

Award No. 9122
Docket No. CL-9227

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Referee Roscoe Hornbeck

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 that the Carrier violates the rules of the Clerks' Agreement at Cleveland, Ohio when on January 4, 1956 the Carrier failed and refused to include on the 1956 Roster No. 9, the names and seniority dates of nine employees in the Valuation Department, and

That the Carrier shall be required to issue a corrected roster showing the names of Employees E. E. Dry, R. W. Eckert, G. E. Harriss, H. M. Hon, R. F. Spencer, E. E. LaTourette, J. J. Lynch, R. K. Rogers and F. C. Sloane on Roster No. 9 with a proper seniority date, and

That the Carrier shall add to the roster the names and seniority dates of other employees acquiring seniority under the rules of the Clerks' Agreement in the Valuation Department subsequent to August 1, 1955, and

That the Carrier shall continue to carry such employees on subsequent rosters until such time as the employees properly lose their seniority. (Claim 1122).

EMPLOYEES' STATEMENT OF FACTS: Prior to the Comptroller taking over the jurisdiction of the Valuation Department on September 1, 1953 the work was performed under the jurisdiction of the Engineering Department and the Chief Engineer. The employees here involved were classified as Engineering Accountants and did the accounting work necessary in connection with new construction. These employees were subject to and covered by the Clerks' then in effect and were included in the Office of Chief Engineer (all positions) X-2 shown at page 4 of the Agreement effective December 1, 1943, amended July 1, 1945. They were subject to the exceptions shown on page 3 of the same Agreement and covered by ten rules as shown opposite the X-2 designation on that page. They were not subject to any of the seniority rules and no rosters were maintained or posted to cover these employees.

Sometime after the Agreement became effective, during September, 1953, the Valuation Department, because of its function as an accounting unit, was placed under the jurisdiction of the Comptroller, the head of the Accounting Department, and became an integral part of the Accounting Department be-

no proof at all in this case. As shown herein, the Engineers in the Valuation Department are not "engaged in the work of the craft or class of Clerical, Office, Station and Storehouse Employees."

It is fundamental that the Board cannot make a contract for the parties. Neither can the Board add to nor detract from the contract, nor can it render an Award that would have such effect. The Board's authority is limited to determining the meaning and intent of the contract which the parties have made for themselves. These truths are ably set forth in Award 6757, wherein the Board said:

"The parties themselves must stand or fall on what they have agreed to through the medium of collective bargaining as subsequently reflected by the terms of the contract to which they have agreed. We cannot legislate or make them a new contract. By the same token we can neither write out something they have included therein nor can we write in something that is not there." (Emphasis supplied).

See, also, Awards 4763, 6828, 7093 and many others on the same principle.

The Carrier submits that the instant matter must be decided in the light of the particular facts and circumstances surrounding it. There is no comparable situation. However, as a guide, the Board may wish to review Awards 1435, 1519, 4335.

The carrier further submits that the burden of proof rests with Petitioner. As stated in Award 7362 "The burden of establishing facts sufficient to require the allowance of a claim (and proper language in the agreement covering the situations), is upon those who seek the allowance." Compare Awards 6359, 6828 and Awards cited therein. In denying the claim in Award 6359, the Board held:

"Mere words that a violation has occurred are not sufficient without positive evidence to substantiate the allegations made. See Awards 5345, 5962."

The record herein plainly shows that the employees mentioned in the claim are not subject to the Clerks' Agreement and as a result they are not entitled to a seniority date on Roster No. 9, as claimed for them by the Organization.

All data presented herein have been discussed with or are known to Petitioner.

(Exhibits not reproduced).

OPINION OF BOARD: The Claim must be denied because prematurely instituted. See Docket CL-8540, Award 9121.

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 Claim should be denied in accordance with the Opinion.

AWARD

Claim denied in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1959.