

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

**RAILROAD DIVISION, TRANSPORT WORKERS UNION
OF AMERICA, AFL-CIO**

DONORA SOUTHERN RAILROAD COMPANY

STATEMENT OF CLAIM: That it is improper for the Carrier to use employes' of another craft or class and from another department to perform the work that belongs to the Clerical, Office, Storehouse and Station employes.

That Mr. James Eckard, janitor, be compensated eight (8) hours at the punitive rate of pay for each of the following days, March 5, 6, 7, 8 and 9, 1956 on account of the Carrier using a Maintenance of Way employe to perform the work belonging to the Clerical, Office, Station and Storehouse employes.

EMPLOYES' STATEMENT OF FACTS: That Mr. James Eckard is an employe of the Donora Southern Railroad Company and is covered by the Clerks Agreement as he holds the position of a janitor with the Carrier.

That the Carrier did use a Maintenance of Way employe on the days stated above to perform the work of a janitor in the Carrier's Office building at 410 McKean Ave., Donora, Pa.

That the Railroad Division, Transport Workers Union of America, AFL-CIO does have a bargaining agreement, effective July 1, 1953, covering the Clerical, Office, Station and Storehouse Employes of the Donora Southern Railroad Company, copies of which are on file with the Third Division, National Railroad Adjustment Board, with the Donora Southern Railroad Company, and is by reference herto made a part of this Statement of Facts.

POSITION OF EMPLOYEE: It is respectfully submitted that Mr. James Eckard is an employe of the Clerical Department and holds the position of janitor with the Carrier and was entitled to the work done by a Maintenance of Way employe at 410 McKean Avenue, the Carrier's office building.

That it was improper for the Carrier to use an employe of another department to do this work as Rule 1, "Scope" reads as follows:

Group 2 Clerks' vacancies has in effect established Maintenance of Way employes as regular relief employes as contemplated by this paragraph. The fact remains, however, that if a Maintenance of Way employe could not be considered as a regular relief employe, the Carrier complied with the alternative provision of this sentence by making an effort to observe the principle of seniority. The vacancy was offered to each Group 2 Clerk in seniority order and declined by them.

Paragraph (c) of Article 12 recognizes the right of the Carrier to temporarily hire an outsider for vacation relief purposes and establishes seniority for such employe if used more than sixty days in a calendar year. It follows that if an outsider could be used, an available employe should not be barred from such temporary employment subject to the same requirement with respect to establishing seniority. At all events, as previously stated in connection with our discussion of past practice, the former President of the Local Union (which represents both Maintenance of Way employes and Clerks) elected to give this work to a Maintenance of Way employe in preference to hiring an outsider, thereby retaining the work for members of his Organization.

In progressing this claim, the Organization relied on Rule 2, Paragraph 3 (f) of the Schedule Agreement which is quoted at the bottom of Page 2 hereof. This provision of the Agreement clearly is inapplicable since the work involved in this claim was a part of a regular assignment. It is interesting to note, however, that if this provision would apply to the facts in this case, claimant could not recover because first he was an assigned employe rather than an "unassigned employe" and permitting him to fill the vacancy would give him eighty (80) hours of work that week when the provision in question restricts the assignment to an employe "Who will otherwise not have forty (40) hours of work that week."

In view of the foregoing, it is respectfully submitted that this claim should be dismissed.

It is hereby affirmed that all data submitted in support of the Carrier's position have been submitted in substance to the employes or their duly authorized representatives and made a part of the particular case in dispute.

OPINION OF BOARD: The use of a Maintenance of Way employe, not covered by the Clerks' Agreement, violated the clear language of said Agreement which provides that "Positions or work coming within the scope of this agreement belong to the employees covered thereby * * *." While the verbal understanding by the former President of the Local Union regarding use of Maintenance of Way employes as vacation relief employes was not sufficient to change the clear language of the Clerks' Agreement, there should be no damages for any violation occurring from the time that understanding was reached until the Organization gave notice to the Carrier that the clear language of the Agreement must thereafter be adhered to.

In the present case the Maintenance of Way employe was used in a janitor's position on March 5-9, 1956; the claim herein was filed on March 23, 1956. The claim had the effect of giving clear notice to the Carrier that the literal language of the Agreement must thereafter be complied with, but since the use of the Maintenance of Way employe was prior to said notice the Carrier is not required to pay damages for the March 5-9 violation.

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 the Carrier violated the Agreement but the monetary claim in this instance should be denied.

AWARD

Claim disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Shulty
Executive Secretary

Dated at Chicago, Illinois this 7th day of December, 1960.