

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY & DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the management of the Ogden Union Railway and Depot Company violated the terms of the existing agreement:

- (a) By creating position of Storekeeper on this property on an "excepted basis" without the concurrence of the Brotherhood, at a rate of \$250.00 per month and appointing on this position one Mr. Holbrook, employe of the Southern Pacific without proper bulletin of bid and assignment and without regard to seniority, fitness and ability of numerous senior employes of the Ogden Union Railway and Depot Company; and
- (b) The company shall be required to establish a daily rate on this position as provided in Rule 29 and based on a rate of \$250.00 per month; and
- (c) The company shall be required to bulletin the position to all employes within the seniority district; and
- (d) The company shall reimburse the successful bidder for differential between the above quoted rate and the established rate that employe's former position beginning with date of February 11, 1943.

EMPLOYEES' STATEMENT OF FACTS: Word was received by the General Chairman, Mr. Lloyd C. Murdock of the Brotherhood that the management of the Ogden Union Railway and Depot Company was contemplating the appointment of a Storekeeper Position on an EXCEPTED basis, whereupon the General Chairman addressed Superintendent, Mr. R. E. Edens of the Depot Company on November 18, 1942 asking if this were fact. (See Employees' Exhibit A.)

No reply was made to the General Chairman's request, nor was action taken by the company until December 8, 1942 on which date Mr. R. E. Titus, Vice President of the Ogden Union Railway and Depot Company, who had arrived in Ogden in his private business car, telephoned the General Chairman requesting a conference in his business car.

At conference with Mr. Titus on afternoon of December 8th was Mr. L. P. Hopkins, Superintendent of the Salt Lake division of the Southern Pacific railroad, where the proposition was presented to the General Chairman that

OPINION OF BOARD: Essential facts are that on December 5, 1942, the Carrier established a Stores Department with a new position of Storekeeper at a salary of \$250.00 per month on its property at Ogden, Utah, without recognizing that such position came within the scope of the present Clerks' Agreement. After repeated conferences on the subject of whether the position was covered by the Contract and, if so, whether it should be excepted from its terms, the parties failed to agree. Hence the dispute.

To narrow the issues it should be stated at the outset this is not one of those controversies where we are called upon to determine whether the incumbent of the Storekeeper position is within the Scope Rule of the Agreement because of the fact he is a Clerk as that term is used therein in its broadest sense. Store employes are specifically named and we experience no difficulty in concluding that term is sufficiently inclusive to permit the conclusion a Storekeeper, when employed by another, is a "store employe" within the meaning of that term as used and, therefore, within the purview of such rule unless for some other reason it appears he is without the scope of its operation.

Section 1 (Fifth) of the Railway Labor Act provides:

"The term 'employe' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employe or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employes may be organized by their voluntary action, nor shall the jurisdiction or powers of such employe organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission."

It was no doubt with the portion of the Section just quoted in mind the Carrier in its supplemental statement made the following assertion with which the Petitioner is in accord.

"The issue presented the Board in the instant case, Docket CL-2734, may be stated in simple terms: whether or not the position of storekeeper of The Ogden Union Railway and Depot Company is an **official position** or a **subordinate official position** under the rulings of the Interstate Commerce Commission." (Emphasis added.)

We believe the all decisive question is as just stated and disposition of the controversy will be made accordingly. Without further dissertation this means the result will be that if the position in question is found to possess the status of an official position the claim will be denied, while if it is found to be a subordinate one, since it is not classified as excepted, it will be sustained.

The ruling of the Interstate Commerce Commission, relied upon by each of the parties in support of their respective positions is Ex Parte 72 (Sub. No. 1) decided on June 23, 1937. Since they are not in accord as to its effect, the Carrier contending it applies only to the rules applicable to Division and District Storekeepers of the C. & N. W. Railway, while the Brotherhood contends it has application to Storekeepers generally, we quote certain pertinent portions thereof in their entirety, which are as follows:

"By agreement of the parties, this matter was submitted upon duly verified memoranda filed by the Association and the carrier in lieu of an oral hearing. On February 5, 1924, the Commission entered an

order in Ex Parte 72 entitled 'Regulations designating the classes of employes that are to be included within the term "subordinate official" under title III of the Transportation Act, 1920.' The regulations therein prescribed superseded previous regulations and are the latest regulations on the subject. It was provided that the term 'subordinate official' should include among others the following:

'Storekeepers—This class shall include storekeepers or foremen of stores who are not vested with authority to make purchases. It does not include general storekeepers and assistant general storekeepers.'

"It is the carrier's position that district and division storekeepers come within the class of officials and are therefore not subject to the provisions of the Railway Labor Act. The authority of division storekeepers is confined to one division, while that of district storekeepers includes more than one division. Both have authority to make purchases and exercise such authority when called upon to furnish material not otherwise available. However, the purchasing powers on the carrier's property are vested in the purchasing department, and the district or division storekeepers make purchases only in cases of emergency requiring immediate action. In the event of making such purchases, which is very unusual, telegraphic authority must be obtained from the general purchasing agent or general storekeeper. It seems clear, therefore, that the district and division storekeepers are subordinate officials within the terms of the above-mentioned order. This is supported by the fact that they are members of the Association composed of subordinate officials.

"We find that the work defined as that of an employe or subordinate official, in orders of this Commission now in effect defining and classifying employes and subordinate officials of common carriers, includes the work of district and division storekeepers of the Chicago and North Western Railway Company and brings them within the term 'employe' as used in the Railway Labor Act, as amended June 21, 1934."

Summarizing, our construction of the effect of the ruling just referred to is that the Interstate Commerce Commission now classifies all Storekeepers as subordinate officials who are not vested with general authority to make the principal purchases ordinarily and normally required in order to carry on the operation of the store, the management of which has been entrusted to their care and direction. We conclude also from its language the question is one to be determined by the trier of facts from the confronting situation and that such tribunal is not limited solely to facts available as to the duties and responsibilities of the position, which are peculiarly available to one of the parties and not the other, but in arriving at its conclusion, may determine from all the surrounding facts and circumstances whether the position is actually an administrative one and hence an official position or is in reality a subordinate official position which the Carrier is merely seeking to have regarded as an official position for the purpose of avoiding obligations imposed upon it by the terms of a collective bargaining agreement.

Having established what we deem the proper test to be applied in determining the true character of such a position, we direct our attention briefly, without attempting to detail all of them, to some of the important facts of record.

In a letter by the Claimant's General Chairman to the Carrier's Superintendent we find the following statements:

"In conference with Mr. Holbrook I was advised the following constituted the duties and responsibilities of the position of storekeeper:

The storekeeper has jurisdiction over and supervision of all electrical material, car repair material, track material, bridge and building material, station and miscellaneous supplies, not including stationary and office supplies ordered, issued and maintained by the respective offices.

Has supervision over two clerks and two store helpers who perform all necessary clerical work and the physical handling of all store material.

Two-thirds of the storekeeper's time is devoted to supervision of his forces and of the material under his jurisdiction, the remaining one-third being devoted to placement of requisitions and order, that is, determining if, where, and how materials may be obtained, and pricing that material if obtained from other than the UP or SP store at Ogden.

I am further advised that 90 percent or more of the requisitions placed by Mr. Holbrook require the approval of the Superintendent, this including all requisitions except those on the S. P. Co. store."

To the letter just quoted the Superintendent replied as follows:

"Referring to your letters December 10th last and January 10th regarding position of Storekeeper.

The duties of this position are substantially as enumerated in your letter December 10th.

There are now three store helpers assigned in the department and a fourth helper will be employed as soon as the vacancy can be filled."

In passing, because the Carrier attaches great significance to it, and with respect to supervisory powers mentioned, which in the instant case require two-thirds of the present incumbent's time, we note that under rules of the Interstate Commerce Commission duties of that character do not require or permit the conclusion the instant position was an official one. See Award 383, where it was said:

"Furthermore, the Order of the Interstate Commerce Commission of February 5, 1924 in Ex Parte 72 clearly classified agents who may have supervision of one or more other employes as 'employes,' when in addition to their supervisory duties they are required to perform routine office work, and as 'subordinate officials' when their duties are wholly supervisory and they are not required to perform routine office work; only the agents at large and important stations whose duties are wholly supervisory were classified as 'officials.'"

While the ruling referred to as it appears in the Opinion of the award just mentioned has reference to agents analogous reasoning compels the conclusion it has equal application to storekeepers in the exercise of their supervisory powers and duties.

Reference to the subject just mentioned has been made more because of the Carrier's contention with respect thereto than for any other reason. From what has been heretofore stated it is apparent our decision must be based primarily upon the nature and extent of the purchasing powers granted the incumbent of the instant position, when viewed in the light of the Interpretation in ICC Ex Parte 72 (Sub. No. 1) as we have construed it, not on the extent of supervisory or any other extraneous powers conferred upon that individual by the Carrier.

In addition to facts heretofore mentioned, we point out another situation which we regard as significant. The record shows that the incumbent of the involved position over a period of a month makes purchases of about \$1,600 and, in addition, draws purchase orders upon the Stores Departments of the Southern Pacific and Union Pacific for about \$12,000 per month of car

department materials and a slightly lesser amount of materials for each of the Electrical and Engineers' Departments. Thus it becomes evident the volume of business transacted at the store in question probably exceeds \$40,000 per month and that purchases made by the Storekeepers personally and without supervision are not in excess of 4% of the total. Even as to such purchases there is evidence from which it can reasonably be inferred that the great majority of them were subject to confirmation by the Superintendent and that all were local in character and relatively unimportant when compared to other purchases which the Carrier was required to make in order to properly carry on its operation. It is also apparent since the Carrier has not refuted Petitioner's statement in its letter but in effect confirmed it, that 90 per cent of the requisitions placed by the Storekeeper required approval of the Superintendent. For that matter, there is evidence from which it can properly be concluded that practically all his activities with respect to both purchases and requisitions are subject to the direction and supervision of that official.

From all the facts which we have related and others we have given attention but not related in detail, including those having to do with the peculiar relationship existing between the Union Pacific, as well as the Southern Pacific, and the Carrier involved here and the facilities afforded it by such carriers through the medium of the two large general stores maintained by them at Ogden, we have concluded that under the rule laid down by the Interstate Commerce Commission as we construe it, the position of Storekeeper at Ogden established by the respondent Carrier was not in fact an official position but actually one subordinate in its character. It follows the position as created was within the coverage of the current Agreement and the Petitioner's claim must be sustained.

In arriving at the conclusion just announced we have not been unmindful of the Carrier's contention there was no employe on the Clerks' roster at Ogden possessing sufficient ability and qualifications to fill the position in dispute. Perhaps so. We do not attempt to pass on that question. The point is that such a situation, if it existed, is not justification for failure to comply with the terms of the Contract. The position should have been bulletined as required. After that had been done, and not before, was the proper time for the Carrier to question the fitness of the successful bidder.

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 the Carrier violated the Agreement in the manner as alleged in the claim.

AWARD

Claim sustained in its entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois this 2nd day of March, 1945.

DISSENT TO AWARD 2830—DOCKET CL-2734

We disagree with the foundation conclusion upon which the Opinion in this Award is built and which decides:

"Store employes are specifically named and we experience no difficulty in concluding that term is sufficiently inclusive to permit the conclusion a Storekeeper, when employed by another, is a 'store employe' within the meaning of that term as used and, therefore, within the purview of such rule unless for some other reason it appears he is without the scope of its operation."

Thus is a position—here undeniably responsible for Carrier's stores and charged with directing the efforts of clerks and other store employes, hence for these and other administrative duties deemed to be a Storekeeper—concluded to be a 'store employe' of the character designated by the Scope rule:

"Other office, station and store employes, such as office boys, messengers, chore boys, train announcers, gatemen, checkers, baggage and parcel room employes, train and engine crew callers, operators of office or station equipment devices, telephone switchboard operators, and office, station and warehouse watchmen. For classification purposes this will not include employes enumerated in sections (a) and (c) of this rule, nor to those whose duties as defined in Rule 2 should be properly classified as clerks." (Emphasis supplied.)

In this manner the Opinion holds without difficulty that the parties when negotiating the Agreement of October 1, 1942 had envisioned a position of Storekeeper as within its purview because he is a store employe such as, i. e., for example, "office boys, messengers, chore boys, etc." Obviously the Scope Rule was never intended to bear such liberality of construction.

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

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO 2830
DOCKET CL-2734**

NAME OF ORGANIZATION:

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

NAME OF CARRIER:

OGDEN UNION RAILWAY AND DEPOT COMPANY

Upon application of the Carrier involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

Preliminary to consideration of the issue now raised by the parties it hardly seems necessary to state that in sustaining the claim in its entirety the award included allowance of paragraph (b) of the claim in conformity with the provisions of Rule 29 of the current agreement. It should, however, be stated, by the way of emphasis, that the allowance contemplated the conversion of the monthly rate to a daily basis should not operate to establish a rate of pay either more or less favorable than was then in effect.

Examination of the original record fails to produce any evidence disclosing a schedule assignment of work hours for the storekeeper who received compensation at a rate of \$250 per month for his services. However, in the supplemental record there appears General Bid No. 1 (Employees' Exhibit No. 1) and General Bid Bulletin No. 2 (Employees Exhibit No. 3), each of which contain the following statement:

"Storekeeper, rate \$.....per day, assigned hours 8:00 A. M. to 5:00 P. M., lunch period 12 Noon to 1:00 P. M., 6 days per week, Sunday off."

It is assumed from what has just been quoted the schedule work hours of the storekeeper at the time of the filing of the original claim, were the same as those referred to in Bulletin Nos. 1 and 2. This assumption is fortified, if in fact it is not entirely justified, by the following undenied statement which appears in the Brotherhood's reply to the Carrier's Request for Interpretation:

"* * * During the undisputed time of this claim the former storekeeper was paid on this basis and worked 204 hours or less each month
* * *"

Based on the assumption just stated it is apparent the monthly rate of \$250 paid the storekeeper was for 8 hours of service on each of 6 days of the week with Sunday off, on which day no service was required, paid for or performed. Annually the position required 313 days actual service for \$3,000.00.

In establishing a daily rate that is neither more nor less favorable than the monthly rate to be converted, the Division's view is that it should be calculated

by the simple mathematical process of dividing the annual compensation (\$3000) by the number of days of work (313) actually required by the assignment. When so computed, a daily rate of \$9.58 plus results. This amount should, of course, be augmented by 72 cents per day to allow for the increase awarded employes of this craft under the national wage movement. The daily rate thus calculated would amount to \$10.30 plus. Hence, \$10.30 should be established as the daily rate required by the award. This seems to be the only practical solution of the problem and of a certainty is a fair and equitable one.

This conclusion rejects the rate proposed by both carrier and claimant. The one suggested by carrier would result in the establishment of a daily rate less favorable than the monthly rate in effect while that contended for by claimant would be more favorable. With respect to the latter it should perhaps be stated, that except as indicative of the work assignment carried by the storekeeper position when created, no weight is given to the suggestion that during the disputed time of the claim the incumbent actually worked 204 hours or less each month. Even so, under an assignment of 6 days per week, service in excess of that number of hours could have been required and the fact as alleged is not determinative of the question.

Also, no consideration is given to claimant's contention General Bid Bulletin No. 2 (Employes' Exhibit No. 3) constitutes an agreement to pay a rate of \$10.52 per day. Obviously, without passing on the merits of such contention, agreements made subsequent to the date of the rendition of the award are without its purview and have no bearing in the determination of its force and effect.

Referee Jay S. Parker, who sat with the Division as a member when Award No. 2830 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 29th day of November, 1945.