Award No. 13605
Docket No. CL-6857

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) 'That, the Carrier violated and continues to violate the Rules of the Clerks' Agreement, when, on August 18, 1951, it arbitrarily and unilaterally removed work, that for many years had been assigned to and performed by AAR Clerk's positions, from such positions and assigned it to and required and/or permitted it to be performed by employes not covered by said Agreement, and as a penalty for the violation,

(2) That Clerk M. J. Arrighi and/or his successor(s) at Richmond, Virginia, be compensated for five hours and forty minutes at the time and one-half rate of his position, plus subsequent general wage increases, for December 1, 1951, and the same number of hours and minutes for each working day subsequent thereto until the violation is corrected by returning the work to an employe covered by the Clerks' Agreement.

That all other employes adversely affected, at Richmond, Virginia, be compensated for all losses sustained account of this violation for December 1, 1951, and subsequent thereto, until the violation is corrected.

(3) That Clerk W. H. Powers and/or his successor(s) at Hamlet, North Carolina, be compensated for eight hours at the time and one-half rate of his position for Saturday, August 18, 1951, and the same for all Saturdays subsequent thereto and, for four hours at the time and one-half rate of said position for August 20, 1951, and the same for all subsequent assigned work days until this violation is corrected by returning this work to a position covered by the scope of the Clerks' Agreement.

That all losses sustained by all employes affected or who may become affected at Hamlet, North Carolina, be paid for August 18, 1951, and subsequent thereto, until the violation is corrected.

(4) That Clerk O. L. Braswell and/or his successor(s) at Monroe, North Carolina be compensated for four hours at the time and one-half rate of his position for August 20, 1951, and subsequent thereto, until the violation is corrected by returning this work to a position covered by the Clerks' Agreement.

That all losses sustained by all employes affected or who may become affected at Monroe, North Carolina, be paid for August 20, 1951, and subsequent thereto, until the violation is corrected.

(5) That Clerk C. R. Virnelson and/or his successor(s) at Savannah, Georgia, be compensated for eight hours at the time and one-half rate of his position for October 25, 1951, and subsequent thereto, until this work is returned to an employe covered by the Clerks' Agreement.

(6) That Clerk J. D. Burfoot and/or his successor(s) at Jacksonville, Florida, be compensated for four hours at the time and one-half rate of his position, plus subsequent general wage increases, for January 7, 1952, and the same number of hours for each working day subsequent thereto, until the violation is corrected by returning the work to an employe covered by the Clerks' Agreement.

That all employes adversely affected at Jacksonville, Florida, be compensated for all losses sustained account of this violation for January 7, 1951, and subsequent thereto, until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Several days prior to August 18, 1951, the following letter was sent to the AAR Clerks at Richmond, Virginia; Hamlet, North Carolina; Monroe, North Carolina; Savannah, Georgia and Jacksonville, Florida, by their superiors.

"Effective August 18, 1951 you will discontinue going to the car for the purpose of performing AAR write-up repair card work."

This was a duty which had been assigned to and performed by AAR Clerks for years. This required the AAR Clerk to go to the car in the repair yard and write the original record of material used in making the repairs as well as the labor hours required to perform the work. Such was in accordance with the provisions of Rule 7 of the Code of Rules governing the condition of, and repairs to freight and passenger cars adopted by the Association of American Railroads, which states:

"When repairs are made to a foreign car (except as otherwise provided in Rule 108), or to any car on the authority of a defect card, the original record of repairs shall be written at the car on billing repair card, * * *."

The above quoted letter evidences the fact that this duty was assigned to and performed by Claimants. In advertising these positions for bid the duties shown on the bulletins would require the applicant to be familiar with the AAR Code of Rules and write up of AAR repair bills, checking and recording cars on repair tracks.

In Award 2334, Referee Edward F. Carter participating, the Board said:

> "It is the rule established by this Division that a foreman or other employe may properly perform clerical work incidental to his regularly assigned duties. Such work is treated as excluded from the Clerks' Agreement. But when such clerical work becomes too burdensome, it may not then be assigned to employes other than clerks. The joint check appearing in the record has been carefully examined and the conclusion reached is that the clerical work performed by the foremen and mechanical employes therein mentioned was incidental to their assigned duties. It clearly had to do with their own work and, under such circumstances, the amount and nature of the clerical work done is of no import. It is not violative of the Agreement. See Award No. 2138."

Once again we submit that the work in dispute is work incident to the duties of mechanical employes authorized to inspect cars to determine repairs necessary and is work that can be required of carmen, carmen supervisors and car foremen whom the Carrier considers qualified and authorizes to perform inspection work.

(6) As to the monetary claim — assuming but not conceding that the Carrier violated the Clerks' Agreement when it required mechanical employes to do the "write-up job", there is absolutely no basis for the monetary claim as filed. The claimants have not been deprived of working their assignments and no positions have been abolished as a result thereof, consequently they have suffered no loss. As to the unnamed claimants mentioned in the second paragraph of Items 2, 3, 4, and 6 of Statement of Claim, Carrier affirmatively states that no employes have been adversely affected; therefore, no loss sustained. At any rate, no such employes allegedly sustaining a loss have been named and this portion of the claim cannot be considered. See Third Division Awards 4734, 5196, 5255, 5283, 5375, 5652 and 6179.

Carrier contends that the clerical agreement has not been violated; therefore, the claim should be further denied.

All data used herein has been discussed with or is well known to the Employes' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves the preparation of "billing repair cards", in compliance with the rules of the Association of American Railroads. This process is commonly called "AAR write-up". The work in dispute consists of entering information on a form, concerning authorized repairs made to freight cars owned by other Carriers, which cars are, for the time being, on the lines of the respondent Carrier.

There were 47 car repair yards on the lines of this Carrier at the time the instant claims were filed. This particular case is concerned with five of these points, where the clerks allege that the Carrier has deprived them of AAR write-up work, and assigned it to employes not covered by the Clerks' Agreement. It is understood that there have not been any clerks positions abolished as a result of the action of the Carrier. This was possible because

of additional work being assigned to the employes and the fact that each of the Claimants had sufficient seniority to remain in the department.

First, we should discuss the history of this docket. Notice of intention to file this claim was given to the Board, September 23, 1953. Award 7816 was adopted April 22, 1957, sustaining the claim. The Carrier members filed a dissent to the majority decision. A petition for rehearing and reconsideration was filed June 21, 1957. This petition was denied on July 23, 1957.

An injunction was filed, by the Carrier, in the United States District Court on August 28, 1957, seeking to prevent the enforcement of the award and asking that it be declared a nullity. (Civil Action No. 57 C 1448). The United States District Court for the Northern District of Illinois, Eastern Division, granted the injunction on March 13, 1959 and decreed that "Award No. 7816 of the National Railroad Adjustment Board, Third Division, and the accompanying order are null and void". It should be pointed out that the court's action was based on the proposition that there had been no third party notice, as required by law. It did not attempt to examine the merits of the claim.

The Petitioner requested the Division to rehear and redetermine the dispute on June 11, 1959. The request was denied on August 3, 1959.

Petitioner then filed suit April 26, 1960, seeking a mandatory injunction, to require the Division to reopen and rehear the Docket. The United States District Court for the Northern District of Illinois, Eastern Division, granted the injunction and ordered that notice be given to all parties involved in the dispute (Civil Action No. 60 C 636). Accordingly, Docket CL-6857 was reopened on June 12, 1962; notice was properly given to all persons and parties involved in the dispute, and the matter is presently before us for a determination of the merits of the claim.

It is basic in claims of this nature, that the Organization must prove that it has the right to perform the work in question, to the exclusion of all others, to whom the Carrier may have assigned the duties.

There does not appear to be any basis for a contention that the work in question is reserved to the clerks under their agreement. Therefore, the Board has held, that the employes must show that they have the exclusive right to perform this work on the basis of past practice, custom and tradition. It seems that the point of contention in this case, is whether that past practice must be system-wide, or whether it can be calculated on a separate point or location basis.

In the instant case it is admitted that the Petitioners have a long history of performing the work in question at the five locations involved in this claim. It is also admitted that at some 42 other points on this line the work was being performed by other than clerks.

In deciding this claim in Award 7816, the Referee found:

> "Thus we are confronted with the question whether or not different customs and practices, if found to exist at different points on a property can be said to properly exist at these points. We think that they can."

We would contrast this finding with Award 7031, Carter:

> "Where work may properly be assigned to two or more crafts, an assignment to one does not have the effect of making it the exclusive work of that craft in the absence of a plain language indicating such an intent. Nor is the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement."

And in Award 10014, we said:

> "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 addition to asserting that the work involved is not exclusively reserved to the clerks, the Carrier argues that the work is in fact to be considered incidental to the duties of the carmen. We are singularly impressed by the following language found in the Organization's original ex parte submission:

> "We agree that there are points on this property where clerks are employed and others where no clerks are employed, and the write up repair card bills, for repairs to foreign cars, are written by carmen and others. At these points such work is considered as incidental to their duties. However, when clerical positions were created and Carrier assigned to them these duties which had been performed by carmen and supervisors as incidental to their positions, the clerical positions and these duties came under the Scope Rule of the Clerks' Agreement, there to remain unless and until properly removed."

There seem to be two propositions which flow from this statement. First, it is admitted that at certain locations this work is incidental to the carmen. It is difficult to understand how the work could be incidental at one location on the line, and not incidental at another location. Secondly, it appears that at some locations the clerks actually received this work when it was removed from the carmen. Therefore, we fail to understand how it could be argued that even at these locations the work is historically reserved to the clerks.

We are of the opinion that the Organization has failed to sustain the burden of proof necessary to prove that the work in question is reserved exclusively to the clerks. We therefore hold that the claim should 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 Employes involved in this dispute are respectively Carrier and Employes 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 21st day of May 1965.