Award No. 10014
Docket No. CL-9779

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated and continues to violate the Clerical Agreement when, effective with the close of business May 22, 1956, at Nashville (Radnor Yard) Tenn., it abolished a full time 8 hour scheduled position of Lift Truck Operator, and removed the full eight hours of work from the Scope and operation of the Agreement by reassigning it to a Shop Craft employe.

(2) That the involved work shall be restored to the scope and operation of the Clerks' Agreement and Mr. W. T. Schell, and/or his successors on the Caller position be paid the difference in daily rate of position of Caller and that of Lift Truck Operator for May 23, 1956, and for each and every day thereafter until the Agreement violation is corrected.

(3) That C. C. Alcorn and/or his successors on the Storeroom Attendant's position be paid the difference in daily rate of position of Storeroom Attendant and that of Caller for May 23, 1956, and for each and every day thereafter until the Agreement violation is corrected.

(4) That W. J. North be compensated for eight hours May 23 and 24, 1956, account Carman Helper operating lift truck.

(5) That C. E. Burnett be compensated for eight hours May 25, 1956, account Carman Helper operating lift truck.

EMPLOYES' STATEMENT OF FACTS: Prior to May 23, 1956 there was a lift truck assigned to the Stores Department and a Storeroom employe was assigned to operate it. This lift truck had been operated by an employe covered by the Clerical Agreement since on or about October 25, 1939.

"But carrier contends an investigation developed that it has always been the practice of this carrier, at Los Angeles and other points, for B & B carpenters to assemble metal lockers, although not necessarily on an exclusive basis. Whatever may have been the practice in the past the organization, under a provision of its controlling agreement that is clear and specific in its terms, may, at any time, have it enforced according to its terms."

It is the opinion of this carrier that the employes should be thankful that for so many years one of their class occupied a position which did not belong to them by agreement, in fact was specifically covered by another agreement. We have discussed this dispute on several occasions with Mr. W. O. Poteet, General Chairman, Brotherhood of Railway Carmen of America, who takes the position that since the preponderance of work handled by this lift truck is that belonging to carmen, the assignment of a carman helper was proper and in accordance with the current shopmen's agreement.

There is no merit to the claim of the employes, and it must, therefore, be denied.

All relevant data in support of the position of the carrier has been furnished representatives of the employes.

OPINION OF BOARD: Effective May 22, 1956, Carrier abolished the Lift Truck Position at Radnor Yard, Tennessee, which had been assigned to Group 3 employes of the Clerks Agreement since October 25, 1939. On the following day, May 23, 1956, a new position of Lift Truck Operator in the Stores Department at Radnor that had been advertised that month was awarded to a Carman Helper covered by the Shop Crafts' Agreement.

Petitioner contends that by assigning the work to an employe outside the scope of the Clerks Agreement, Carrier violated Rules 11, 18 and other provisions. Before these rules can properly come into play, however it must be established that the work in question belongs exclusively to the Clerks.

The pertinent part of the Scope Rule provides that the terms of the Agreement shall govern the working conditions of "Laborers in and around stations, warehouses, and storehouses, . . . and those performing other similar work not requiring clerical ability."

This Scope Rule defines coverage in terms of positions and not in terms of work. See Award 7338. It does not mention Lift Truck Operators but Petitioner insists that they are covered by the above quoted portion of the Scope Rule and argues that the lift truck operation in the Stores Department is merely another method of doing work that traditionally has been performed by laborers.

It is true that as a matter of historical practice, Store Department laborers have been covered by the Clerks Agreement for over thirty years. However, we are not satisfied that Petitioner has established by the evidence that Lift Truck Operators fall within the category of laborers or "those performing other similar work." Operating the lift truck and transporting by that machine materials such as car wheels, skids and cylinders does not seem to come within the laborer, or any other, classification specified in the Scope Rule. In the light of the record before us, it is our conclusion that the work of laborers and of Lift Truck Operators is not of substantially the same character. Accordingly the present situation is quite unlike those before

the Board in Awards 3746 (where there was a change from messenger service to pneumatic tubes) and 4448 (where the use of a stationary crane was discontinued and a traveling Krane Kar used in its stead.).

In considering the past practice of the parties as bearing upon the issues of the present case, emphasis has been directed to the fact that Lift Truck Operators at Radnor have been covered by the Clerks Agreement for a period of seventeen years. However, the Agreement is system-wide and it is uncontroverted that at Carrier's South Louisville, Kentucky Stores Department, which is also covered by the rules of that Agreement, Lift Trucks Operators are not Clerks but Shop employes. In this factual setting it cannot validly be stated that the duties of the disputed position belong exclusively to employes within the scope of the Clerks Agreement. We agree with Awards 7031 and 7784 that the fact that work at one point is assigned to one craft for a long period of time is not of controlling significance "when it appears that such work has been assigned to different crafts at different points within the scope of the agreement."

In view of the foregoing considerations, it is our opinion that lift truck operations are not reserved by either express language or tradition and custom to the positions covered by the Clerks Agreement. The claim will be denied.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Clerks Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July, 1961.

DISSENT TO AWARD NO. 10014, DOCKET NO. CL-9779

The majority, consisting of the Referee and Carrier Members, have committed grievous and substantial error in denying the Employes' claim under the false assumption that before certain rules of the agreement "can properly come into play, however it must be established that the work belongs **exclusively** to the Clerks." (Emphasis added).

From this false premise the following untenable conclusions are reached: "This Scope Rule defines coverage in terms of positions and not in terms of work", that the "work of Laborers and Lift Truck operators is not of substantially the same character"; that a practice at another location has the effect of rendering the agreement null and void where the violation occurred; that the transportation of company materials "such as car wheels, skids and cylinders (in the store department) does not **seem** to come within the laborer, or any other, classification specified in the Scope Rule." (Emphasis and parenthesis added).

It is crystal clear that the Majority's assumptions, speculations and conclusions, above enumerated, are farfetched, untenable and illogical when viewed in the light of the pertinent and controlling facts, the governing rules, the manner in which the work had traditionally and customarily been performed under the scope of the subject agreement by Group 3 laborers and the many awards of this Division that have recognized and applied the controlling principles under similar circumstances, which were contrary to the unsupported conclusions reached in this award.

It is conceded under "Opinion of Board" that:

> "The pertinent part of the Scope Rule provides that the terms of the Agreement shall govern the working conditions of 'Laborers in and around stations, warehouses, and storehouses, . . . and those performing other similar work not requiring clerical ability.' "

Therefore, it is beyond my comprehension how the Majority could then conclude in the following paragraph that:

> "This Scope Rule defines coverage in terms of position and not in terms of work."

A review of the subject Scope Rule will show that it clearly defines coverage in terms of employes, positions and work. It is a historical fact that the work reserved to a craft or class of employes is that which has traditionally and customarily been performed by them over a long period of time. The instant record shows that store laborers had performed the disputed work under the scope of the Clerks' Agreement for a period of 30 years, and that 17 of such years they had performed such work with a lift truck. Apparently, the Majority overlooked the well established and fundamental principle that the method of performance does not change the character of the work.

A review of Award 7338, upon which the Majority relies, will show that it is clearly distinguishable from the instant dispute; the Scope Rule there involved being different, the dispute did not involve the abolition of a position under one craft's agreement and the establishment thereof under another craft's agreement, as was the case here. However, it is interesting to note that Award 7338 did further state:

> "* * * In such a case, the work covered by the Agreement is said to be the traditional and customary work performed by the employes assigned to the positions set forth in the Agreement. * * *" (Emphasis added)

In Award 1314, Referee Wolfe recognized the controlling principle when he stated:

"The agreement by its express terms governs 'hours of service and working conditions.' It does not specify 'work.' Where then does the principle ennunciated in the Awards arise? We think it flows logically from the agreement when all its parts are construed together. The agreement recognizes 'positions.' * * * The biblical adage that 'by their works ye shall know them' applies to 'positions' as well as persons. * * *

* * * * *

From what has been said it is apparent that the two outstanding purposes of agreements are to insure to a craft those positions which fall within the craft, and to insure to the members of that craft the work concomitant to those positions in order of their length of service, for work is to the position what seniority is to the employe. These two principles are the top stone and keystone of the arch. Work is attached to and is an attribute of a position; seniority attaches to and is an attribute of the person."

That the instant position of Lift Truck Operator was established on October 25, 1939, and placed under the Clerks' Agreement and assigned to Group 3 employes is conceded. Further, that it was abolished on May 22, 1956, and transferred out from under the Clerks' Agreement and assigned to an employe covered by the Shop Crafts' Agreement, is also admitted. Therefore, the position of Lift Truck Operator was established to perform the work of Group 3 laborers, i.e., handling and transporting company materials under the custody of the Stores Department at Radnor Yard Store, and assigned to such employes under the Clerks' Agreement seventeen (17) years prior to its removal therefrom. Anyone familiar with store department operations knows that, as a historical fact, that Group 3 laborers, covered by the Clerks' Agreement have always performed the work of handling, storing, unloading, loading, transporting company material in the custody of the store department. In fact, it has been laborers, in the store departments exclusive duties to handle such materials since the mind of man "runneth not to the contrary."

In the face of these undisputed facts, it is hard to understand how anyone could come to the erroneous conclusion that the Petitioner failed to "establish by the evidence" that Lift Truck Operators fall within the category of laborers" or "those performing similar work". Apparently, the author is confused as to the method of performance of work and the character of the work to be performed. He is obviously of the opinion here, which is contrary to an opinion he expressed in Award No. 9984, M.ofW. vs. Reading, that the introduction of a lift truck to perform work that had previously been performed manually, has the effect of removing the work from the scope of the agreement. If this were true, then the Carrier could unilaterally remove work at will anytime it brought new machinery to perform scheduled work that had been reserved to a craft by tradition and custom.

The Award's feeble attempt to distinguish Awards 3746 and 4448 from the instant dispute would be humorous, if it was not so serious. The work covered by the Scope Rule of every craft's agreement has been placed in jeopardy by this erroneous award.

In the instant dispute a Lift Truck Operator position was abolished under the Clerks' Agreement and reestablished under the Shop Crafts Agreement. That the position had been under the Clerks' Agreement for a period

of 17 years and when introduced it was used to perform work that had always been exclusively performed manually by employes under the Clerks' Agreement for over 30 years, was apparently given no consideration by the Referee. It is crystal clear that if the change from manual operation to a lift truck operation did not have the effect of taking the work out from under the Clerks' Agreement in 1939; it could not be held to do so 17 years later. Therefore, the principles enunciated in Award 3746 and 4448 are on all fours with the present dispute. It should also be noted that nowhere in the Award are there any pertinent awards cited in support of this unpalatable decision.

The first error of judgment was committed here when it was concluded that the burden was upon the Employes to prove that they had the "exclusive right" to the work in dispute. The erroneous theory that no craft has the "exclusive right" to any work covered by the Scope Rule of their agreement was taken out of the context of Award 615. Many referees have been mislead by this unsavory contention and have raised it to the stature of an exception to the Scope Rule. That being so, then the burden of proving an exception to the Scope Rule, justifying the unilateral removal of work from the Agreement, would be on the Carrier and not on the Employes. See Awards 2819, 4538, 5136, 5457, 6063, 6109, 8794, 8798, 9545.

In Award 6063, Referee Wenke ruled:

> "* * * Whether water service repairmen did or did not have the exclusive right to perform it is a matter of fact and, if the carrier claims they did not, then the burden of showing they did not would rest upon it."

Award 10014 clearly attempts to shift the burden of Carrier to prove its defenses upon the Employes contrary to well established principles. Furthermore, the Majority admits the "historical practice" of over 30 years, consequently, they had no alternative than to sustain the Employes' claim.

An analysis of Award 615 will show that Referee Swacker never intended that his statement, that the scope and seniority rules do not purport to accord to the employes represented the "exclusive right" to the performance of the work covered by the agreement, would later be given the meaning attributed to it by various referees, who were looking for an excuse to deny the Employes' claims, or those who found it more expedient "to follow foolish precedents and wink both eyes is easier than to think."

Referee Swacker recognizes the historical, traditional and customary performance of clerical work by Clerks and Telegraphers and stated that the Board did not intend in that case in the slightest to impinge upon or limit the principles asserted by the Clerks. He further ruled:

> **"The right to exclusive performance in the absence of exception arises from the application of an elementary principle of law.** The 'schedules' are not and do not purport to be the agreement of employment. The agreement of employment is almost universally unwritten. The 'schedules' are merely the subordinate rules and conditions of such employment. The actual contract of employment itself is implied. **Since by the patent facts such a contract must exist, as an elemental principle of law it must have a determinable subject matter; stated differently, there can be in law no such thing as a contract but that its subject matter is susceptible of definite**

> **determination. It follows from this that in the absence of some definite exclusion, the contract must be deemed to embrace all of the field involved to be a valid contract at all. If it were purely optional with the Carrier to say how much or what of a definite kind of work was the subject matter of the contract, it could say none and the consequence would be in the absence of a subject matter that there would be no contract.** Whatever if any exceptions exists will fall into one or the other of two classes — (a) those directly expressed in the exceptions to the scope rule of the schedule and (b) those which may be definitely demonstrable extraneously. The latter class might be shown by definite evidence such as clearly provable agreement of the parties or by implication arising from the conditions surrounding the making of the agreement; **in the last class of cases, however, the Board should be extremely slow to find the existence of such exceptions and only upon unmistakable proof. Practice alone would be insufficient grounds because of the inequality of the relative status of the parties to make such practice. There must be definite evidence of actual acquiescence.** (Emphasis added)

> "What has been said does not, of course, permit arbitrarily switching of a position from one agreement to the other merely to evade the rules of the one because of its higher wage rate. * * *."

The referees that have relied upon the unsavory "exclusive right" theory in denying claims have overlooked the context of Referee Swacker's rulings. Award 615 was modified by Referee Swacker in Award 636, wherein he confined it entirely to disputed clerical work performed by Clerks and Telegraphers under certain conditions, which were explained by Referee Carter in Award 4288, as:

> "We think the rule stated in Award 615, as limited by Award 636 and other subsequent awards, means that telegraphers with telegraphic duties to perform have the right to perform clerical duties to the extent necessary to fill out their time, but that said clerical duties must be incidental to or in proximity with their work as a telegrapher. See Award 3988."

In the instant case, the author of Award 10014 has failed to show any exception to the confronting Scope Rule that would justify the removal of work that had been assigned to covered Group 3 employes for a period of 30 years, nor did Carrier attempt to supply that defect in its allegations. It merely relied upon an agreement that it had executed with another organization covering lift truck operators, effective February 1, 1952, which was 12 years and 4 months after the position was established under the Clerks' Agreement. Carrier also claimed a past practice exisisted at Louisville Stores, where lift trucks were operated under the Shop Crafts' Agreement. It is quite evident that the Referee was greatly impressed by this as he held that the practice at Louisville was controlling and thereby justified Carrier's removal of the work at Radnor Yard Store, where the work had always been performed by Group 3 employes covered by the Clerks' Agreement. We are led to the illogical conclusion then that a violation at one location justifies the removal of work from the scope of the Craft's Agreement at another location, under this type of reasoning. It would be interesting to know what his opinion would have been had Carrier abolished the Shop Crafts' positions at Louisville and then relied upon the past practice at Nashville Radnor Yard Store for justification of its action?

The author of this award overlooked Referee Swacker's admonition in Award 615 supra, that practice alone would be insufficient to justify the unilateral removal of work because of the inequality of the relative status of the parties to make such practice. There must be definite evidence of acquiescence. There was no such evidence presented here. He also overlooked the well established principle that the contract must be deemed to embrace all the work that has been traditionally and customarily performed by employes of a craft in order to be a valid contract at all. As a lawyer he should know that isolated instances of a so-called practice cannot change a traditional and customary fact. It should also be remembered that the number of years that shop craft employes had been performing similar work was not shown. However, it could not have been for very long as Lift Truck Operators were not included within their agreement until 1952. In Award 9245, Referee Schedler ruled:

> "* * * A custom or usage becomes an established past practice when the parties by their tacit approval have acquiesced in the act or custom for a long period of time. On the other hand, a violation may have existed for several years but only recently brought to the attention of the proper official. * * *."

In Awards 137 and 757, the Board held: "That a party to an agreement cannot revise it by repeated violations of it." In Award 5421, Referee Parker ruled that the burden was upon the Carrier to prove the existence of a past practice by stating:

> "The Carrier's first defense is based on custom and practice which, without proof, it asserts has existed for several years. * * * Custom and practice is a defense which must be proved by evidence when traversed. Mere assertions of its existence when denied to (is) not suffice to meet the burden of proof placed on the party asserting it. Therefore Carrier's contention on this point fails for want of evidence to sustain it."

Nowhere in the record did Carrier produce any evidence that the so-called past practice at Louisville has existed for a long period of time or that the Employes had acquiesced therein.

In Award 2553, Referee Blake ruled:

> "We think none of these contentions are tenable. First. The assignment of work, falling within the scope of an agreement, to employes not covered by the agreement cannot be justified by long continued practice. See Awards 180, 425, 458. The best evidence that the work in controversy falls within the scope of the Clerks' agreement is that the work is performed by clerks up to the capacity of the clerical staff on duty. * * *."

In Award 6101, Referee Jasper ruled:

> "Even though the work is not spelled out in the Scope Rule, it has been assigned to employes whose positions are described in the Scope Rule. It has been the practice and custom to assign Clerks at the South Tacoma Shops to do the clock watching. Past practice, custom, and tradition at the South Tacoma Shops have made the clock-watching work, work of the Clerks coming within the Clerks' Agreement. See Award 5404."

In Award 4513, Referee Wenke ruled:

"The Scope Rule of the Agreement herein involved embraces all work on the Carrier's property of the kind and class which employes of the named positions included therein usually and customarily performed at the time of the negotiation and execution thereof. See Awards 180, 323, 602, 757, 779, 906, 1492 and 2812 of this Division. * * *

Where work is within the scope of a collective agreement and not within any exception contained therein or any exception recognized by the Board as inherently existent, that work belongs to the employes under the agreement and may not be taken therefrom with impunity. See Awards 323, 757, 1647, 2465, 2812, 2988, 3251, 3684, 3687 and 3746 of this Division.

* * *"

Also, see Award 1343, Fourth Division, wherein Referee Coburn said:

"The Carrier admits that yardmaster work was performed by 'various officers and clerks and other classes of employes' (ltr. Sept. 4, 1957. Supt. to Gen'l Chrmn.). And in its Submission to this Board, Carrier says, 'The record shows that duties of this nature have been performed by others for many years'. Apparently these statements purport to show that yardmasters do not enjoy an exclusive right to yardmaster work because the custom and practice on this property was to permit others to perform that work.

We do not agree with this theory. Here there is a contract between the Carrier and the representative of the yardmasters. It contains a Scope Rule which does not define the duties to be performed by yardmasters but must be construed to cover work belonging to that craft. To hold otherwise would render the whole agreement nugatory. As was said in Award No. 757 of the Third Division:

> 'It is well settled by many decisions of this and the First Division of this Board and predecessor Boards, that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. See awards of this Division, 180, 323, 521 and 615, of the First Division, 351 and 1257. This conclusion is reached not because of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, but the decisions likewise recognized that there may be other exceptions, very definite proof of which, however, is necessary to establish their status as a limitation upon the agreement. Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it.'

That the instant award is erroneous is evident from the above and following awards of this Division, where the controlling principles have been

restated time and time again. In Award 6284, Referee Wenke reaffirmed what he said in Award 5700, by stating:

> "The Scope Rule of the Agreement herein involved embraces all work on the Carrier's property of the kind and class which employes of the named positions included therein usually and customarily performed at the time of the negotiation and execution thereof. See Awards 4513 and 6101 of this Division.
>
> We find the following, announced in Awards 5526 and 5973 of this Division applicable: As to scope rules similar to that here involved, we have held that while they do not purport to describe work encompassed but merely set forth the class of positions to which they are applicable, yet the traditional and customary work assigned exclusively to those positions constitute work falling within the Scope of the Agreement and it is a violation of the Agreement for the Carrier to permit persons not covered by the Agreement to perform it. See Award 6101.
>
> It is a fundamental rule that work of a class covered by an agreement belongs to those for whose benefit the contract was made. A delegation of such work to others not covered by the Agreement is in violation of the Agreement except as the parties in their Agreement may otherwise provide. See Award 360, 1300 and 1647 of this Division.
>
> When work is within the scope of a collective agreement and not within any exception contained therein or any exception recognized by the Board as inherently existent, that work belongs to the employes under the agreement and may not be taken therefrom with impunity."

Also, see Awards 179, 180, 323, 360, 751, 1210, 1259, 1384, 1647, 2071, 2686, 3251, 4651, 4934, 5196, 5200, 5973, 7203, 7816 and 9477.

Awards 754, 2005, 2051, 2737, 3396, 5024, 5197, 6179, 7287, 7311, 9395, 9546, 9547 held that the agreement was violated under similar circumstances, i.e., where a fully covered position was discontinued and recreated outside the Agreement.

For the above reasons, I vehemently dissent to this award.

/s/ J. B. Haines
J. B. Haines
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD NO. 10014, DOCKET NO. CL-9779

In the main, the dissent consists of nothing more than a restatement of the position taken by the Labor Member in the handling of this dispute, all of which was found lacking in merit by the majority. The restatement of the arguments in the dissent does not add to their persuasiveness.

No purpose can be served by further arguing the issues that have been decided by the majority. It is elementary that claims to work which is not exclusively reserved under the scope rules of agreements must be denied,

and that performance thereof cannot per se change agreements. Accordingly, lamentations over Award No. 10014 and others so holding are to no avail.

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen