

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYES
SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM—

"(a) Did T. A. Beaver and J. F. Ware, locomotive crane engineers, holding seniority rights as such under the carmen's schedule at Spencer, North Carolina, as of March 11, 1920, and July 1, 1916, respectively, have the right under the provisions of the storehouse employees' agreement of May 1, 1934, to displace employees covered by the storehouse agreement?

"(b) Shall the names of T. A. Beaver and J. F. Ware be removed from the storehouse employees' seniority roster?"

STATEMENT OF FACTS.—Although this was a joint submission, the parties could not agree upon a joint statement of facts.

The employees submitted the following statement of facts:

"The locomotive crane engineers are covered by the Carmen's agreement and such employees carry their seniority on the carmen's roster.

"T. A. Beaver entered the service on a position covered by the Storehouse employees' agreement on October 5, 1918. He left this service on March 11, 1920, and entered the service on a position covered by the carmen's agreement. He was displaced from the position under the Carmen's agreement and was allowed to displace an employee under the Storehouse employees' agreement, on February 9, 1933. He later returned to a position under the Carmen's agreement.

"J. F. Ware entered the service on a position covered by the Carmen's agreement on July 1, 1916. He was displaced by a senior carman and on October 5, 1918, was placed on a position covered by the storehouse employees' agreement. On March 1, 1920, he returned to a position under the Carmen's agreement. Due to a reduction in force he was again displaced from the position under the Carmen's agreement and on February 9, 1933, he was placed on a position covered by the Storehouse employees' agreement. He later returned to a position under the Carmen's agreement.

"The names of T. A. Beaver and J. F. Ware are carried on the seniority roster of both the Carmen and Storehouse employees."

The carrier submitted the following statement of facts:

"T. A. Beaver entered the service of the Stores Department as a laborer on October 5, 1918, was promoted in that department to position of groundman on October 26, 1918, and to position of craneman on October 1, 1919.

"J. F. Ware entered the service of the Stores Department as a laborer on November 5, 1916, and was promoted to position of craneman in that department on June 1, 1917.

"Prior to the year 1921 cranemen in the Stores Department were not represented by or included within the scope of any agreement with any labor organization. However, in that year representation of these employees was conceded to the carmen's organization and, accordingly, Mr. Beaver was placed on the seniority roster of carmen, in the Spencer, North Carolina, seniority district with seniority date of March 11, 1920, and Mr. Ware was placed on the same roster with seniority date of July 1, 1916.

"Prior to May 1, 1934, laborers in the Stores Department were included within the scope of the maintenance of way employees' agreement; groundmen were not covered by any agreement or represented by any labor organization. On May 1, 1934, the maintenance of way organization having relinquished jurisdiction over laborers in the Stores Department, an agreement was entered into between the Southern Railway Company and Certain storehouse employees, as represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and laborers and groundmen in the Stores Department were included within its scope.

* * * *

"In compliance with the provisions of Rule 7—Rosters, seniority rosters for respective classes were prepared and posted. On the seniority roster of groundmen Mr. T. A. Beaver was shown with seniority date of October 26, 1918. On the seniority roster of laborers Mr. T. A. Beaver was shown with seniority date of October 5, 1918, and Mr. J. F. Ware with seniority date of November 5, 1916."

An agreement between the parties bearing effective date of May 1, 1934, was placed in evidence, and the following rules of this agreement were specifically cited as bearing upon the disposition of the dispute:

"RULE 1—SCOPE

"These rules shall govern the hours of service and working conditions of the following storehouse employees:

"(a) Foremen;

"(b) Truck and Tractor Drivers, Torchmen, Groundmen, Storehousemen (including Dope House Men, Oil House Men, Supply Car Men and Cab Supply Men);

"(c) Laborers.

"NOTE.—Storehouse Men and Laborers will work as between themselves in accordance with past practice.

"Nothing in this agreement shall prevent the working of storehouse labor in shops or vice versa; this shall not, however, be done for the purpose of abolishing positions.

"This agreement does not apply to employees of any class employed in Roadway Storehouses."

"RULE 6—SENIORITY (SECTION 1)

"(1) Seniority, as restricted in Rule 16, will be effective and will date from the last time entering the service on the respective seniority district in the respective classes of service embraced by this agreement, namely—

"(a) Foremen;

"(b) Truck and Tractor Drivers, Torchmen, Groundmen, Storehousemen (including Dope House Men, Oil House Men, Supply Car Men, and Cab Supply Men);

"(c) Laborers.

"While common seniority as between the respective classes of service is not effective, employees promoted from one class of service to another shall retain and continue to accumulate seniority in the class or classes of service from which promoted; similarly, if demoted, seniority will continue to accumulate in the class from which demoted.

"The respective seniority districts shall consist of the territory over which the respective Division Storekeepers have jurisdiction as of May 1, 1934."

"RULE 7—ROSTERS (PARAGRAPH 1)

"Separate seniority lists of respective classes, as set forth in Rules 1 and 6, will be prepared annually by proper officers of their respective seniority districts and will be posted in agreed upon places accessible to all employees affected, and a copy will be furnished upon request to the duly accredited representative of employees affected."

"RULE 10—EXCEPTED POSITIONS

"Employees now filling or promoted to excepted, official, or clerical positions will retain all their rights and will continue to accumulate seniority on the district from which promoted in the classes of service in which their seniority was effective at time of promotion.

"When excepted, official, or clerical positions are filled by other than employees covered by these rules no seniority rights to the classes of service covered by this agreement shall be established by such employment."

"RULE 11—PROMOTION

"Employees covered by these rules shall be considered on basis of merit, capacity, and qualifications for promotion to position not filled by seniority. Merit, capacity, and qualifications being equal, preference shall be given employees in the service in the order of their service age, the appointing officer to be the judge, subject to appeal to the highest officer designated by the Company to whom appeals may be made, whose decision shall be final."

"RULE 16—REDUCING FORCES

"When forces are reduced, employees affected will be given all reasonable notice practicable and will be eligible to exercise their seniority rights within five (5) days to positions to which their seniority and qualifications entitle them in the following manner:

"(a) Must first displace, at the point at which employed, a junior employee holding a position either of the same class or of a class below.

"(b) If no position to which employee is entitled under provisions of Paragraph (a), may then displace a junior employee holding a position of either the same or a lower class at any point within the jurisdiction of the Division Storekeeper under whom employed. Employees failing to place themselves within five (5) days as provided herein, must keep filed with the proper officer their correct address. When forces are restored, fitness and ability being sufficient, seniority rights shall govern. Employees failing to return to the service within seven (7) days after being notified (by mail or telegram sent to address last given) or give satisfactory reason for not doing so will be considered out of the service."

"TERMINATION

"This agreement to remain in effect until the 30th day of April 1935, and thereafter subject to thirty (30) days' written notice from either party to the other of a desire to change, which may be served on or after May 1, 1935."

POSITION OF EMPLOYEES.—The contentions of the employees were stated as follows:

"It is an admitted fact that the locomotive crane engineers are covered by the Carmen's agreement; that the employees are carried on the Carmen's seniority roster and that Beaver and Ware were displaced by senior employees on the Storehouse roster. There is nothing in the Storehouse employees' agreement which gives the Storehouse employees any rights to these positions, nor is there anything in the Storehouse employees' agreement which gives the employees on the Carmen's roster any rights to positions covered by the Storehouse agreement, even tho' such employee may have worked under the Storehouse agreement at one time. When Beaver and Ware left the service of the Stores Department and accepted employment in the Mechanical Department as locomotive crane engineers they gave up their rights in the Stores Department and established them under the Carmen's agreement. Beaver and Ware not only worked as crane engineers in the Mechanical Department but when they were not busy they performed other mechanical service. The Management admits this.

"Under the circumstances we challenge the Management to point out one rule in the Storehouse agreement which gives Beaver and Ware the right to return to the Stores Department. We contend that they have no such

rights and that the Management showed no respect for the agreement when they permitted Beaver and Ware to displace Storehouse employees. The only rule in the agreement which permits employees to return to Storehouse positions is Rule 10, * * * and this rule does not include crane engineers.

"Beaver and Ware have returned to their positions on the crane and in as much as the monetary loss suffered by the Storehouse employees is so small, the employees are not filing any claim for monetary loss suffered; therefore, we are asking that the names of Beaver and Ware be removed from the Storehouse employees' seniority roster."

POSITION OF CARRIER.—The contentions of the carrier were stated as follows:

"The Stores Department's records of the services of Messrs. Beaver and Ware are as follows:

"T. A. Beaver.—

"Entered service in the Stores Department as laborer October 5, 1918; promoted to position of groundman October 26, 1918; promoted to position of craneman October 1, 1919; demoted to position of laborer February 9, 1933, account reduction in forces; promoted to position of groundman July 30, 1934; demoted to position of laborer September 28, 1934; promoted to position of craneman October 1, 1934; demoted to position of laborer September 3, 1935.

"J. F. Ware.—

"Entered service in the Stores Department as laborer November 5, 1916; promoted to position of craneman June 1, 1917; demoted to position of laborer June 11, 1934; promoted to position of craneman July 30, 1934; demoted to position of laborer September 1, 1934; promoted to position of craneman September 12, 1934.

"As shown in carrier's statement of facts, prior to the year 1921 cranimen in the Stores Department were not represented by or included within the scope of any agreement with any labor organization. However, in that year representation of this class of Stores Department employees was conceded to the carmen's organization and, accordingly, Messrs. Beaver and Ware were placed on the seniority roster of carmen in the Spencer, North Carolina, seniority district.

"On May 1, 1934, an agreement was entered into between Southern Railway Company and certain storehouse employees shown in Rule 1—Scope thereof, as represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

"In compliance with the provisions of Rule 7—Rosters—of the agreement referred to above, seniority rosters of respective classes were prepared and posted. On the seniority roster of laborers Mr. Beaver was shown with seniority date of October 5, 1918, and Mr. Ware with seniority date of November 5, 1916; on the seniority roster of groundmen Mr. Beaver was shown with seniority date of October 26, 1918. These dates were established under the provisions of Section 1 of Rule 6—Seniority—of the agreement, which reads in part as follows:

"'Seniority, as restricted in Rule 16, will be effective and will date from the last time entering the service on the respective seniority district in the respective classes of service embraced by this agreement. * * *'

"On the date the storehouse employees' agreement became effective, i. e., May 1, 1934, Mr. Beaver occupied a position of storehouse laborer and Mr. Ware a position of storehouse craneman. Subsequently, or on June 7, 1934, Mr. Ware was displaced from his position as craneman by a senior man and was permitted to exercise his seniority as a laborer in the manner provided in Rule 16—Reducing Forces—of the agreement, which is quoted in Carrier's Statement of Facts.

"As we understand the position of the employees in this case, it is that because Messrs. Beaver and Ware are carried on the seniority roster of carmen at Spencer they have left the service of the Stores Department and taken service with the Mechanical Department, that they are not protected by Rule 10—Excepted Positions—of the storehouse employees' agreement and, therefore, that they can hold no seniority to any of the grades of service covered by that agreement.

"The carrier does not agree with any of the contentions advanced by the employees, but to the contrary insists that the seniority of the employees in question to the grades of service covered by the storehouse employees' agreement is fully protected by the rules of that agreement, which are quoted in the Carriers' Statement of Facts.

"These employees entered the service of the Stores Department on the dates hereinbefore shown and on positions which are now covered by the storehouse employees' agreement, thereby establishing their seniority rights to service of the classes in which they worked; they were promoted from these classes to the position of crane man in the Stores Department and have never since been carried on the pay rolls of any other department, but have always been carried on the pay rolls of the Stores Department. The fact that they are carried on the carmen's seniority roster and that at times they, with their crane, are loaned to and perform some service for the Mechanical Department, in no way changes their status as employees of the Stores Department. The contention that they left the service of the Stores Department and accepted employment in the Mechanical Department is, therefore, untenable.

"The best evidence that these men are employees of the Stores Department is the fact that they are and always have been continuously carried on the pay rolls of the Stores Department.

"The carrier does not agree with the contention of the employees that Rule 10—Excepted Positions—of the storehouse employees' agreement is not applicable in this case. By reference to that rule it will be found that the only question which could arise thereunder would be the question of what constitutes excepted positions in the Stores Department. Certainly the word 'excepted,' as used in the rule, could have no reference to either official or clerical positions, as they are specifically provided for. Therefore, the word must and can only refer to positions in the Stores Department other than official positions, clerical positions and positions falling within the scope of the agreement. A review of the Stores Department organization at Spencer shows that the only existing positions of this character are those of scrap dock foreman, general foreman, assistant general foreman, locomotive crane operator, and apprentice storekeepers.

"At the time the rule was agreed upon there was no discussion between the representatives of the carrier and the employees as to what constituted excepted positions in the Stores Department. It will not be denied by the representatives of the employees that employees promoted from positions now falling within the scope of the storehouse employees' agreement to positions of scrap dock foreman, general foreman, and assistant general foreman, continue to hold seniority in the respective classes covered by the agreement from which they were promoted, and that their names are carried on the respective seniority lists, and how they can contend that employees promoted from these classes to positions of crane men in the Stores Department forfeit their seniority rights to the grades of service covered by the storehouse employees' agreement is beyond our understanding.

"As a matter of fact, there are two other employees at Spencer Storehouse filling positions covered by the storehouse employees' agreement who also hold seniority as carman helper, and one employee who holds seniority as a yard fireman.

"The attention of the Board is called to the fact that employees covered by the storehouse employees' agreement who are promoted to clerical positions on seniority districts which in some instances embrace the same and in other instances greater territory than the storehouse employees' seniority districts, retain their seniority as storehouse employees and have 'flow back' rights to the positions from which promoted. It is apparent that to accord such rights to storehouse employees promoted to clerical positions, and deny the same rights to storehouse employees promoted to other storehouse positions not covered by the agreement, would be nothing less than rank discrimination.

"In agreeing to the 'excepted position' rule, the carrier had no intention whatever of discriminating as between employees, but intended they should all be considered on the same general basis. The carrier respectfully submits that seniority which had accrued to the employees by reason of actual service could have been taken away from them only by direct rule and not by inadvertence.

"The carrier respectfully insists—

"(a) That the fact these men were given seniority as carmen and were carried on the seniority roster of carmen at Spencer, in no way affects their status as employees of the Stores Department.

"(b) That as Messrs. Beaver and Ware were originally employed in the Stores Department in positions now falling within the scope of the storehouse employees' agreement of May 1, 1934, were promoted to position of crane man in Stores Department, and have been in the continuous service and carried on the pay rolls of that department, their status is in no way different from that of other employees occupying excepted positions, and, therefore, that under Rule 10—Excepted Positions—of the agreement, their seniority in the classes of service from which promoted is fully protected; and

"(c) That under Rule 16—Reducing Forces—of storehouse employees' agreement, if, as, and when there was no longer service for Messrs. Beaver and Ware as locomotive crane men, the carrier was clearly within its rights in permitting them to exercise their rights to service in the classes covered by the agreement in which they held seniority at the time of their promotion.

"For the reasons given above, there is no merit in the contention of the employees and the carrier requests that the claim be declined."

At the hearing held before this Division, September 22, 1936, the carrier filed a motion to dismiss the case on the following grounds:

"There is a defect of necessary and indispensable parties defendant herein because it is sought in this proceeding to deprive T. A. Beaver and J. F. Ware, who are not parties thereto, of their seniority rights to certain classes of service covered by the Storehouse Employees' agreement of May 1, 1934.

"It is obvious that in the absence of the aforesaid employees no order can be made herein displacing them from the positions they now hold on said seniority list. An order as prayed in the petition would necessarily deprive said employees of their property rights without due notice and hearing and without due process of law. Each of said employees is a necessary and indispensable party and the petition is bad and should be dismissed by reason of their absence."

Briefs arguing the legal issues involved, both in support of and in opposition to this motion to dismiss, were submitted by the parties.

OPINION OF BOARD.—Since this was a joint submission under the rules of this Board (Circular No. 1, issued October 10, 1934), which provide for notice of hearing only to the parties to the dispute, the carrier's motion to dismiss on the grounds alleged constituted a questionable procedure, in apparent conflict with its position when it agreed to submit the dispute jointly with the accredited representatives of the employees. The Board has assumed jurisdiction to dispose of the issue on the merits, as in all similar cases in the past, without in any way foreclosing such legal rights as either party to the dispute or those affected by its disposition may possess under the provisions of the Railway Labor Act or the due process clause of the Constitution.

It appears that Beaver and Ware are carried on the seniority rosters of both the Carmen and the Storehouse Employees; that crane men are expressly covered by the Carmen's Agreement and are not mentioned as such in the Storehouse Employees' Agreement; that Beaver and Ware had at various times served as laborers, a class of employees expressly covered by the Storehouse Employees' Agreement; and that their employment throughout, whether serving as laborers or as crane men, had been in the Storehouse Department. It is not the usual practice to have employees acquire and accumulate seniority under more than one agreement, and it is the contention of the Brotherhood of Railway Clerks, which is party to the current agreement covering Storehouse Employees, that such dual seniority, unless specifically provided for, is detrimental to the seniority rights of the employees expressly covered by their agreement and in conflict with the accepted scope of collective arrangements. The carrier, on the other hand, contends that Beaver and Ware have in fact accumulated seniority on two rosters from the dates of their employment, since they occupied positions covered by agreements with two different organizations of employees; that this dual seniority had not been questioned by either the Carmen's organization or the Maintenance of Way organization which held the agreement under which they accumulated seniority as laborers prior to the agreement with the Clerks' or-

ganization; that this agreement with the Clerks' organization of May 1, 1934, did not specifically exclude those holding seniority rights with any other organization; and that, on the contrary, one of the rules of this agreement was designed to conserve the seniority thus accumulated by Beaver and Ware as laborers. If the Clerks' agreement now operative as to storehouse employees does in fact safeguard the seniority rights of those who had served as laborers prior to its adoption, then all the other considerations become largely irrelevant. Under these circumstances it is necessary to examine the provisions of the Storehouse Employees' Agreement bearing upon this issue and to determine their meaning and intent.

In its caption the agreement is declared to be one between the Southern Railway Company and "storehouse employees herein specified" as represented by the Brotherhood of Railway Clerks. Rule 1—Scope, furthermore, provides that these rules shall govern the hours of service and working conditions of a specified group of storehouse employees, described as (a) Foremen, (b) Truck and Tractor Drivers, Torchmen, Groundmen, Storehousemen (including Dope House Men, Oil House Men, Supply Car Men, and Cab Supply Men), (c) Laborers. Cranemen are not included in this enumeration and there can be no question that as cranemen, employees in the Storehouse Department cannot acquire any rights, whether by way of seniority or otherwise, under the various provisions, applicable from and after May 1, 1934, of the Storehouse Employees' Agreement. On this issue, however, there is no conflict between the parties. The question is whether any rule of the agreement conserves the seniority rights which cranemen may have acquired as laborers prior to the adoption of the agreement.

The carrier contends that Rule 10, dealing with excepted positions, was designed to achieve this end, and that it does in fact protect the seniority rights which these cranemen had previously acquired as laborers. This rule, as already noted, reads as follows: "Employees now filling or promoted to excepted, official or clerical positions will retain all their rights and will continue to accumulate seniority on the district from which promoted in the classes of service in which their seniority was effective at time of promotion. When excepted, official or clerical positions are filled by other than employees covered by these rules no seniority rights to the classes of service covered by this agreement shall be established by such employment." Three distinct categories are specified—excepted, official, and clerical positions; and in the case of each of these categories it is provided that those filling or promoted to such positions, having previously held positions covered by the current agreement, will retain all their rights and continue to accumulate seniority in the classes of service on which their seniority was effective at the time of their promotion. This rule was obviously intended to conserve the seniority rights of those who had in the past served in positions covered by the current agreement, although they are not privileged to acquire new rights of any sort under the terms of that agreement, insofar as they no longer hold positions included within its scope. The sole remaining question, then, is whether cranemen employed in the Storehouse Department are covered by this rule.

The employees concede that "official" and "clerical" positions are thus covered, despite the fact that these positions are not included within the scope rule of the agreement; and there appears to be no adequate ground for excluding cranemen from "excepted" positions merely because they are not included within the scope rule of the agreement. There is no express stipulation, as found in many agreements, as to what shall constitute "excepted" positions, and the only objective content that can reasonably be given to this category under the terms of the instant agreement is that provided by including in "excepted" positions all positions in the Storehouse Department not covered by the scope rule of the agreement. It is true that scope rule includes the following provision: "This agreement does not apply to employees of any class employed in Roadway Storehouses." This provision, however, excludes all classes of employees in Roadway Storehouses, rather than specifies "excepted" positions in that part of the Storehouse Department covered by the agreement, and it is significant that nowhere in the record did either the carrier or the employees as much as mention this provision as bearing in any way upon the issue as to what positions constitute "excepted" positions. If, then, as seems reasonable, the excepted positions referred to in Rule 10 are found to embrace all positions in the Storehouse Department, excluding Roadway Storehouses, not covered by the current agreement, the seniority rights which Beaver and Ware acquired as laborers in the Storehouse Department prior to their promotion to the position of cranemen

in the same department were expressly safeguarded by the terms of this rule. The Board so finds.

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 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;

That the exercise of seniority rights by Beaver and Ware was not in violation of the agreement; and

That no adequate grounds appear for ordering the removal of the names of Beaver and Ware from the seniority roster of the storehouse employees.

AWARD

The first question is answered in the affirmative; the second question is answered in the negative.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 12th day of February, 1937.