Award No. 14036
Docket No. CL-14822

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5564) that:

(1) The Carrier violated the Agreement on November 6, 7 and 8, 1963 by assigning clerical work to Yard Foreman Kopelski,

(2) Relief Yard Clerk James T. Dunsworth be paid one (1) hour at overtime rate on each of the above dates.

EMPLOYES' STATEMENT OF FACTS: Wiggins East Side Seniority District No. 34 is made up of several freight yards, one of which is known as Monsanto. On the dates of the claim, the yard clerk force at Monsanto consisted of the following:

Title of Position	Hours	Days of Rest
Car Service Job No. 2	7:30 A. M. to 4:00 P. M.	Sat. & Sun.
Car Service Job No. 3	7:00 A. M. to 3:30 P. M.	Sat. & Sun.

Job No. 3 is relieved on Saturday only by Relief Job No. 1, held by Relief Clerk J. T. Dunsworth.

On or about January 1, 1962, appropriate instructions were issued that the occupant of Job No. 3 was to check all tracks in the Monsanto Yard. Prior to this time, only certain tracks were checked, including industry tracks. Among the new tracks to be checked were those designated as "Old Main and Middle Track". The checking of these two tracks took approximately one hour of the clerk's time, and, as a result, the occupant of Job No. 3 was required to work one hour overtime daily. On November 1, 1963, the occupant of this job was notified to discontinue the one hour overtime, and as a result, he did not have time to check these two tracks, as his other duties consumed his eight hours. Commencing on November 1, 1963, the Yard Foreman of the second shift crew made a check of these tracks when the crew came on duty at 2:30 P. M.

It is well-established by awards of this Division that clerical work may be performed by anyone outside the scope of the Clerks' Agreement when it is incident to the performance of their other duties. The attention of this Board is directed particularly to Award No. 2674 of this Division disposing of the contention of the Brotherhood of Railway Clerks on the Indiana Harbor Belt Railroad Company that clerks should be assigned to perform work that was being performed by Conductors incident to the handling of their trains. In denying the claim the Board stated as follows:

> "While the element of time consumed in this activity is persuasive as to its proper classification, it is not necessarily controlling. More important is the use which this particular record serves. It appears that the record is essential to the proper and orderly discharge of a conductor's duties. By it he keeps himself informed as to the make-up of his train and the destination of the several cars therein. From it he completes his comprehensive wheel report at the end of the day. If this work is to be assigned to yard clerks, it will, nevertheless, be necessary for the conductors to check and verify the information noted on these cars, since he is held responsible for the proper disposition of the cars in his train. This would necessitate the employment of eight or ten additional clerks, to do what is now more efficiently accomplished by the conductors themselves. Every employe who holds a position of responsibility is required to do more or less work that might be called clerical. We cannot bring ourselves to believe that the Agreement contemplates any such result as is contended for by the petitioner in this case. The forms made and carried by the conductors are not substantially different in content or purpose from the train record books kept by train conductors, generally. If the petitioner should prevail, we would be taking a long step toward an ultimate requirement that every conductor should be accompanied by a clerk. If this is to be desired, it ought to be accomplished by negotiation, rather than by interpretation."

The Carrier has shown that the checking of the Old Main and Middle Tracks by the second shift yard foreman is done incident to his switching the tracks; that the second shift yard foreman has from time to time over the years performed this same work without complaint; that during the period of November 1, 1963 to February 24, 1964, when the second shift yard foreman again made his own track check, only three claims were filed and they were not made by the regular incumbent of the position; and that similar checks have always been made at Monsanto by first and third shift yard foremen on Monday through Friday and the first and second shift yard foremen on Saturday without any complaint from the Clerks' Organization.

The claim of the Employes should be denied.

OPINION OF BOARD: The Carrier in this case issued instructions on or about January 1, 1962, for the occupant of Job No. 3 to check all tracks in the Monsanto Yard. Included therein were two tracks designated as "Old Main" and "Middle." Checking these two tracks consumed approximately one hour each day. It became necessary for the occupant of the "Monsanto" Clerk's job (Job No. 3) to work one hour overtime each day. These working conditions continued from January 1, 1962 until November 1, 1963, at which time Carrier notified the clerk to discontinue working the overtime. Since his other duties consumed the entire eight hours, the Clerk discontinued checking the two tracks.

The Organization alleges that on November 6, 7 and 8, the Yard Foreman of the 2:30 P. M. switch crew, an employe of another craft and class, commenced checking these two tracks. Thereafter, and on February 25, 1964 the work in question was returned to the Clerks, and they were called upon to check these two tracks, and were allowed an hour overtime each day.

First, the Carrier argues that the Scope Rule of the applicable agreement is general in nature, and does not of itself reserve this work to the Clerks. This appears to be correct.

The Carrier then urges that the Organization must show that the transferred work has been performed exclusively on Carrier's property, by the employes covered by the Clerks' Agreement.

The record indicates that this work came into being on January 1, 1962, and remained within the province of the Clerks until it was removed on November 1, 1963. It was returned to the Clerks on February 25, 1964. The Carrier speaks of the work being assigned at various times to two or more crafts. However, we fail to find any substantive evidence of this work being assigned to those other than Clerks except during the period from November 1, 1963 to February 25, 1964, the time in which the violations complained of in this case occurred.

We are particularly impressed with the letter of February 25, 1964 from I. J. Wood to Mr. Perrin and Mr. Dunsworth:

"February 25, 1964

Messrs. Perrin
Dunsworth

Effective above date, per orders of Mr. Sharp — past practice of one hour overtime per day for the Monsanto clerk, will be resumed.

Also have instructions to fill vacation vacancies (Monsanto) per past practice, using experienced personnel only.

/s/ I. J. Wood, Agent"

It is our opinion that the past practice concerning this particular work tends to show that it has been performed by the Clerks. Although this practice does not establish exclusivity per se.

The Carrier next raises an affirmative defense, on the grounds that the Yard Foreman only checked the track to determine which cars he would be required to switch and spot and that he did not make a complete check of the tracks. The Carrier alleges that this action falls within the prerogatives of those other than Clerks, to perform clerical duties which are incidental to the performance of their main duties. The Organization answers that the Carrier has not furnished sufficient evidence to support their position in regard to this affirmative defense.

We are impressed with the letter of February 20, 1964 from General Chairman Paul D. Dwyer to Mr. J. W. Hammers, Jr., Manager, Labor Relations, in which it is said:

"While it is true, as Mr. Mathewson and Mr. Woods state, the check of the two tracks is essential in the performance of the Yard Foreman's duties, nevertheless, such check has never been made by the Foreman, but has been made by the Yard Clerk, and furnished to the Foreman."

We are of the opinion that the work in question has generally been performed by the Clerks on this property. We further believe that the assignments by the Carrier to the Clerks do not of themselves establish the exclusive right of the Clerks to this work. We further find that it is recognized that the checking of these two tracks could well be considered incidental to the work of the Yard Foreman and we, therefore, will deny the claim.

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 17th day of December 1965.

LABOR MEMBER'S DISSENT TO AWARD 14036, DOCKET CL-14822

Award 14036, Docket CL-14822, when compared with the usual test relied on by Referees to resolve Scope Rule cases, is in error.

Award 14036 seems to say, on the one hand, that Employes must prove that they, and they alone, have exclusively performed certain work. What such a showing establishes is not certain from this Award for, on the other hand, the Award says that it can be considered proper for the Carrier to assign that same work to others if it can be considered as incidental to the work of another craft or class.

In this case the Employes, by a fair preponderance of evidence, established that the work of checking tracks had always been assigned to and

performed by clerical employes. Nothing more should have been required of the Employes. The claim should have been sustained for the Employes had met the most severe "test" devised by Referees.

If the "Exclusivity Test", which operates to deny most of the Scope Rule cases, is a proper test to be applied, it should be conclusive. In other words, the "Exclusivity Test", as severe and extreme as it is, should not operate merely to deny Employes claims and, when that same severe test is met by the Employes, some other means of carving out an exception then be applied. If the Employes have to live with that extreme a test, which has brought many benefits to the Carrier and is constantly urged by Carriers as being proper, although resisted by the Employes, then it seems only proper and eminently fair that Carrier should have to live with it, too.

Common sense dictates that if certain work is shown to be exclusive to one craft and class there are no exceptions.

I therefore dissent.

D. E. Watkins

Labor Member
1-12-66