

Award No. 13812

Docket No. CL-13987

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5337) that:

1. Carrier violated the Clerks' Agreement, February 22, 1962 at the Niagara Frontier Food Terminal, Buffalo, N. Y. when they blanked position of Loader and required and permitted Mr. George Preisch, General Foreman, an NKP employe, holding an X-1 position not fully covered by the Clerks' Agreement, to perform duties normally performed by Loaders on track at Niagara Frontier Food Terminal.

2. That Carrier shall now compensate Mr. Anthony Klein one day's pay at time and one-half for February 22, 1962 (Washington's Birthday) on account of violation of the Clerks' Agreement. (Claim No. 1367.)

EMPLOYEES' STATEMENT OF FACTS: At Buffalo, N. Y., receivers of perishable freight have their cars placed on sidings in the Niagara Frontier Food Terminal where they are accessible for either partial or total unloading at the direction of the owner of the freight. Railroad employes titled Loaders are on hand to accept orders from the owner to permit unloading of portions of the carload consignment and reseal the car when such delivery has been made to the party purchasing the quantity of the commodity indicated on the order from the owner thereof.

Mr. Anthony Klein holds a regular assigned position of Loader, working 6 A. M. to 3 P. M., Monday through Friday. He was notified on February 21, 1962 that his position would not work the following day, Thursday, February 22, 1962, a national holiday. Mr. Klein is an Erie-Lackawanna Railroad employe having secured his position at this location through the bulletin, bidding and assignment process in accordance with the rules of the Clerks' Agreement. Thursday, February 22, 1962 would have been a regular work day in Mr. Klein's work week had it not been a holiday.

Mr. George Preisch is the regularly assigned General Foreman, a Nickel Plate employe, having been appointed to such position in accordance with Memorandum of Agreement effective October 1, 1946, employes' exhibit A.

Scope of the Agreement when it was assigned to and performed by the Assistant Agent, so therefore, no violation of the Agreement occurred.

See Awards 3563 and Interpretation No. 1 to 3563, 3866 and 4235.

* * * * *

Claim denied."

Common sense and logic alone dictate that a partially excepted position is not precluded from performing work coming under the scope of the rules agreement. This is made manifest by the very fact that the parties agreed that the partially excepted position was embraced under the scope of the parties' rules agreement. Most certainly if a partially excepted position can take over all the duties of a fully covered position that is abolished, such as held by this Division in Awards 4235 and 7348, supra, then it must be recognized that a partially excepted position is not precluded at any time from performing work covered by the scope of the applicable rules agreement. It should not be otherwise held by this Board for the reasons and facts shown.

IV. CONCLUSION.

Carrier has hereinbefore shown that Petitioner has not, consistent with the dictates of this Board, assumed the burden of proof as it must during the handling of this dispute on the property. This being so, under the explicit provisions of both the Railway Labor Act, as amended, and this Board's Circular No. 1, dated October 10, 1934, Petitioner is now precluded, even if it has such evidence which Carrier doubts, from coming forward with any evidence in its submission to this Board.

Carrier has further hereinbefore shown that the applicable rules agreement fully supports Carrier's right to blank claimant's position on the date of claim. And, that the volume of business handled for and by the produce merchants on the date of claim did not warrant more than two (2) loader positions being worked. That the two (2) loaders who worked could be utilized to perform any work that claimant might have performed on a normal work day is fully supported by the authorities of this Board cited.

Finally, it has been shown that no rule of agreement or otherwise precludes the General Foreman from performing loader work, even if such work was performed by the incumbent of this position on the date of claim, which Petitioner cannot authoritatively or legitimately prove.

Based upon the facts and authorities cited, Carrier submits that this claim should be denied for want of merit.

OPINION OF BOARD: At the time this dispute arose Claimant Klein held a regularly assigned Group 2 position of Loader, working Monday through Friday, 6:00 A. M. to 3:00 P. M. He was one of four Loaders assigned at the subject food terminal. Claimant was notified on February 21, 1962 that his position would not work on February 22 (Washington's Birthday), which is one of the holidays specified in the Agreement. Two of the Loaders and the General Foreman (a Group 1 position) worked on this holiday, however. Claimant was paid straight time holiday pay for this date. The claim is that Claimant Klein is entitled to an additional day's pay at time and one-half rate because the General Foreman performed loader work on the

team track on the holiday. Carrier responds that Petitioner has failed to offer competent proof that the General Foreman performed loader work on the holiday. Carrier further asserts that even if the General Foreman did perform such work, no agreement violation resulted.

We think the Petitioner has an obligation to provide the essential facts upon which its claim is based. In this instance the Petitioner makes repeated assertions that the General Foreman performed loader work on the subject holiday but there is insufficient evidence of probative value to support these assertions. In view of this insufficiency, consideration of the contract interpretation questions raised by the Petitioner would serve no useful purpose.

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 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 6th day of August 1965.