

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

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

THE INDIANA HARBOR BELT RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' General Agreement:

(1) When the Carrier assigned Messrs. O. H. Newman, H. J. Bouchard and J. L. Dermody, Yard Clerks employed in Seniority District No. 5, during their regular eight (8) hours of assigned duties as Yard Clerks, on dates indicated in Exhibits No. 1, No. 2 and No. 3, to check and card cars at the Gibson West End Rip Track, which work was originally assigned and performed by Clerks in the Gibson Office, Seniority District No. 12 and Seniority District No. 7, during which assignments on these dates part of the regular assignments of the employes involved was taken over and performed by Chief Clerk, Mr. Chas. H. Mott; and

(2) Carrier further violated the Clerks' General Agreement when they failed to have this unassigned work in Seniority District No. 5 performed by these employes either on a call or overtime basis, for which they were available, had part of their own assigned work during their regular assigned hours not been performed by their Chief Clerk, Mr. Chas. H. Mott; and

(3) That the Carrier now be required to pay Messrs. O. H. Newman, H. J. Bouchard and J. L. Dermody for a call or its equivalent in overtime for each of the days indicated in the attached statements, Exhibits No. 1, No. 2 and No. 3, that these employes were required to perform work originally assigned to Seniority District No. 12 and Seniority District No. 7.

EMPLOYEES' STATEMENT OF FACTS: For many years prior to 1924, the Clerks in the Agent's Office at Gibson, Indiana, known as Seniority District No. 12 checked and carded all cars held on the "Rip Tracks" for repairs at the Gibson West and South Yards, which included the checking and carding of all other cars to industries located in that district.

In 1924, the Carrier established a Car Department force at the Gibson West End Rip Track, which Car Department was set up as a new seniority

OPINION OF BOARD: In essence this claim involves a contention that claimant clerks were required to perform work of other clerks in a different seniority district.

The claim arises in the west yard of the Carrier at Gibson, Indiana. Carrier's tracks extend from the "hump" classification lead, at which point is located the headquarters of Clerks' Seniority District No. 12, westward a distance of about 1 mile, at which point the tracks converge into a flat lead track at a place known as the West End, and where Seniority District No. 5, the claimants in this case, have their headquarters. Clerks of Seniority District No. 5 are sometimes referred to as West End Clerks. The clerks in District No. 12 are sometimes referred to as clerks working out of the agent's office.

The Gibson West End repair tracks, a subsidiary of the Gibson work shop, the main repair facility of the Carrier, is a small repair facility consisting of 2 short tracks with a total capacity of about 33 cars. It is located adjacent to the headquarters of the Clerks' Seniority District No. 5 of West End and is served from a lead track.

Claimants having rights in Seniority District No. 5, occupying regular position No. 31 and regular relief position No. 38, alleged that they were required as part of their regular duties to perform work which should have been performed by employee Rutz, holding position No. 103 in Seniority District No. 12. The wage rates in effect for position No. 103 throughout the period in question have been consistently higher than positions No. 31 and 38.

The claim for yard clerk Newman, occupying position No. 31, is for the period from January 2, 1945, up to March 10, 1949, or for a total of 1,035 days. Clerks Bouchard and Dermody made claim for days in which they relieved clerk Newman.

If the Claimants were able to establish that they were required to perform work in a different seniority district, the Board would be required under the applicable rules to reach the conclusion that there was a violation of the agreement. This Board in numerous awards has established the principle that the Carrier may not require employees to perform work in different seniority districts contrary to the provisions of the applicable agreement. (Awards 198, 199, 756, 1711, 1808, 2050, 1440, 3746, 4076, 4312, 4534, 4653, 4667.)

The real issue in this case, however, is not one of applicable rules or principles, but one of fact. The parties have diligently presented considerable material bearing on the fact issue as to who performed the work in question prior to the time the claims were filed. Certain of the facts are admitted, some are in direct conflict. We believe it necessary to set out in some detail what the record shows.

Prior to November 4, 1933, the Gibson West End repair tracks, herein-after referred to as "repair tracks", were in operation. On that date the repair tracks were closed and the car repair work was sent elsewhere. On March 29, 1942, the repair tracks were reopened. During the interim, a period of about 8½ years, the Carrier claims that the repair tracks were not in service. The organization at one point claims that some work was done on the repair tracks but offers no evidence in support of this claim.

The first agreement between the organization and the Carrier was effective July 1, 1936. For many years prior to July 1, 1936, there were no seniority districts set up under any agreement between the Brotherhood of Railway Clerks and Carrier.

When the General Agreement between the Brotherhood of Railway Clerks and Carrier was negotiated and became effective July 1, 1936, seniority districts were established. At that time, Seniority District No. 1 covered employees in the Auditor of Freight Accounts' Office and Gibson Subway Station,

but in 1945, these offices were separated as to jurisdiction and Seniority District No. 1 covered employes in the Auditor of Freight Accounts' Office and a new seniority district, Seniority District No. 12, was established to cover the employes in the Agent's Office at that point.

The work in question is the checking and carding of cars at the repair tracks. The organization claims that the carrier in 1924 established a car department force at the repair tracks. It claims that as a result of the establishment of the car department in 1924, the clerical work of checking and carding cars on the repair tracks of the Gibson West End south yards (work that had been performed by the clerical force of Seniority District No. 12) was assigned to a clerical position created in the car department, Seniority District No. 7, at that time. This clerical position took care of all the work formerly done by employes of Seniority District No. 12, with the exception of issuing the car cards. The issuing of car cards continued by employes of Seniority District No. 12 and returned to the clerk in Seniority District No. 7 for completion of his work. It claims further that when the Carrier discontinued the repair track work at the Gibson West End Yards in 1933, it abolished the clerical position of Seniority District No. 7 and the work that this clerk had been performing was again reassigned to the clerical work in the agent's office (Seniority District No. 12). When the Carrier reopened the repair tracks, it did not establish the clerical work, Seniority District No. 7, nor did the Carrier permit the clerks working in the agent's office of Seniority District No. 12 to continue checking and carding the cars, but arbitrarily assigned this work to yard clerks in Seniority District No. 5, although these clerks had never prior to that time performed that service.

The Organization relies on:

1. An affidavit by Claimant, O. H. Newman, stating that for about 2 years prior to the time the West End repair shop was shut down, the work in question was performed by Mike Matovina, working out of the Gibson shops; prior to that time the work was done by a clerk at the agent's office (now Seniority District No. 12), the job held by G. Rutz; and none of the West End clerks, Seniority District No. 5, ever checked or carded cars in the West End repair shops prior to 1932.
2. An affidavit by Claimant, H. J. Bouchard, stating that he worked for 5 years from 1927 to 1932 at the Gibson yard, and that none of the clerks working in the West End (Seniority District No. 5) checked the West End Rip Tracks through those dates.
3. An affidavit by Claimant, J. L. Dermody, similar to that of Claimant Bouchard.
4. An affidavit of August G. Rutz to the effect that the last time he remembers checking the West End Rip Tracks was in 1942.
5. An affidavit by Daniel F. Tharp that in the summer of 1943, during the 2 week vacation period of Rutz, he checked the West Yard Rip Tracks; and
6. An affidavit by Ray Beatty saying that he likewise checked the West End Rip Tracks while working Rutz's job during the time the agent was on vacation, but was unable to state when this was. The three last affiants are clerks in Seniority District No. 12.

The Carrier relies upon the following:

1. An affidavit by A. H. Bonse, foreman at the West End (Seniority District No. 5) from 3/1/27 to 12/1/27, stating that as far as he can remember, the work in question was done by yard clerks under his jurisdiction.

2. An affidavit of C. F. Fairchild stating that he worked at the West End Gibson repair track from 1921 until early 1927, and that during this period the work in question in the majority of cases was done by repair track clerks, and that the remaining carding was done after hours by clerks under his supervision (Seniority District No. 5), and that the carding of cars in that period was pretty much "catch as catch can," in other words whoever had the time did it."

3. A statement taken from Yard Clerk A. G. Rutz. In this statement Rutz testified that he is now employed in the agent's office, Seniority District No. 12, and has been in that position since 1921, that as yard clerk in that district he did not think he was ever required to do the work in question, that for a while he did check cars looking for bad order cars and other cars such as those hanging around the yard, but that except for one time he did not check the cars for the purpose of later on giving information for the classification of the cars for movement off of the repair tracks; that while he was doing this work, clerks of the West End (Seniority District No. 5) were still checking the cars for their own benefit; and that at all times when he checked the cars, they were also being checked by the clerks of Seniority District No. 5.

4. The Carrier also relies on a letter in its files dated May 25, 1932, written to the Chief Yard Clerk at the West End (Seniority District No. 5) reading as follows: "Effective at once and until further notice, you will discontinue the checking of the Rip Track in Gibson West Yard. Arrangements have been made with Agent Thomas at Gibson that the retarder list will be made from the check furnished by the Rip Track foreman."

5. A statement from Chief Yard Clerk C. H. Mott of Seniority District No. 5, in which he states that the checking and carding of cars at the Gibson West End repair tracks was done by clerks of Seniority District No. 5 when repair facilities were opened on March 29, 1942, and that he personally performed this work until one of his clerks described by him as an organization representative, protested to him that he would file a grievance if he did not discontinue this work, that thereupon he did discontinue the work and had one of his clerks do it.

Certain conclusions seem clear from the foregoing.

First. There were no seniority districts prior to 1936, when the first agreement was entered into.

Second. From 1933 to 1942, the tracks in question were closed and none of the work complained about was apparently performed during that period.

Third. There is a conflict of testimony as to who performed the work in question prior to the closing of the tracks in 1933.

Fourth. The only document in the file not prepared for the record in this case would tend to support the Carrier's contention that the work in question was performed by clerks in Seniority District No. 5 prior to 1933. This is the letter to Chief Clerk Doyle on May 25, 1932.

Fifth. After 1942, when the repair tracks were reopened, the work in question was performed by clerks in Seniority District No. 5.

Sixth. An analysis of the claim made by Newman, the principal Claimant, is significant in relation to the merits of this case. The original claim was filed May 29, 1944, or more than 2 years after the repair tracks were reopened, and the work in question assigned to clerks in Seniority District No. 5. This claim sought a rate increase for Newman on account of added duties by reason of the establishment of the repair track. No contention was made at that time that the assignment of the work in question to an employee in Seniority District No. 5 was in violation of the agreement. This claim was denied May 29, 1944. Three years later on March 17, 1947, and some

5 years after the track was reopened, Newman filed a claim for which he requested a difference in the rate of pay between Position 31, the position he held in District No. 5, and that of Position 103 in District No. 12. It is significant that this claim was made on the basis of Rule 18 and not on the basis that the Claimant was being improperly requested to perform the work in question. Under Rule 18, an employee assigned temporarily to a position having a higher rate is entitled to receive the higher rate for the position. There was, as previously indicated, a difference in rates between Position No. 31 and Position 103. On June 25, 1948, this claim was revised, Newman claiming for 2 years' pay at the rate of Position No. 31—his own position. This claim was based on the ground that he spent 2 hours each day checking and carding cars on the repair tracks. The claim in the terms as submitted to the Board was not made until this submission and asked this Board to require the Carrier to pay for a call or its equivalent in overtime. The claim of Bouchard was not filed until April 18, 1948, a period of some 6 years after the tracks were opened; likewise the claim of Dermody was not filed until May 11, 1948.

We do not agree with the Carrier that the delay in question should bar the claim, or for that matter that the Claimants were not free to amend their claim. This Board has permitted amendments of a similar character. See Awards 3256 and 5330. Likewise, we do not believe that Rule 36 involved in this case can be interpreted as claimed for by the Carrier. See Awards 1060, 1403, 1839, 2611, 2925, 3095, 4204, 5299.

However, we are convinced the record of delay and change is inconsistent with the Organization's claim. If the employees in question felt that they were being compelled to do work that belonged in another seniority district, it is strange that they would wait 5 years to make such a claim. It is also significant that when the first claim was filed in 1944, it was not made on the basis of violation of seniority rules, but was a claim for an increase because of additional duties growing out of the reopening of the repair tracks.

The Carrier contends that since the agreement between the Carrier and the Organization was made on July 1, 1936, and the seniority districts were first established at that time, there is no necessity for the Board's going into the historical facts relating to the practices in existence prior to the agreement. We do not have to pass upon this question. Even if we assume that it is proper for the Board to consider the historical background in order to determine where the work proper belongs, the organization has not, in our opinion, established that in fact clerical employees in District No. 5 performed the work in question prior to the closing of the repair tracks in 1933.

The record is certainly by no means clear. The inconsistency in the statements which have been made can only be reconciled by the conclusion that apparently clerks in various parts of the yard, including clerks in Seniority District No. 5 and clerks in Seniority District No. 12, performed the work in question prior to 1933. Even if we discard the earlier period, the fact is that from 1933 to 1942 the work in question was not performed, but when the work was resumed, it was performed by clerical employees of Seniority District No. 5. These employees continued to do this work until 1947 before any question was raised as to the proper allocation of the work.

The Organization argues that the conduct of the Carrier in entering into the agreement on March 9, 1949, making all allocation of the work between the employees in Seniority District No. 5 and those in Seniority District No. 12, and submitting a proposal for such an understanding several times previously in 1949 by the Carrier, tends to support the contention of the Petitioner as to its merits. The argument is made that carriers usually do not tend to make settlements contrary to the provisions of the agreement, especially when compensation is not waived, which was the situation under the understanding of March 9, 1949. We do not know whether the Carrier had any particular interest in the allocation of the work. It may be that the Carrier desired to have such an agreement in order to once and for all

bring an end to the discussions as to the seniority issue involved. This does not appear of record but a claim of the character here involved must rest on a more solid foundation than the implication to be drawn from the making of the agreement.

We have gone into the facts in this case in considerable detail in order to be certain of the merits of the case. It is our conclusion that on the fact issue, the organization has failed to sustain the burden of proof.

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; and

That the Carrier did not violate the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of October, 1951.