

Award No. 11126

Docket No. CL-10760

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY**

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

(a) Carrier violated and continues to violate the provisions of the Clerks' Agreement at Peoria, Illinois when it removed certain routine work from the scope of the Agreement and requires or permits its performance by others not covered by the Agreement rules; and,

(b) Such work shall now be returned to the scope and operation of the Agreement; and,

(c) The following clerks shall be paid at the rate of straight time for 8 hours per day for the following days;

(d) B. W. Berkshire, Yard Clerk, for October 30 and 31, 1957.

(e) L. A. Atkinson, Yard Clerk for October 20 and 27, 1957.

(f) R. F. Norman, Yard Clerk, for October 19, and 26, 1957.

(g) M. G. Harris, Yard Clerk, for November 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, and 15, 1957.

(h) A. W. Kutkat, Yard Clerk, for November 2 and 6, 1957.

(i) B. W. Berkshire, Yard Clerk, for November 3 and 9, 1957.

EMPLOYEES' STATEMENT OF FACTS: As of July 2, 1957 there existed at Peoria, Illinois three Yard Clerk positions working around the clock. Part of the assigned duties of these Yard Clerks was the marking of the Switchmen's Board. This operation consisted of the changing of the names of the switchmen on the board which designated the date and time of their working shift; also keeping of a record in a Journal Book on the Yardmaster's or Yard Clerk's desk as to the time the switchmen called in and noting whether he was reporting to work from a layoff or desiring a layoff. Up to July 2, 1957 this work was exclusively performed by any clerical worker assigned to work any one of these Yard Clerk positions. Subsequent to July 2, 1957 the work of marking the Switchmen's Board was unilaterally assigned to the Yardmaster.

Awards 4827, 4889, 5702, 6409, Third Division. Award 1626, Second Division."

Third Division Award No. 8381 makes reference, in part, to the above quoted paragraph of Award No. 7031 in denying claims of clerks on the Chesapeake and Ohio Railway.

CONCLUSION

The Carrier believes that it has conclusively shown by abundant evidence that the instant claims are:

- (a) subject to dismissal by the Board unless proper notice is served on the third party in interest and opportunity for hearing given,
- (b) outside the provisions of the rules for the progressing of claims and grievances (time limits on claims rules),
- (c) not supported by any provisions of agreement nor by past practice.

These claims are therefore completely without merit or validity and Carrier respectfully requests that this Division render an award sustaining the position of the Carrier.

Carrier affirmatively asserts that all material in support of its position has been presented to Employees and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: On and immediately prior to July 2, 1957 there were three yard crews at the Peoria station. Three switchmen, consisting of a foreman and two helpers, were assigned to each crew. A relief crew was assigned to work on rest days. Thus, there were a total of twelve switchmen at the station.

Prior to July 2, 1957 there were also three Yard Clerk positions on each shift. These Yard Clerks, among other things, marked the Switchmen's Board which showed the assignment of crews. This work was done under the supervision of the Agent or Yardmaster. Subsequent to July 2, 1957 the Carrier directed and assigned the marking of the Switchmen's Board to the Yardmaster. Claimants request pay for dates noted in the record because Carrier wrongfully removed work which, they contend, rightfully belongs to them.

The Carrier raises two procedural and jurisdictional questions. First, they contend that the claim should be dismissed because the Employees bypassed the General Superintendent and appealed the claims directly to the highest designated officer. On May 23, 1956 Carrier notified the Employees that the channels of appeal for the Operating Department should be:

"Initial Appeal—Trainmaster or Department Head
Second Appeal—General Superintendent
Final Appeal—Chief Personnel Officer"

After the Trainmaster denied the claims, the Employees appealed directly to the highest officer, ignoring the Second Appeal to the General Superintendent. A copy of the letter to the Carrier's Chief Personnel Officer was simultaneously sent to the General Superintendent. In a letter dated January 24, 1958 Carrier's Chief Personnel Officer and Assistant to the President replied denying the claims on the merits. No procedural defect was raised in the letter. This Board

has consistently held that such procedural defects may be waived by the parties. The Carrier has so waived it in this instance.

Second, the Carrier argues that the Yardmasters are involved in this dispute and that even though that Organization was given an opportunity to be heard in accordance with the provisions of Section 3, First (j) of the Railway Labor Act, and even though that Organization has waived such opportunity to be heard, the Yardmaster's Agreement is, nevertheless, before this Board and that any Award rendered in this case is final and binding on the Yardmasters.

The provisions of Section 3, First (j) of the Railway Labor Act was complied with on May 12, 1961. The Executive Secretary of this Board notified the Yardmasters Organization of the pendency of this dispute and advised them that they had the right to appear, to set out their rights and position, and to be heard. By letter dated May 25, 1961 the Railroad Yardmasters of America waived that right. By such waiver the Yardmasters' Agreement is not before this Board and they are not a party to this dispute. We have only the Agreement between the parties herein involved to consider and to apply that Agreement to the dispute before us. Although the Awards of this Board and the Boards of other Divisions are not unanimous on this subject, we believe that the better reasoned Awards hold that we have no right to consider the Agreement of a party that is not properly before the Board. See Awards 9658 (Fleming), 7915 (Shugrue), 5993 (Jasper), 6203 (Shake) and 2253 (Swain). The Award of the Board in this case affects only the Carrier and the Clerks.

The Employees argue that the work of making the Switchmen's Board belongs to the Clerks. They cite an order issued by the Trainmaster on February 3, 1954 which read as follows:

"Yardmasters:

Yard Clerks:

All Clerks:

Effective immediately Yardmasters will discontinue any part of marking the switchmen's board at Peoria. Yard Clerk working the First Trick will take over this duty entirely. Switchmen will contact the yard clerk on duty day or night for purpose of laying off and the clerk receiving the request will enter it in the lay off book for the guidance of the first trick man in making his next markup. This will also apply to men OK'ing for their assignment after laying off. Extra men will as in the past receive their markup between 12 noon and 1 P. M. Board will be dead between these hours."

The Scope Rule does not describe or define the work of the jobs classifications in the Agreement. It only lists the job classifications. We have consistently held that "proper coverage is to be determined from the facts regarding custom, usage and practice on the property." Award 8793 (Daugherty).

The record shows that the "actual marking of the switchmen's board averages less than five minutes per day." It also shows that this work was for many years the responsibility of the agent at the station. During "this time there was never any difficulty or controversy with the clerks and no claims were filed even though the duty of marking the switchmen's board was shared by the agent, yardmasters and yard clerks." Even the order of February 3, 1954 upon which the Employees rely specifically says that effective on that day "Yardmasters will discontinue any part of marking the switchmen's board at Peoria." Surely, the Yardmasters did this work prior to that date.

The issuance of the order of February 3, 1954 above does not prove that the Clerks have exclusive right to this work. The Employees have not proven this by a preponderance of evidence. On the contrary, the letter of the Trainmaster to the General Superintendent dated January 11, 1958 clearly establishes the fact that the work was done by the Agents, the Yardmasters and the Clerks. Nowhere in the record do the employees categorically deny this fact nor is there evidence that this work was ever exclusively assigned to the Clerks. There is no reason to prohibit the Carrier, under these circumstances, from assigning this work to any of the employees mentioned as the necessities of the business require.

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

Claims are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of February 1963.

CONCURRING OPINION TO AWARD NUMBER 11126, DOCKET NUMBER CL-10760

We concur with the decision on the merits. However, we do not agree with the conclusions regarding the effect of notice under Section 3, First (j).

/s/ T. F. Strunck
/s/ P. C. Carter
/s/ R. A. Carroll
/s/ W. H. Castle
/s/ D. S. Dugan

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' "CONCURRING OPINION TO AWARD NUMBER 11126, DOCKET NUMBER CL-10760"

Having voted to adopt Award 11126, the Carrier Members are in no position to take issue with the conclusions reached regarding the effect of notice under Section 3, First (j), of the Railway Labor Act.

Their contentions in this respect have been repeatedly rejected by the Division and to continue to argue such trivia is foolhardy and an insult to our intelligence. See Award 11100 and Labor Member's Reply To Carrier Members' Dissent To Award No. 9658, Docket No. CL-9444.

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