

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

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

- (1) That Carrier violated the Clerks' Agreement when it failed and refused to call Stockkeeper, C. Parr for necessary Sunday and Holiday work attaching to his position at Marion Store House, Marion, Ohio, and performed by him six days each week, Monday through Saturday, during the hours of his regular assignment, 7:00 A. M. to 3:00 P. M., and
- (2) That Stockkeeper Parr be compensated under the provisions of Rules 27 and 32 for eight (8) hours each Sunday and Holiday from January 4, 1943 to February 27, 1944, inclusive, when such Sunday and Holiday work was performed by employees not covered by the Clerks' Agreement and Mr. Parr was not used.

EMPLOYEES' STATEMENT OF FACTS: Effective July 23, 1937 employee C. Parr was assigned to the position of Stockkeeper at Marion Store House, Marion, Ohio, with an assigned relief day of Saturday which was subsequently changed to Sunday.

Prior to June 1, 1941, Carrier's attention was directed to the fact that this position was being worked on Sundays and Holidays by employees not covered by the Clerks' Agreement and though the Committee was assured that correction would be made, employees not covered by the Clerks' Agreement continued to perform the work each Sunday and Holiday resulting in claim being filed January 4, 1943, payment of which has been denied. Effective March 1, 1944 this Sunday and Holiday work was assigned to Mr. Parr and he has been paid the penalty rate for such service on and after that date.

POSITION OF EMPLOYEES: There is an Agreement between the parties bearing effective date of September 1, 1936 which contains the following Rules:

Rule 1 (Scope) reads as follows:

"These rules shall govern the hours of service and working conditions of the following employees of the Erie Railroad System Lines, subject to the exceptions noted below:

"Group 1. Clerks as defined in Rule 2, including baggage agents, foremen, assistant foremen, receiving clerks, delivery clerks, checkers, flag clerks, ballot collectors, icing inspectors, sectional storekeepers,

The Third Division in Award 1709, which covered a similar case involving the Carrier and the same Brotherhood at Buffalo, N. Y. very clearly settled this question and said:

"The execution of the Clerks' Agreement did not bring within its scope Clerks' work which was then incidental to a position covered by another agreement. The Board is of the opinion that the Stockkeepers' work which the Petitioner asks to have removed from the position of tool room attendant is incidental to the latter position and constitutes a limitation on the scope of work included in the agreement."

The jurisdictional question between the carmen and the clerks concerning certain stockkeeper positions, which question has never been settled to our knowledge, clearly demonstrates that the Clerks do not have monopoly of all stockkeeper positions. Some of these stockkeeper positions are still assigned to employees represented by the Carmen.

The assignment of the work in question to tool room attendants at Marion, Ohio and at other locations, when such work can be done by tool room attendants incidental to their regular work, antedates the agreement with Claimant Brotherhood and in the absence of any rule which prohibits this practice it cannot be held that the practice involved in this claim constitutes a violation of the agreement. (See Award 1418 by Third Division assisted by Referee Bushnell.)

Disbursing of material cannot be said to be work that belongs exclusively to employees represented by this Brotherhood. There is no rule to support such a statement.

In the notice by Mr. Geo. M. Harrison to Secretary Johnson dated August 29, 1944, the statement of claim makes no reference to any rule violated but in General Chairman's letter June 8, 1944 claim is based on alleged violation of Rules 1 and 32.

Rule 1 is the scope rule and covers only "Employees" who are covered by the agreement and there is no classification of work rule in the agreement. Many employees of all classifications perform clerical work and there is nothing in the scope rule which gives employees represented by this Brotherhood the exclusive right to all clerical work.

Rule 32 is the Sunday and Holiday work rule. Obviously this rule has no application here because the claim which is filed is on basis that Parr did not perform work on Sundays and Holidays during this period for which claim is made.

The International Association of Machinists properly designated as representatives for the tool room attendants involved in this claim must be considered as party to this dispute, and accordingly should be notified when oral hearing is had in order that all parties who are concerned may have proper representation as intended under the Railway Labor Act as amended, and the regulations of the National Railroad Adjustment Board.

Since this claim has been submitted to the Third Division ex parte by the Brotherhood, the Carrier is not aware of statement or contentions that will be made by the Brotherhood. We accordingly reserve the right to make further statement if found necessary when we are informed of the contentions presented to the Third Division by the Brotherhood.

OPINION OF BOARD: This is a claim for Sunday and Holiday work founded upon an alleged violation of the Scope Rule. That the work in question falls within the purview of the Scope Rule of the Agreement is, it seems to us, not open to argument. Stockkeepers are specifically named in Group 1 thereof. That the work is assigned to Claimant on week days is conclusive on that issue. Award 2549.

Carrier frankly concedes that the tool room attendant, not covered by the applicable Agreement, disbursed some supplies on Sunday, for it states: "During the period . . . the tool room attendant at Marion disbursed some supplies from the storehouse."

But Carrier asserts that this was the mere incidental disbursing of materials and that incidental disbursing of materials is not the exclusive work of any employee; that for many years the tool room attendant and others performed this work; that similar work was performed at other locations and on other tricks and that no records or reports were kept of the materials disbursed. We have carefully considered each of these contentions and find ourselves unable to agree that they present a valid defense to this claim.

We are not persuaded that the work should be considered merely incidental. It was not so considered by the Carrier itself when, effective March 1, 1944, Sunday work was assigned to and performed by Claimant. We have not overlooked the statement by Carrier that this change was due to heavy disbursements of materials. There are, however, no facts in the record showing that the situation was substantially different after March 1, 1944 than it was before that date.

What was done at other locations under varying differences of facts and rules is of no relevance in solving the problem here involved. Compare Award 2044. Nor should the claim be sustained or denied based upon what the practice was on the second or third tricks. In view of the undisputed fact that Claimant was regularly assigned for six days a week to a Stockkeeper's position, which is within the Scope of the Agreement, if there is work on Sunday to be performed within the hours of that assigned position, Claimant is entitled to it under the Agreement, entirely aside from what happened to be the practice on the second or third tricks or elsewhere. Our specific problem must be determined by the question whether there has been a violation of the Scope Rule based upon the facts and circumstances in the instant case, and not in some other case.

We do not see merit in the assertion that the long established practice of the tool room attendant in disbursing supplies is an important factor to be considered in determining this case. It has been decided by this Division so often as to obviate citation of awards that mere continued violation of rules does not bar the presentation of a claim. It may have some bearing on the matter of notice to the carrier and the date from which the claim should be allowed, but it does not absolve the carrier from the responsibility of compliance with the rules.

Award 2551 is cited in support of Carrier's position. That case is not in point. The gist of the claim there was for the establishment of the position of "Caboose Supply Stockkeeper." The Referee pointed out that under Group 1 of the Scope Rule no such position was listed and the claim was therefore properly denied. In the instant case not only is the stockkeeper's position specifically listed in the Scope Rule but also an employee is actually assigned work under it for six days a week.

Nor can Carrier secure any comfort from Award 1709 upon which it strongly relies. In that case the facts show that in January 1931 (at which time Storekeepers were not organized or represented by an organization) the position of Storekeeper was consolidated with the position of tool room attendant and thereafter all materials and supplies were handed out and distributed by tool room attendants. The Referee found that the execution of the Clerks' Agreement on September 1, 1936, under these circumstances, did not bring within its scope the Storekeepers' work. There was there no assignment of a Storekeeper's position or performance of the work under the position for six days a week, as appears from the facts in the instant case.

We hold therefore that Claimant was entitled to perform the work in question and that the claim should be sustained.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of March, 1945.

DISSENT TO AWARD NO. 2858, DOCKET CL-2836

The Opinion of Board leading to the decision in this case reflects such minimizing of the evidence of the record, of the Carrier's position, and of the previous Awards mentioned in the Opinion as to make those elements almost unrecognizable.

The first paragraph states three conclusions, the first of which represents decision of the only issue the case presents, which only can be arbitrary decision as it proceeds from no stated reason. That first conclusion is that the work in question falls within the purview of the Scope Rule of the Agreement. Then follows two conclusions of fact, that stockkeepers are specifically named in Group 1 thereof and that the work being assigned to claimant on week-days is conclusive on that issue. Thereupon it cites Award No. 2549. This is inept citation. Reference to that Award will disclose in its Opinion recitation of the facts that the clerical service on Sunday involved had not previously been performed by the employee to whom it was assigned after it had been taken from the claimant clerk who had theretofore performed it on Sunday and who occupied the position to which the work was assigned six days of the week, Monday to Saturday, inclusive. Subsequently the work on Sunday was taken from the claimant and assigned to the employees not covered by the Clerks' Agreement, whose performance of it was contested by that claim.

In the instant case, to the contrary, the record discloses that the specific work of disbursement of materials not requiring daily records or accounts thereof had prior to this claim been performed on Sundays on the claimant's trick involved (as well as on week-days and Sundays on other tricks) by employees other than those covered by the Clerks' Agreement.

In the second paragraph it is stated that the Carrier frankly concedes, etc. The Carrier did not "concede"; the Carrier affirmed and in the record reaffirmed, and it was not denied, that this claimant on the first trick, from December 1, 1937, until the instance of this claim in 1943, did not disburse materials on Sundays, but that such work on Sundays was done by tool room attendants covered by an Agreement other than the Clerks', which arrangement was understood by the claimant and others concerned, and further affirmed that throughout such period such disbursement not requiring daily records or accounts at this storehouse at Marion, was performed by tool room attendants on the second and third tricks without protest until more than five years later when a claim originated which developed into this claim. The complete sentence by the Carrier, abbreviated by this paragraph of the Opinion, which was but reaffirmation and emphasis of its position, reads:

"During the period January 4, 1943 to March 4, 1944, the period covered by this claim, the tool room attendant at Marion disbursed some

supplies from the storehouse that were incident to his position as tool room attendant just the same as other tool room attendants on the 2nd and 3rd tricks always disburse material and still do."

In the third paragraph it is stated that the Carrier asserts that this was mere incidental disbursing of materials, etc. The Carrier's statements were specific in saying that such disbursing of materials on Sundays prior to February 8, 1944, "was taken care of by the tool room attendant incident to his tool room attendant work in the roundhouse," as was such disbursing on the second and third tricks "done by the tool room attendants incidental to their other regular work in the roundhouse." The Carrier's position was clear that here at Marion the incidental element was specific as being incidental to the tool room attendant's duties and work, the existing condition which the Clerks' contract found and to which it for years applied without protest. It was preceding Award No. 2551 which stated, quite properly, that "the work of checking and replenishing caboose supplies is work that may be incidental to the duties of various classes of employees. At any rate, it is not work incidental to the ordinary functions of the position of stockkeeper." The same Carrier in this case at Marion contended only that the work had theretofore been incidental to the work and duties of tool room attendants. It may be added that the Carrier also did state that foremen and other mechanical employees at some locations secure their own materials from the storehouses.

In the fourth paragraph it is stated that the Carrier did not consider the work "merely incidental" when March 1, 1944, Sunday work was assigned to and performed by claimant, that paragraph further noting that there were no facts in the record showing the situation substantially different after March 1, 1944. The record, unrefuted, challenges the statements of that entire paragraph. Beginning February 8, 1944, the record shows that because of increased work in the roundhouse and a considerable increase in use of material and tools, a second trick stockkeeper position was established and later, when roundhouse mechanical forces began to work ten hours per day, this stockkeeper position worked two additional hours during March and April, 1944. It was on February 27, 1944, due to the heavy disbursement of materials at Marion on Sundays and the necessity of keeping daily records and accounts, that a stockkeeper position was established also on the first trick and the claimant, Parr, in the absence of relief workers, used and paid time and one-half in order to take care of this increased work. Certainly the situation after March 1st was substantially different, as proved by this record.

In the fifth paragraph, after stating that what was done at other locations is of no relevance in solving the problem here involved, we are asked to compare Award No. 2044. Upon doing so it is found that Award No. 2044 supports the Carrier in the instant case. The Opinion there stated, in respect to contention as to the work done at other locations, that "It may be that at these points this work was not done exclusively by the clerks, but that is not the fact in this case." Here at Marion the record is conclusive that the work of disbursing materials not requiring daily records or accounts was not done exclusively by the claimant in this case; in fact, to the contrary the record is conclusive that other than his performance of it during a brief 4-month period in 1937 it had previously and subsequently been done by tool room attendants other than clerks. If reliance be placed upon Award No. 2044 as to the influence of other locations, the Carrier's position in the instant case is supported and not discounted.

In the fifth paragraph also there is stated the arbitrary conclusion, based upon an uncontrolling element, that because a stockkeeper's position was assigned for six days a week the occupant of such position is entitled to the work thereof on Sunday within the hours of that assignment. That conclusion again disregards the difference in character of work on Sunday and is wholly an unjustifiable one on the basis of the record of its performance by tool room attendants not under the Clerks' Agreement theretofore, and so understood to be properly done after the Clerks secured an Agreement, and it was thus continued thereunder.

In the sixth paragraph reference is made to this fundamental performance by tool room attendants of the disbursement of supplies not requiring current records or accounts by casting aside this fact, basic for a proper decision, and coming to the arbitrary conclusion that there was a violation of the rules, following which is the observation that this Division has heretofore decided that mere continued violation of rules does not bar presentation of a claim.

The eighth paragraph of the Opinion refers to Award No. 1709 and attempts a distinguishment upon the statement of the element in the instant case of a stockkeeper's position assigned six days a week not appearing in the case of Award No. 1709. Reference to the Opinion of Board precedent to the decision in that Award will disclose that such element was not cited or controlling to the conclusion there that the work of disbursing materials and supplies, which the Petitioner asked to have removed from the position of tool room attendant and brought exclusively within the scope of the Clerks' Agreement, was not a violation of the Clerks' Agreement, for that Opinion held, as under the like prevailing condition at Marion when the Clerks' Agreement was executed, that such work was incidental to the tool room attendant's position and constituted a limitation on the scope of work included in the Clerks' Agreement. This eighth paragraph misses the substance of Award No. 1709 in its selection of the element of a 6-day assignment for application to the instant case. The basic element there of the prior right of tool room attendants, controlling to a decision, is here disregarded.

Summarization of this Award in the light of the uncontested facts of record discloses that the single fact, inadequate to uphold this claim, upon which the Award rests is that for a 4-month period, July to December, 1937, one year after the first and existing Agreement with the Clerks was made effective, the claimant, occupant of the position of stockkeeper on the first trick at Marion, Ohio, was assigned on Sundays the work of disbursing materials and supplies not requiring daily recording or accounting thereof.

The facts are uncontested that the work on Sundays of disbursing materials and supplies not requiring daily recording or accounting thereof on the first trick at Marion had theretofore upon and preceding the negotiation of this first and existing Agreement and thereafter, with the exception of the 4-month period in 1937, always been performed by tool room attendants covered by the Shop Crafts Agreement. It continued to be performed after December 1, 1937, for four years before the Employees say they called it to the Carrier's attention and more than five years, the Carrier shows, before a claim was originated with it which develops to this claim before the Board.

The further uncontested facts are that the work on Sundays, as well as on week-days, of disbursing materials and supplies not requiring daily recording or accounting thereof on the second and third tricks at Marion has always been performed by tool room attendants not coming within the scope of the Clerks' Agreement, and such work has thus been performed by tool room attendants at Marion and at other locations on the System for many years prior to this first Agreement of September 1, 1936, with the Clerks, and thus has continued to be performed without violation of the Clerks' Agreement. It was thus embraced in the duties of tool room attendants at Buffalo, New York, whose performance of it was challenged by the Clerks before this Board in Docket CL-1641, and was passed upon by this Division as work which was not brought within the scope of the Clerks' Agreement by Award No. 1709.

It is respectfully submitted that the faulty premises of this Opinion, its disregard of fundamental facts, and its casting aside of persuasive precedent by the Division, has resulted in an erroneous Award fraught with possibilities of disturbance rather than adjustment of the issues with which it dealt.

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