

Award No. 18819
Docket No. CL-14792

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, 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 (GL-5481) that:

1. Carrier's action in requiring or permitting the Agent and/or stock yard employees who are not covered by the Clerks' Agreement to perform the work of sealing stock cars at Stock Sales Yard, Lewistown, Montana is in violation of the Clerks' Agreement.

2. Carrier shall compensate Employee Frank C. Abel at the penalty rate of General Clerk position for four (4) hours for each of the following dates:

October 31, 1962
November 7, 14 and 28, 1962
December 5, 1962

and for each subsequent day that the Agent and/or others outside the Clerks' Agreement are used to seal cars at Lewistown, Montana Stock Sales Yard.

EMPLOYES' STATEMENT OF FACTS: The Carrier maintains a station force at Lewistown, Montana, consisting of the following:

- 1 Cashier, 1 Yard Clerk, 1 General Clerk and 1 Relief Clerk covered by the Clerks' Agreement.
- 1 Telegraph Operator covered by the Telegraphers' Agreement.
- 1 Agent, who acts in the dual capacity of Agent and Yardmaster.

The Agent's position is a monthly rated position and the monthly rate comprehends all service required 24 hours per day, seven days per week.

OPINION OF BOARD: The Carrier herein, at the time of the presentation of this claim by Claimant Frank C. Abel, maintained a station force at Lewistown, Montana, consisting of the following:

"1 Cashier, 1 Yard Clerk, 1 General Clerk, and 1 Relief Clerk covered by the Clerks' Agreement.

1 Telegraph Operator covered by the Telegraphers' Agreement.

1 Agent who acted in the dual capacity of Agent and Yardmaster within the Scope of the Telegraphers' Agreement.

Yard master positions within the scope of the Yardmasters' Agreement." (Quote marks ours.)

Employee Frank Abel was the regularly assigned occupant of the General Clerk position at Lewistown, Montana. Prior to the year 1962, when the work of sealing cars at Lewistown Stock Sales Yard on sales days was required after his regular assignment Claimant Abel was directed to perform such work on overtime hours. After the year 1962, his services for this overtime work was discontinued by the Carrier. This work of sealing cars at the Stock Sales Yards at Lewistown, Montana, is the only item of work with which we are now concerned.

The Scope Rule of the Clerks' Agreement under which employees performed work is general in nature — not defining, describing nor delineating the work. *In order to support the claim herein, it must be proven by competent evidence that this work has been performed exclusively by employees under the Clerks' Agreement.*

There have been a number of Awards on this precise property which are addressed to the question here presented. Claimant has raised the point that these prior awards, generally, dealt only with situations which involved full time positions in which the Carrier had work performed by members from one Union and the members of another Union were contending that this was their work. However, in the following awards on this property wherein the principle involved herein is the same, though the facts were not precisely the same, the claimants therein were denied compensation for overtime or holiday pay though claimant was not removed from his permanent position by a member of another craft. See Awards No. 8256, 8871, 9971, 11755, 12493, 12509, 14155 and 17754.

There cannot be much question but that the work of sealing cars at Lewistown Stock Yards on sales dates had been performed by employees under the Clerks' Agreement and also had been done by the Agent under the Telegraphers' Agreement and others who were not covered by the Clerks' Agreement prior to the days now in question. Consequently, such work had not been performed exclusively by employees under the Clerks' Agreement, but, to the contrary, had traditionally, historically and customarily been performed by others outside of the Clerks' Agreement as well.

The employees under the Clerks' Agreement have failed to meet the requirement of the burden of proving the employees under the Agreement had the right to the exclusive performance of this disputed work.

See also the following awards on this precise property in addition to those already cited: No. 9212, 9220, 10529, 10732, 11577, 12047, 12148, 12149, 12360, 12841, 12897, 14064, 14605 and 17358.

What the Carrier did here was an exercise of managerial prerogative and was justified unless it removed from the Clerks' Organization work which it was its exclusive right to perform. See Award No. 9219.

For the foregoing reasons the claim must be disallowed.

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 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: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 19th day of November, 1971.

LABOR MEMBER'S DISSENT TO AWARD 18819 (CL-14792) **(Referee Hall)**

The sole issue involved in this dispute is the sealing of livestock cars at Lewistown, Montana. Referee Hall, with the Majority, placed an incredible "exclusivity" burden upon the Employees. For instance, the Award states:

"There cannot be much question but that the work of sealing cars at Lewistown Stock Yards on sales dates had been performed by employees under the Clerks' Agreement and also had been done by the Agent under the Telegraphers' Agreement and others who were not covered by the Clerks' Agreement prior to the days now in question. Consequently, such work had not been performed exclusively by employees under the Clerks' Agreement, but, to the contrary, had traditionally, historically and customarily been performed by others outside of the Clerks' Agreement as well."

In the period, "prior to the days now in question", from August 14, 1956 to January 1, 1962, 4,970 cars of livestock were sealed at Lewistown, Mon-

tana. 4,954 of these cars were sealed by Clerks. A mere 16 were sealed by the Agent or by others. On the basis of these "facts", the Majority made the INCREDIBLE FINDING:

"The employes under the Clerks' Agreement have failed to meet the requirement of the burden of proving the employes under the Agreement had the right to the exclusive performance of this disputed work."

In a five and one-half year period employes not covered by the Clerks' Agreement performed about three-tenths of one per cent of the work in dispute—and we failed to prove that we had the right to the exclusive performance of this disputed work. INCREDIBLE.

The Award is in error. I dissent.

J. C. Fletcher
Labor Member
Third Division, NRAB
December 6, 1971