

Award No. 11942
Docket No. CL-11231

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

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

1. Carrier violated and continues to violate the Clerks' Rules Agreement, including paragraph six of Memorandum of Agreement dated January 13, 1958, when effective July 1, 1958 and thereafter it unilaterally transferred work from the Terre Haute Division, former Seniority District No. 35, to Seniority District No. 30.
2. Employee Donald Ziems be compensated for eight (8) hours at the pro rata rate of Position No. 233, which was \$17.776 on date of abolishment, for each day from and including July 12, 1958 to date violation is corrected.
3. Employee R. P. Dorfmeier be compensated for eight (8) hours at the regular pro rata rate of Relief Position No. 2, which was \$17.776 on date of abolishment, for each day from and including July 12, 1958 to date the violation is corrected.
4. Employee P. Nunley be compensated eight (8) hours at the regular pro rata rate of Relief Position No. 2, which was \$17.776 on date of abolishment, for each day, commencing with the date he was displaced by Employee W. E. Hasty, until the violation is corrected.
5. Employee W. E. Hasty be compensated eight (8) hours at the regular rate of Position No. 207, which was \$17.776 on date of abolishment, for each day from and including July 12, 1958 until the violation is corrected.
6. Employee Elroy Luecke be compensated eight (8) hours at the punitive rate of Position No. 212 at Chicago Heights, Illinois, which was \$17.776 on date violation occurred, for each Sunday from date

position was changed from a 7-day to a 6-day position until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to July 11, 1958 the following positions were in effect at Faithorn, Illinois:

Pos. No.	Title	Occupant	Assigned Hours	Rest Days	Rel. By
4	Chf Yd Clerk	W. E. Hewitt	9:00 a - 5:00 p	Sun & Mon	#1
233	1st Yd Clerk	D. Ziems	7:30 a - 3:30 p	Mon & Tues	#2
232	2nd Yd Clerk	A. Sellers	3:30 p - 11:30 p	Tues & Wed	#1(T) #2(W)
207	3rd Yd Clerk	W. E. Hasty	11:30 p - 7:30 a	Wed & Thurs	#1
Rel. #1		R. Buchanan		Fri & Sat	
Rel. #2*		R. Dorfmeier		Thurs & Fri	

*Relief Position #2 relieved Position 212 at Chicago Heights on Saturday and Sunday

Effective July 1, 1958 the interchange of cars between the IHB, BOCT and Milwaukee railroads was discontinued at North Harvey, Illinois.

On July 8, 1958 Superintendent N. H. McKegney issued Bulletin No. 197 to employes in District No. 30, notifying them that effective as of July 11, 1958 the following positions would be abolished:

1st Yard Clerk Position No. 233

2nd Yard Clerk Position No. 232

3rd Yard Clerk Position No. 207

Relief Clerk No. 1

Relief Clerk No. 2

Concurrent with this notice, Superintendent McKegney issued Bulletin No. 198 advertising 1st Yard Clerk Position No. 233 and Bulletin No. 199 advertising Relief Clerk Position No. 1. Position No. 233 was awarded to Employee A. Sellers and Relief Clerk Position No. 1 was awarded to Employee D. Ziems.

These changes took place while Employee Buchanan was on vacation. When he returned to work he exercised seniority over Employee Ziems, which reduced Employee Ziems to the furloughed list. Employee Hasty exercised seniority over Employee Nunley at Joliet, Illinois, thereby reducing Employee Nunley to the furloughed list. Employee R. Dorfmeier, occupant of former Relief Position No. 2, was also reduced to a furloughed status.

There has been a net loss of three jobs at Faithorn and three employes—Ziems, Nunley and Dorfmeier—reduced to the furloughed list. Account his physical condition, Employee Ziems was not qualified to perform the work of trucker at Joliet and this resulted in Employee Hasty taking the position.

been confronted with request for re-arrangement of interchange, these changes would have been made regardless of whether the Terre Haute Division was operated apart from the Chicago Terminal Division or whether the territories were operated under the jurisdiction of one superintendent. Moreover, this change in the handling of interchange cars, in the normal management of its operations, would have been made regardless of whether or not there had been executed the Memorandum of Agreement effective January 16, 1958, and we submit that the operational changes made in connection with the handling of interchange were not made in violation of any portion of that agreement, nor with any thought of infringing in any way upon the provisions of that agreement.

The work which forms the basis of this claim has always been performed by clerical employees at Bensenville and such work has fluctuated from time to time or even from day to day, depending on various conditions. As we have said, such clerks are devoting no more time today to such work than they have at various times in the past. There has been no transfer of work as between Seniority District No. 35 and Seniority District No. 30 and there is no basis whatever for the claims which have been presented.

All data contained herein has been made known to the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties entered into an Agreement, effective January 16, 1958, consolidating two Seniority Districts. The following provision was part of the consideration:

"6. With the exception of any transfer of work of positions abolished prior to January 17, 1958, effective that date and for a period of one year thereafter there will be no transfer of work or duties of positions from the present Terre Haute Division to the Chicago Terminal Division; likewise, effective January 17, 1958 and for a period of one year thereafter there will be no transfer of work or duties from the Chicago Terminal Division to the present Terre Haute Division."

It is the contention of Petitioner that Carrier violated the above provision when, effective July 1, 1958, it transferred the interchange of cars and related work from the Terre Haute Division to Bensenville and Chicago Terminals.

In considering the principle of contract law here involved, we can assume that Carrier, as contended by it, did not have control of designating points of interchange. But, at the time the Agreement was executed Carrier admits it had knowledge of the possibility that during the term of the provision, here involved, interchanges then being made in the Terre Haute Division might be shifted to another Seniority District. Notwithstanding this knowledge of a contingency, Carrier entered into an absolute contract not to remove the work from the Terre Haute Division.

Since the contingency was known to Carrier and its occurrence could have been guarded against by Carrier, it is reasonable to assume that Carrier took the risk of transfer of interchanges from the Terre Haute Division. Having bound itself absolutely the occurrence of the contingency did not release Carrier from its promise not to transfer "work or duties of positions from the present Terre Haute Division." Therefore, we find that Carrier's complained of

action violated the Agreement; and, it was a continuing violation from July 12, 1958 to January 17, 1959.

As to Claimants Dorfmeier, Nunley and Luecke, we dismiss the claim. Claims on their behalf were not presented in accordance with Section 1(a) of Article V of the National Agreement of August 21, 1954, to the designated officer of Carrier authorized to receive claims or grievances in the first instance.

As to Claimants Ziems and Hasty, we will award that each of them be made whole for any loss of wages suffered, because of the violation, in the period from July 12, 1958 to January 17, 1959. The amount payable to each of them shall be the difference between what he would have earned in the period absent the violation less his actual earnings during said period.

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 Carrier violated the Agreement in part.

AWARD

Paragraph 1 of the claim is sustained.

Paragraphs 2 and 5 of the claim are sustained with monetary award to be computed as prescribed in the Opinion.

Paragraphs 3, 4 and 6 of the claim 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 December 1963.