Award No. 1295
Docket No. CL-1272

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

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

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of System Committee that positions 4-7, 4-7, 1-7 and 3-7 were abolished at the close of work August 15, 1939 under Bulletin Nos. 58 and 59 in violation of Rule 1, Current Clerks' Agreement."

JOINT STATEMENT OF FACTS: "Following is a copy of bulletins 58 and 59 issued by Mr. Burns on August 12th:

'BULLETIN NO. 58

August 12, 1939

The following position will be abolished at the close of the work day, Tuesday, August 15, 1939.

Pos. No.	Rate of Pay	Incumbent
3-7, Ex. Gang Tmkpr.	$4.15 per day	Edw. Idzikowski'

'BULLETIN NO. 59

August 12, 1939

The following positions will be abolished at the close of the work day, Tuesday, August 15th, 1939.

Pos. No.	Rate of Pay	Location	Incumbent
4-7, Ex. Gang Tmkpr.	$4.15 per day	Proviso	Fred Moore
4-7, Ex. Gang Tmkpr.	4.15 " "	Deval	R. Fogelsanger
1-7, Ex. Gang Tmkpr.	4.15 " "	Bain	R. Gilberts'

"These positions were abolished on instructions from the Auditor Disbursements that timekeepers on extra gang of thirty or less should be discontinued, the reporting of time and material being done by the foreman or assistant foreman in charge."

POSITION OF EMPLOYES: "We contend that the abolishment of these four extra gang timekeepers is in violation of Rule 1, Current Clerks' Agreement. The duties on these positions were turned over to the foremen of the gangs, which is contrary to the existing agreement. Mr. Burns in his letter of August 28th states 'Extra gang timekeepers have never been regularly employed on small extra gangs and had the extra gangs been originally

visions of rules substantially as they are written in clerks' agreement today, for a period of twenty years such has been the recognized application thereof.'

"The Railway Company knows full well that such has not been the recognized application. On the contrary they know that the four hour clause is to determine the classification of positions and has been so applied. If the carrier's contention can be assumed to be correct then the clerks have no agreement because the carrier could remove all positions from the operation and scope of Clerks' Agreement by piece mealing out the work to employes not covered by Clerks' Agreement in parcels of two and three hours and in this manner nullify the purpose and intent of the entire Clerks' Agreement.

"The facts in the instant case prove beyond question of doubt that the carrier has violated the terms and provisions of Clerks' Agreement by assigning work covered thereby (this by carrier's own admission) to employes not covered by Clerks' Agreement."

OPINION OF BOARD: The claimant contends that four timekeeping positions were abolished by the carrier in violation of the current agreement with the clerks. The joint submission discloses that the positions were abolished on instructions from the Auditor Disbursements that time-keepers on extra gangs of thirty or less should be discontinued.

This Board has consistently held in a long line of awards that work subject to an agreement cannot arbitrarily be removed therefrom. Cf. Awards 385, 458, 571, 631, 637, 751, 752, 754, 791, 1122, 1209, 1210. The carrier insists that, by reason of an existing and accepted practice, it was privileged to abolish timekeepers' positions on extra gangs whenever it elected so to do. The only proof in support of this practice is the statement of the carrier, and a showing that in June 1939 it established some extra gangs with timekeepers and some without. The employes in their rebuttal brief deny the existence of any such practice, and especially deny their acceptance of any such practice, if it existed. In the light of this record and in the light of this denial by the employes, we must say, as was said in Award 779:

> "It will not do to say that since the actions constituting the alleged practice were the result of the exercise of the will of the management that prerogative must be deemed to be a part of the practice claimed to have been adopted. It would stretch credulity too much to assume anyone agreed to that."

We appreciate and know that on some small gangs consisting of a few men the foremen do keep the time of their men, and this fact is not disputed by the claimant. But this practice falls far short of sustaining the action of the carrier in this case, and in this connection it should be noted that the employes here contend that no practice of the carrier is material in determining the rights of the parties under the agreement. Certainly the practice which we have mentioned, if material, would not justify the arbitrary order that on gangs under thirty men the foremen keep the time, without regard to the nature of the work or the time consumed. Quite obviously, this record discloses no practice which by reason of its general acceptance has become a part of the agreement which will justify the carrier's action unless it be that unlimited practice which the carrier asserted and the employes denied, and which we hold is not established by this record.

We, therefore, hold that there is nothing in this record to except this case from the general holding that positions or work once within collective agreements cannot be removed therefrom, arbitrarily, and the work assigned to those not within the purview of such agreements.

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 there is disclosed a violation by the carrier of the existing agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1940.

Dissent to Award No. 1295—Docket No. CL-1272

There is lacking opportunity for justice in an award which declares the circumstances of a case to be a violation of an agreement as a basis for the Opinion which thereupon proceeds to the conclusion that there is such violation. Yet that is the erratic fundament from which the Opinion in this award springs in the beginning of the second paragraph thereof in these words:

> "This Board has consistently held in a long line of awards that work subject to an agreement cannot arbitrarily be removed therefrom. Cf. Awards 385, 458, 571, 631, 637, 751, 752, 754, 791, 1122, 1209, 1210."

If it were necessary to thus rest upon former awards of this Division to find a base for award in this case, in reason it may be asked why consideration was not given to an award (No. 615), brought to the attention of the author of the instant award, in which the following unimpeachable opinion pertinent to such basic assumption is stated:

> ". . . it is a mistaken concept that the source of the right to exclusive performance of the work covered by the agreement is to be found in either the scope or seniority rules; they may be searched in vain for a line even implying that they purport to accord to the employes represented the exclusive right to the performance of the work covered by the agreement. The Scope rules describe the class of work; they do not undertake to specify directly the inclusion of all of such classes of work; the Seniority rules merely control the disposition of the work that is available under the agreement."

The error of presuming a violation in the instant case as a base for proceeding to a conclusion to that effect is immediately followed in the same paragraph with a statement reciting that the Carrier said ". . . it was privileged to abolish timekeepers' positions on extra gangs whenever it elected so to do." That statement of the Carrier's position is non-factual. This is proved by the following paragraph by the Carrier from the record:

> "The railway company reiterates its position that work in connection with timekeeping of men employed on extra gangs or in other classes of service does not come within the scope of clerks agreement until the volume thereof is such that it requires four or more hours per day to perform same; that on basis of practices in effect under provisions of rules substantially as they are written in clerks agree-

ment today, for a period of twenty years such has been the recognized application thereof."

Note how far removed from the total privilege which the Opinion stated was the Carrier's insistence.

And further note that the above quoted paragraph is reiteration of the Carrier's position in respect to the practice about which the Opinion proceeds to say:

"The employes in their rebuttal brief deny the existence of any such practice, and especially deny their acceptance of any such practice, if it existed."

To show the further compounding error in this Opinion, the direct response by the Employes to the Carrier's statement as to practice (2nd quoted paragraph preceding) is also taken from the record in this case:

"The Railway Company knows full well that such has not been the recognized application. On the contrary they know that the four hour clause is to determine the classification of positions and has been so applied. If the carrier's contention can be assumed to be correct then the clerks have no agreement because the carrier could remove all positions from the operation and scope of Clerks' Agreement by piece mealing out the work to employes not covered by Clerks' Agreement in parcels of two and three hours and in this manner nullify the purpose and intent of the entire Clerks' Agreement."

Note that the Carrier's position with respect to the practice of foremen keeping time of their gangs up to the point where four or more hours per day are required is not denied by the employes. The Employes' response, as covered by its first two sentences, shifts to "recognized application" of the four hour rule of the Clerks' Agreement and does not deny the practice of extra gang foremen keeping their own time until such work requires four hours per day. Their response then proceeds to an argument (not a denial of practice) as to the purpose of the four hour clause and as to the effect of the Carrier's statement.

Yet with such foundation of record the award holds that the Carrier asserted and the employes denied an unlimited practice which the Opinion declares is not established by the record, and thus sustains the claim outright.

The reason why this award does not give practical and just determination of the issue thus evidently is because it does not reflect inclusion of the fundamental situation, pre-existent to the negotiation of the contract with the Clerks, that the foremen of gangs such as these kept the time of their gangs until the extent of that timekeeping warranted employment of a timekeeper, naturally at lesser rate, to relieve the foreman for his more important duties of directing the work of his gang. That situation continued to prevail thereafter under the operation of the Clerks' contract as well as under the concurrently operating contracts with the organization representing the foremen. The record in this case as above reviewed represented on the part of the Clerks an adroit introduction and emphasis of the irrelevant four hour rule of their agreement, and neither denied the basic conditions incident to the negotiation of the contract nor offered evidence to show any contrary understanding of its proper application to the situation presented by the instances involved in this claim. The failure to give due weight thereto has led to this award devoid of that practical substantial justice that should have evolved.

/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan
/s/ A. H. Jones
/s/ C. C. Cook