

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Carrier violated Schedule for Clerks when it employed George Hargis on contract basis, purporting to class him as an independent contractor rather than an employe of the railroad, to perform duties of janitor at Taylorville, Illinois, for the sum of \$35.00 per month, which amount was and is in violation of daily wage rate established through wage negotiations, for janitor service on the Decatur Division.

(b) George Hargis, employed to perform janitor service at Taylorville, Illinois, on or about February 6, 1937, he compensated for difference between established daily rate for janitor service under the Schedule for Clerks, and the thirty-five (\$35.00) a month he was paid, from on or about February 6, 1937 up to and including January 9, 1943; adjustment to be made on basis of seven days per week, with payment of punitive rate for legal holidays listed in Rule 8 of the Schedule for Clerks, up to and including January 9, 1943, the date on which Hargis was arbitrarily relieved from the service as an employe in the janitor classification covered by the Schedule for Clerks.

(c) George Hargis be re-assigned to perform duties of janitor at Taylorville, Illinois, seven days per week, and compensated at the established daily rate for janitor service, effective January 10, 1943, date on which he was relieved from service as janitor; seniority date of February 6, 1937 to be given Hargis on the janitor seniority roster issued by office of the Decatur Division Superintendent.

EMPLOYES' STATEMENT OF FACTS: On or about February 6, 1937, George Hargis was employed to perform janitor service at Wabash station, Taylorville, Illinois. A document designated as Contract No. R-3876 was drawn up and signed by Mr. Geo. H. Sido for the Wabash Railway Company, and Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers thereof, also Mr. George Hargis. Contract No. R-3876, as it is designated, provided that George Hargis perform janitor service daily between the hours of 7:00 A. M. and 4:00 P. M., during continuance of contract, so as at all times to keep the said station in a neat, clean and sanitary condition, also fire heating plant in passenger station.

In consideration of the performance of said janitor service to the satisfaction of Wabash, Hargis was to receive the sum of thirty-five dollars (\$35.00) per month during the continuance of said contract. A true copy of said document is submitted as Employes' Exhibit "A" in support of the above statement of facts.

The rules of the Schedule for Clerks do not restrict the right of the Carrier to require clerks to perform so-called "janitor" or "porter's work" and that fact has been recognized by the Committee.

Under date of June 16, 1926, the General Committee proposed that a rule be incorporated in the Schedule for Clerks reading as follows:

"(NEW)

RULE 18B

Clerks covered by this agreement will not be required to scrub offices or waiting rooms, wash windows, clean station platforms or perform janitor work."

The request of the Committee to incorporate the proposed rule quoted above in the Schedule for Clerks was declined by the representatives of the Carrier.

The submission of this alleged dispute to the Board is without question an attempt on the part of the Committee to obtain a rule which would require the Carrier to establish and maintain a position of janitor and compensate the occupant thereof on the basis of eight hours per day at all stations such as Taylorville, Illinois; notwithstanding the fact that the services of such position were not necessary or required, and regardless of the amount of so-called "janitor" or "porter's work" there was to be performed and thereby relieve clerks from performing any so-called "janitor" or "porter's work" at any station or in any office.

A rule of that character would be equivalent to granting the employees the rule which the Committee proposed in 1926 and which they failed to obtain by direct negotiations with the representatives of the Carrier; and in addition thereto, penalize the Carrier to the extent of maintaining full-time janitor positions at stations where the services of such positions are not necessary or required, which would not be in keeping with efficient and economical operation of the property.

During the period February 6, 1937 to January 9, 1943, George Hargis performed the work involved in keeping the passenger station at Taylorville, Illinois, in a clean and sanitary condition as provided by the contract effective February 6, 1937, and was compensated therefor in full in accordance with the terms of the said contract; and, therefore, is not entitled to any additional compensation for the service rendered during the period in question.

The alleged claim referred to herein in favor of George Hargis was originated by the Committee, and in submitting the alleged claim to the Board, the Committee is endeavoring to penalize the Carrier for continuing in effect an arrangement at Taylorville, Illinois, similar to arrangements in effect at many other points which were made with the knowledge of, and in some instances at the request of, the General Committee of the clerks' organization.

When consideration is given to all the facts surrounding this alleged dispute, it is obvious that the contention of the Committee should be dismissed and the claim denied.

The foregoing statement on the merits is without prejudice to the position of the Carrier that the alleged dispute referred to herein is not properly before or subject to a decision by the National Railroad Adjustment Board.

OPINION OF BOARD: On February 6, 1937, one George Hargis entered into a written contract with the Carrier to perform janitor work daily between the hours of 7:00 A. M. and 4:00 P. M. at the Taylorville, Illinois Station at the agreed price of \$35.00 per month. It is the contention of the Organization that Hargis was in fact an employe and as such entitled to all the benefits of the current collective agreement.

The work performed by Hargis was clearly within the scope of the Clerks' Agreement. See Rule 1 (3), Clerks' Schedule. Instead of assigning the work to an employee entitled to it under the Clerks' Agreement, the Carrier entered into a formal written contract with a stranger for the performance of the work. Previous to the making of the contract, Hargis had never been an employee of the Carrier. He was never on the payroll nor was his name ever carried on a seniority roster. He assumed obligations under his contract which are wholly inconsistent with the relation of employer and employee. The Carrier exercised no control over him and he performed the contracted work as he chose, within the limitations prescribed in the contract. The Carrier could not dispense with his services without liability, except by terminating the contract as provided in the contract itself. The fact that the work contracted was work ordinarily performed by an employee, makes Hargis no less an independent contractor. We necessarily conclude that Hargis was an independent contractor, performing work under his contract with the Carrier which belonged to employees within the current Clerks' Agreement.

It will be readily seen that Hargis, not being an employee, can have no rights under the Clerks' Agreement. His rights are determined solely by the contract he made. Only employees under the Clerks' Agreement who have been deprived of the work are entitled to enforce the seniority and penalty provisions of the Clerks' Agreement and none such have been made parties here.

The Clerks' Agreement was negotiated for the benefit of the employees performing work within its scope. Clearly, a stranger who contracted with the Carrier to perform work already reserved to employees under this Clerks' Agreement cannot be heard to assert a claim for benefits under a collective agreement not made by him or for his benefit. Any employees under the Clerks' Agreement who were deprived of the work contracted by Hargis, if any there be, might well be proper parties to a claim based on the Carrier's violation of the Clerks' Agreement. But Hargis, as an independent contractor, simply has no rights at all under the Clerks' Agreement.

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 employee involved in this dispute are respectively carrier and employee 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 one who contracts with a Carrier to perform work already reserved to employees under the terms of a collective agreement, is bound by the terms of his contract and can claim no benefits granted under the Carrier's agreement with its employees.

AWARD

Claim (a) sustained to the extent indicated in the Opinion.

Claims (b) and (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of November, 1943.