

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

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

NEW YORK CENTRAL RAILROAD
(New York District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, New York Central Railroad, Eastern District (except Boston Division):

1 — That Carrier violated the Clerks' Agreement, when on Labor Day, September 1, 1958, Thanksgiving Day, November 27, 1958, Christmas Day, December 25, 1958 and New Year's Day, January 1, 1959, it directed and required a Class 1 Ice Clerk at its 33rd Street Freight Station, New York, N.Y., to perform the work of Mr. R. Simmons, a Class 2 Ice Laborer, such work being that which was regularly assigned to Ice Laborers, employees carried on the Class 2 seniority roster.

2 — That Carrier violated the Clerks' Agreement when, on Thanksgiving Day, November 27, 1958, Christmas Day, December 25, 1958 and New Years Day, January 1, 1959, it directed and required a Class 1 Ice Clerk at its 33rd Street Freight Station, New York, N.Y., to perform the work of F. Mazzaella, a Class 2 Ice Laborer, such work being that which was regularly assigned to Ice Laborers, employees carried on the Class 2 seniority roster.

3 — That Carrier be required to compensate the affected employees at the punitive rate for each day (eight hours) as follows:

Mr. R. Simmons — Sept. 1, 1958	Mr. F. Mazzaella — Nov. 27, 1958
Nov. 27, 1958	Dec. 25, 1958
Dec. 25, 1958	Jan. 1, 1959
Jan. 1, 1959	

In Award 9217 the Findings read, in part:

"It is a universal tenet of construction of contracts that the interpretation which the parties themselves gave to the contract by their conduct will ordinarily be controlling. This tenet of construction has not the same force in the railroad industry as it has where the parties have equal freedom of conduct. The railroad industry is quasi military in the sense that an employe must generally obey orders of his superior and make complaint afterwards if he thinks the rules

have been violated. Repeated violations cannot establish a right on the part of the carrier to continue them, nor work a modification of the rule. But where there is an ambiguity in the rules, or, as in this case, more than an ambiguity, i.e., a direct conflict, failure to complain over a long period of time has great probative value in resolving that conflict."

The Organization is attempting to obtain, through a favorable decision of your Board, a new and more liberal application of their rules. The Organization has no rule or interpretation to support their claim.

CONCLUSION

The Carrier has shown that the present claim is without support in fact or in agreement rule and claimants have been properly compensated on the dates of claim. It is without merit and should be denied.

All data and evidence have been made known in conference or through correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: Claim is made by Organization on behalf of R. Simmons and F. Mazzarella, Class II, Ice Laborers, that on certain specified holidays they were not called by Carrier and the work that they regularly did was performed by Class I, Ice Clerks. Organization requests that Carrier compensate Claimants at punitive rates for each day cited because of alleged violation of the Clerks' Agreement. Reference is made to Rule 1 of the Scope and Rules 5, 15, 32, and 35(e). Carrier contends it was not bound by agreement to call Ice Laborers on the holidays indicated.

The controlling issue is whether Class I, Ice Clerks, may perform duties of Class II, Ice Laborers, incidental to their duties without violating the agreement of the parties. Organization regards the failure of Carrier to use Ice Laborers to open and close ice bunkers on the holidays, duties performed by them during the week, as a device to avoid paying punitive rates, and to destroy the two seniority rosters existing in the geographic area. The Scope Rule of the Agreement does not exclusively reserve the opening and closing of ice bunkers to Class II, Ice Laborers. The two seniority rosters serve to provide a classification of higher and lower employes primarily for pay basis. The existence of these two seniority lists does not imply exclusive rights to open and close ice bunkers to Class II, Ice Laborers, nor does it prohibit Class I, Ice Clerks, from performing this work.

We recognize that on week days, Class II, Ice Laborers assisted Class I, Ice Clerks, but the fact that they were needed during the week does not make

it mandatory that they be hired on the holidays. It is reasonable to expect a Class I, Ice Clerk, who has the right incidental to his main duty of inspecting and record keeping, to open and close the hatch covers of the bunkers without the assistance of Class II, Ice Laborers, to do so; especially since there was not enough work on these holidays to justify the need of assistance. We believe, therefore, that Organization has not shown that Carrier deliberately and arbitrarily intended to destroy the separate classification when it failed to call Class II, Ice Laborers, on holidays to avoid paying punitive rates. Under these circumstances, we conclude that the claim does not have merit.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 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 9th day of October 1963.