PUBLIC LAW BOARD NO. 3337

AWARD NO. 9

CASE NO. 9

PARTIES TO DISPUTE:

Consolidated Rail Corporation

and

Railroad Yardmasters of America

STATEMENT OF CLAIM

"Yardmaster Earl Hilgert be allowed three days pay at the current yardmaster rate of pay on August 7, 1980 account Yard Clerk Weihing, and September 11, 1980 and October 1, 1980 account yard clerk Carter performing yardmaster service on these dates at Preston Street Yard."

OPINION OF BOARD

On the claim dates, the Claimant was the regularly assigned Yardmaster from 4:00 P.M. through midnight, Monday through Friday, which was the only Yardmaster position at the Preston Street Yard.

Clerk Carter issued certain instructions to a C&O crew on how to double their train and how to depart from the Preston Street Yard on the claim dates. The Organization asserts that the work performed by the Clerk is work which is performed on all other days by a Yardmaster and is covered by the Scope Rule of the Agreement. The Carrier concedes that the Clerk gave the instructions to the C&O crew. However, the Carrier argues that the Yardmaster had issued the instructions in writing to the Clerk and he merely "passed them" to the C&O crew.

The Employees insist that the Claim is not based on "programming work", but rather represents a situation where the Clerk made a discretionary decision based upon information that he obtained from the Yardmaster's turn-over book.

The Organization cites a number of Awards in support of its contention that the performance of discretionary work by the Clerk violates the Scope Rule. Of significant import to this case is the decision in Award No. 13 of Public Law Board 2786, which resolved a dispute between these same parties. In that case, at a location where Yardmasters were employed (which is the case here), a clerk performed work which is subject to the Yardmaster's Scope Rule because it "...quite obviously involved the directing of the movement of trains, engines and cars in the yard." The Organization insists that said Award is res judicata to this dispute.

Our review of the record demonstrates to us that this dispute is, in reality, a fact dispute because the Carrier insists that the Clerk did not perform any discretionary work on his own, but he merely relayed the information which had previously been made by the Yardmaster before he went off duty.

Under the procedures which control Public Law Boards in the railroad industry, we do not have available to us our own evidentiary hearing to take testimony and evaluate questions of credibility. Rather, we are confined to review of the documents of record which were handled as the matter was developed and handled on the property. Thus, in order to ascertain the factual background of this dispute, the Board has considered, at length, prior handling of the case, and is prepared to apply the usual rules and burdens.

The initial claim asserts that the Clerk gave instructions to the crew; an asserted violation of the Agreement. The denial to that initial claim states that the Clerk was "... merely relaying instructions issued by you,..." That same assertion was made a short time later to the Organization's Division Chairman. In the appeal to the Senior Director of Labor Relations, the Organization again asserts that the Clerk was "...performing Yardmaster service."

While the matter was still under active review on the property, the Carrier reminded the Organization that the

Yardmaster has standing instructions that in the event the C&O Railroad does not get their train handled during the Yardmaster's tour of duty, he is to leave written instructions for the C&O crew as to the location of the train and the consist. Further, the Claimant is supposed to write out his instructions for the crew which is delivered to the crew by the Clerk. Once again, the Carrier denied that the Clerk handled or supervised or instructed the crew, and, in fact, according to the Carrier, he did nothing more than deliver the Yardmaster's instructions.

In the August 9, 1983 correspondence to the Senior Director of Labor Relations, the General Chairman asserts that the Carrier did not demonstrate that the Claimant had left any instructions for the Clerk.

This author does not feel that the ultimate goals of labor-management relations are best served by issuing awards based upon procedural rules. Nonetheless, in certain circumstances such a result is the only alternative.

Either the Clerk did or did not perform certain discretionary actions on the claim dates. While it should be a relatively simple task to ascertain and recite the actual events, nonetheless we search the record in vain in an effort to find any agreement concerning the actual happenings. Obviously, this Board has no independent knowledge of what transpired on the claim dates, and, under the long-established rules which govern this type of procedure, we have no recourse but to look to the written record; and if, as seems to be the case here, the evidence does not preponderate to benefit of either side, it becomes necessary for us to dispose of the claim based upon the burden of proof concept.

I do not minimize at all the significant importance to the Organization of Award No. 13 of Public Law Board No. 2786, and if the record convinced the undersigned Neutral that the Clerk in this case actually performed certain substantive functions on the claim dates, the concepts of res judicata would demand a sustaining award. Further, the doctrine of de minimus would not deter such a result. However, as noted above, in order to issue a sustaining award based upon the concepts set forth in Award No. 13 of Public Law Board No. 2786, it is first necessary to find that there is a similar factual background because the doctrine of res judicata demands that no only the parties to the dispute be the same, but that the precise issue be the same. Here, I

am unable to find, as a factual matter, that the Clerk did anything more than relay information which had been prepared by the Claimant. Under that type of circumstance, the Board does not find a basis for a violation of the Agreement. Similarly, it becomes unnecessary to explore at length the question of whether or not the work was "programmed" or not because of the failure of the evidence to satisfy the burden of proof concerning the actual factual events of the days in question.

Again, we emphasize that nothing herein should be construed as minimizing or lessening the authority set forth by the Organization in support of its case. Rather, our award is limited solely to the facts and circumstances of this dispute, and our failure to find that the Organization has satisfied the burden of proof sufficient to place this case within the context of the cited authority.

FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due and proper notice of hearing thereon.

AWARD

Claim denied.

Joseph A. Sickles
Chairman and Neutral Member

G. R. Welsh
Carrier Member

J. C. Thomas (DISSENTING)
Organization Member

March 20, 1984
Date