated February 17, 1969.

In disposition of Section 6 Notice dated February 17, 1969 the parties signatory hereto recognize the following listed position now classified as "excepted" as being of the craft and class of clerical employes represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes"

* * * *

"1. With the exception of Rule 20, the rules of the Clerks' Agreement shall not apply to employes in the excepted category.

2. Partially excepted positions will be identified as "PAD" or "PADO" positions and will not be subject to the promotion, assignment of displacement rules ("PADO" positions not being subject to the overtime rules) of the Clerks' Agreement, but the incumbents of partially excepted positions are subject to the other rules thereof, except as otherwise agreed. Assignments to vacancies on these positions may be made without regard to the promotion rule and without bulletining, with Management having the right to select the employes to be assigned thereto. Assigned employes cannot be displaced from these positions through the exercise of seniority rights.

3. While occupying partially excepted positions employes shall be permitted to exercise seniority only in bidding for bulletined vacancies or new positions, and in making application for transfer under Rule 13. Employes involuntarily displaced from partially excepted positions shall have the rights specified in Rule 15.

4. Employes occupying partially excepted positions may be removed therefrom at the discretion of Management, in which case they shall have the rights specified in Rule 15, but they may not be removed from the service of the Company without the procedure provided for in Rule 24.

5. Management will have the right of reassignment of incumbents on partially excepted positions when there is an increase or decrease in the number of such positions.

6. Employes assigned to "PAD" or "PADO" positions shall have not less than one year of seniority under the Clerks' Agreement, unless otherwise agreed to be the parties.

7. "PAD" and "PADO" positions are provided for the purpose of instructing and directing other employes and/or to perform more complex clerical work and/or other clerical work incidental thereto.

8. Notwithstanding the provisions of Section 2 of the Union Shop Agreement effective December 16, 1957, occupants of "PAD" and "PADO" positions will be subject to that Agreement.

9. The term "partially excepted" positions is synonymous with "selected" positions which may appear in other Agreements between the parties."

SUMMARY OF CONTENTIONS

A. PETITIONER

The Organization points out that the Scope Rule of the Agreement (supra) provides that employees not covered by the Agreement (including mechanical department employees at Oklahoma City) may not perform any work or function belonging to the craft or class of clerks which is not directly and immediately linked to and an integral part of their regular duties. Recognizing that prior to 1972 the Inspectors were excepted employees, the Organization contends that Supplement "A" (supra) is a recognition that the work performed by the fifty-eight refrigeration department inspector positions is work belonging to the craft and class of clerical employees. From this it is concluded that the work in question is work covered by the Agreement. The Organization argues that after it negotiated work under the Agreement, Carrier cannot unilaterally give such work to employees not covered by the Agreement. It is noted that the Organization argues that its position rests entirely on the Agreement language which it considers to be the best evidence of the support for the claim. The Agreement with Carrier is system wide and covers the work in question according to Petitioner. Additionally, Petitioner argues, that contrary to Carrier's exclusivity assertions, the second sentence of Rule 1 (a) covers "any work or function" and such language contains no exceptions. It is urged that under such language it suffices to show that the work in question (and similar work system wide) was under the Agreement.

Petitioner stated that it was not aware that at any other location the work or functions belonging to their craft were being performed by others. It is asserted that wherever the Inspectors position existed, they existed concurrently with other positions and had their own work assignments. The Organization insists that this is the first instance that work from the Inspectors positions was given to the employees outside the Agreement. Additionally it is argued that there is no evidence to indicate that the Shop Craft employees performed the work of the Inspectors. In fact, it is argued, that the work

was assigned to and was performed by the fifty-eight Inspectors across the system.

The Organization argues that the Scope Rule in this dispute is specific in nature and not general. However, even if the Scope Rule is general, according to the Organization, Supplement "A" is a special Agreement which places specified positions under the Agreement.

Petitioner has cited a series of Awards of the Third Division in support of its position in this dispute. Careful study of these Awards indicates that they are different either factually or in terms of rules from the dispute herein. As an example, Petitioner cites Award No. 14708 to support the thesis that work once placed under an Agreement does not have to meet the so-called exclusivity test. A portion of that Award, however, reads as follows:

> "There is little doubt that the Scope Rule of this Agreement is general in nature. In the absence of specific job description or definitions, Petitioner needs to prove by a preponderance of evidence that the work of the agent and telegrapher-clerk belongs exclusively to them by custom, practice and tradition. This the Petitioner has done, the proof has been met by a preponderance of evidence."

In summary, the Organization argues that Supplement "A" specifically placed the work in question under the Agreement and that Rule 1(a), the Scope Rule, reserves any work or function belonging to the craft or class to employees covered thereby unless such work is directly and immediately linked to and an integral part of a non covered employees' regular duties. Further, it is pointed out that the work in question was part of the regular assigned duties of the inspector position until that position was abolished. Further, it is urged that the work in question was not directly linked to and an integral part of the non covered employees regular duties because they had never performed this work until the Inspector position was abolished.

B. CARRIER

Carrier takes the position that the complained of work has historically and traditionally been performed by shop craft (mechanical department employees) and never performed by cleri-

cal employees on a system wide basis to the exclusion of all other employees. Carrier argues that the claim is not supported by past practice on the property nor is it supported by any Agreement rule.

Carrier argues initially that the Scope Rule is general in nature and merely specifies the classes and employees that are subject to the Agreement. It does not either define or enumerate the work for which employees have an exclusive right to perform. In order to establish the work as belonging to the craft, the Carrier argues that Petitioner must show by probative evidence that the work has been performed exclusively by Clerks, historically, customarily and traditionally on a system wide basis and Petitioner cannot do so. Carrier also points out that during the handling of the claim on the property Petitioner never took exception to the Carrier's position that mechanical department employees, as well as other Carrier employees, performed the disputed work on a system wide basis for in excess of twenty-five years. From this Carrier concludes that Petitioner has not met its burden of proof that the disputed work belongs exclusively to the Clerks or that the Scope Rule enjoins Carrier from having the disputed work performed by mechanical department employees or others. In further support of this argument, Carrier refers to the four prior incidents of positions being abolished and the Inspector functions being assigned to mechanical department employees identically to the circumstances in Oklahoma City with no claim or protest filed by Petitioner.

Carrier argues that it is well recognized that it and other Carriers are free to determi the manner in which work is to be performed in the interests of efficiency and economy as well as having the right to determine how and when the work shall be performed and the nu ber of employees required to accomplish the work. Since there is no prohibition by law or by rule in the Organization's Agreement preventing Carrier from assigning mechanical department employees or other Carrier employees to perform the disputed work, Carrier concludes that it has and retains the unilateral right to determine how, when and where and by whom the work will be performed.

As an additional argument, Carrier suggests that it is clear that mechanical department

employees (Carmen) must check every car in a train at regular intervals for defects in the running gear and are responsible to see that each car can move safely over the system and as an integral part of such regular assigned duties, Carmen perform the disputed work herein. Thus, the Carrier concludes even if the complained of work should be determined to be subject to the Scope Rule the mechanical department employees still have a right to perform this work as it is directly and immediately linked to and an integral part of their regular duties. The Carrier refers to a recent decision involving the same parties in which a claim was denied (Third Division Award No. 21268).

Carrier argues further that the Inspector at Oklahoma City was an excepted position and thus was not subject to the Scope Rule of the Clerks Agreement. Further, it is urged that even if the work was assigned to an employee at a specific location, this does not give the Organization exclusive rights to the work at any other location or even at that location. In short, a local assignment of work does not create exclusive rights to that work under a general Scope Rule, according to Carrier.

Carrier particularly urges that Supplement "A" does not place the work of the positions listed in Supplement "A" under the Scope Rule of the Agreement. The Supplement refers only to positions, it is not referred to the work of positions and is general in nature and is not defined or identified the work or the positions listed. Further, according to Carrier, the parties specifically agreed that the positions listed in Supplement "A" are not subject to the Scope Rule of the Agreement. Additionally, the Scope Rule itself lists Supplement "A" as an exception to the Scope Rule. In summary, Carrier argues that Supplement "A" is a separate Agreement which did not amend the Scope Rule nor give clerica employees the exclusive right to perform the work of the positions listed in Supplement" Carrier reiterates its point that there are only eleven locations in the entire system in which Inspectors covered by the Agreement perform the work in question while at the same time there are at least twenty-three locations where employees not subject to the Agreement perform the same work as well as other areas where employees of the Quality Control department who are not subject to any labor agreement perform the disputed work as part of their regular duties. Carrier concludes that it is impossible for the

Organization to establish either system wide or even point exclusivicity at Oklahoma City.

Carrier cites a host of Awards in support of its position including Awards dealing with the question of point exclusivity . One need be quoted to indicate the nature of Carrier's reliance. In Third Division Award No. 16470 Referee McGovern stated as follows:

> "The Awards of this Board have consistently held that the assignment of work at a specific location does not create exclusive rights to that work under a general Scope Rule. Such an assignment must be on a system wide basis in order for us to issue a sustaining Award in this case."

It is also pointed out that Supplement"A"from the Carrier's standpoint does not and was not intended to take away from the mechanical department employees and give to the Clerks Organization any work nor could this have been done without being in violation of the Agreement with the mechanical department employees.

Carrier makes the argument that in November of 1977 the Organization filed a Section 6 Notice in which it requested the following rules to be added to the current Clerks Agreement

> "2-E Work performed by the employees coming within the scope of this Agreement belongs to the employees covered thereby and nothing in this Agreement shall be construed to permit the removal of such work from the application of these rules except as provided herein or by agreement between the parties hereto.
>
> 2-F When a position covered by this Agreement is abolished, the work assigned to same which remains to be performed will be reassigned to other positions covered by this Agreement."

Carrier cites the Section 6 Notice and these requests in particular to indicate without doubt that the Scope Rule is general in nature and that the Organization wished to change the Rule for just such situations as the instant dispute by a Section 6 Notice. It is clear then, according to Carrier, that the Scope Rule as well as Supplement "A" are general in nature and the work is not reserved exclusively to the clerks.

C. THIRD PARTIES CONTENTIONS

Electrical workers stated in their submission that while they did not perform the dispute

in Oklahoma City and make no claims for that work at that location, that it is a matter of record that they do indeed check the fuel and inside temperature and the thermostat settings at various other points on the property. The electrical workers refer to an agreement reached between three mechanical department organizations and Carrier in January of 1969 in which it was agreed that the work involved in this dispute would be assigne to employees of the three crafts at certain specific points listed. Additionally, the electrical workers alleged that they do this work exclusively at certain other locations as part of their regular assignment. The Organization concludes that while it does not claim sole and exclusive rights to the work in dispute, the electrical workers have performed this work and continue to do so as well as employees of other crafts on this property.

The machinists take the same position as the electrical workers except that they also add that there are machinists employed at Oklahoma City and the work should be handled by machinists or members of the other two mechanical crafts. The machinists argue that the work in question has been handled in accordance with the same Agreement referred to by the electricians and should be continued to be handled by the various mechanical crafts throughout the property. The machinists contest the allegation of the clerks that they have exclusive rights to the work at Oklahoma City or at any other location on the property. The sheet metal workers arguments are analagous to those of both the electricans and the machinists. They also urge that the work should remain within the province of the mechanical crafts in a manner similar to that of the past at other points on the system.

The Carmen take the position that there is no individual craft which has the exclusive right to perform the work of checking the temperature on trailers and cars and also checking the fuel on those units. The Carmen also point to the Agreement of 1969 which specifies that the work in question at least at certain locations be performed by the mechanical department crafts. Additionally, the Carmen assert that in the course of their regular mechanical inspection work which is a contractual right, the Carmen do the work of checking the temperatures on trailers and mechanical cars. Such work also includes

checking the fuel supply and thermostat settings on mechanical refrigeration cars, etc. The Carmen argue that if the work in question were given to the Clerks exclusively, there is nothing to deter that Organization from making claims at the locations where Carmen and other mechanical department employees have performed the work as mentioned for many years in the past and where Clerks have never performed such service for Carrier. Such a result would be an encroachment on the work of the mechanical crafts and would be a grave error. The Carmen conclude that the work in question is normally performed when the Carmen or other mechanical department employees are performing their regular duties. It is concluded that there no specific exclusive rights to perform this work which should be performed, as in the past, by Clerks, Carmen or members of the other mechanical department crafts.

DISCUSSION

This dispute may be resolved in the context of the facts, the specific applicable rule and well established doctrine in this industry.

First, with respect to the facts, Petitioner is incorrect in its statement that it is unaware of other employees not covered by the Agreement performing the work in question. The facts indicate clearly that there is generally well known information available to the Organization that not only was the work in question taken over from their Inspectors at four different locations previously but that at many locations throughout the system, the work claimed is being performed by the mechanical crafts, the Carmen and members of the Quality Control department. There is even a question with respect to the work at Oklahoma City. Carrier asserts that Carmen have performed the work at Oklahoma City over a period of years and even at that location the work was not done exclusively by the Inspector. The Organization has not rebutted such statement. Thus the record submitted by all the parties herein including the four intervening organizations establishes clearly the fact that the inspection work involved in this dispute is performed by at least four other organizations as well as the Quality Control Department of the Carrier throughout the system in addition to being performed by the Inspectors covered by the

Clerks Agreement. Furthermore, the facts indicate that the inspection work when performed by the mechanical crafts are performed as part of their normal functions of total inspections of cars which are their's by contract right.

An analysis of the Scope Rule as well as Supplement"A" affords little comfort for Petitioner. The Scope Rule is clearly general in nature. It does not reserve work or define work on behalf of the Organization. It even provides under Paragraph 1-A that other employees may perform work which is generally performed by the craft or class of Clerks when it is directly linked to and an integral of their regular duties. Even that phrase has an exception in which special agreement may be made between the parties providing for further extensions of the right for other employees to perform clerical functions. 1-E of the Scope Rule is also relevant in that it provides for other employees within the craft who are not fully covered by the rules as specified in Supplement"A". Thus, Supplement"A"itself is not considered to be part of the Scope Rule but merely a listing of positions which are not fully covered by the rules of the Agreement. It is not necessary to characterize Supplement"A", as the Carrier has, with respect to whether it is general or not. It simply is a method for resolving a dispute with respect to certain previously excepted positions. On its face, Supplement"A"simply purports to provide that a long list of positions which were previously excepted are either excepted, partially excepted or part of the scheduled Agreement. That Supplement also provides that with the exception of Rule 20, the Rules of the Clerks Agreement shall not apply to employee's in the excepted category. The Supplement also defines, in greater detail, some of the rights of the partially excepted employees. However, it is clear that neither the excepted nor the partially excepted employees are covered by the entire basic Agreement. It must be noted that the position of Inspector had previously been an excepted position. However, after the adoption of Supplement"A"in 1972, it became partially a excepted position. Thus, the very position involved in this dispute is not clearly cove by all the rules of the Agreement except those specified in Supplement"A". It seems clear to this Board, therefore, that by the rules of the Agreement, including the Scope Rule and Supplement"A", there is no support for Petitioner's position that the work in questio

is reserved to the Clerks.

With respect to accepted doctrine in this industry, it is well established that when an Agreement applies to Carrier's operations on a system wide basis, the particular practice itself upon which the claim is made must be system wide. (Third Division Award No. 19124 among others) There is no evidence whatever in this dispute to indicate that the Organization performs the work in question on a system wide basis. In fact, the evidence is quite contrary to that. Hence, even if the work in question were performed at Oklahoma City exclusively by Clerks prior to the abolishment of the position, that is insufficient to base a decision affirming the claim. Taking the crux of this doctrine if the Organization alleges that its Agreement supercedes the understandings of the other Organization with the Carrier and indeed it has had the right to the work in question on a system wide basis, it again fails based on well accepted principles. It is obvious that no Organization may be permitted to stand by and observe practices, for in this instance, twenty-five years and then file claims alleging that the practice violated its Agreement. With greater particularity there were positions abolished in 1975 and earlier in 1977 which related to the identical situation as that in Oklahoma City and the Organization failed to file claims in relation to any of the above. It is our judgment that the doctrine of estoppel is applicable in the instant claim with respect to this particular aspect of it (See Third Division Award 7135).

Finally, it must be noted that the Scope Rule in question is a general Scope Rule and it is quite clear that the exclusive right to the work is dependent upon the demonstration of system wide historical performance of the work in question. There have been a host of Awards dealing with this issue and we do not find them to be in palable error. The critical determination thereforeis that since this is a general Scope Rule, such doctrine are applicable to this dispute.

An extremely significant ultimate determinant in this dispute is the impact of Petitioner Section 6 Notice of November 1977. That Notice is evidence of the uncertainty, at very least, of Petitioner with respect to the Scope Rule's reservation of work to Clerks. It

is axiomatic that when a rule change is requested, the party making such request is seeking rights it does not have under the existing agreement. It must then be evident that the Scope Rule does not contain a reservation of work.

Based on the entire record and the reasoning expressed above the claim must be denied.

AWARD

Claim denied.

Neutral Member

B. J. East
Carrier Member

D. E. Mathis
Employee Member

I Dissent
8/13/79

Chicago, Illinois
August 13, 1979