



Award No. 18856
Docket No. MW-19155

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**BURLINGTON NORTHERN INC. (Formerly Spokane, Portland
& Seattle Railway Company)**

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

(1) The Carrier violated the Agreement when it assigned other than Track Department forces to perform the work of cleaning the depot at Bend, Oregon on rest days and holiday. (System File M/W Scope — 3/19/70 B/Case 305)

(2) Section Laborer J. Black be allowed two (2) hours' and forty (40) minutes' pay at his time and one-half rate beginning December 13, 1969 and for each rest day and holiday thereafter until the violation referred to in Part (1) of this claim is discontinued.

EMPLOYES' STATEMENT OF FACTS: Claimant J. Black is regularly assigned to the position of section laborer on Section 89 headquartered at Bend, Oregon with a work week extending from Monday through Friday excepting holidays (Saturdays and Sundays are rest days).

Since at least 1941 and continuing up to and including the date involved here, various section laborers headquartered at Bend, Oregon have been customarily and historically assigned to perform the work of cleaning the depot at Bend during their regularly assigned work week. The Carrier conceded that such work was performed by the claimant during his regularly assigned work week as will be noted from the following quoted letters of claim declination:

LETTER "A"

"Wisham, Wa.
Feb. 13, 1970

Mr. F. H. Funk, General Chairman
Brotherhood of Maintenance of Way Employes
Vancouver, Wash.

Dear Mr. Funk:

Regarding your letter of Feb. 10, 1970. Mr. Black has been cleaning depot at Bend every work day since he has been assigned, or,

The Agreement in effect between the two parties to this dispute dated June 1, 1956, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The former Spokane, Portland & Seattle Railway Company maintains a yard office, freight office, waiting room, employees' locker room and rest rooms in the depot building at Bend, Oregon. For a period of at least twenty years prior to the date of the instant claim, janitor work has been performed in part by clerical employees and in greater part by a Maintenance of Way laborer Monday through Friday each week. Specifically, a clerk in the freight office performed the janitor work in that office, while the Maintenance of Way laborer performed the remainder of the janitor work, spending all day on Monday and an average of one hour on the other four days in taking care of such work. Up until shortly before this claim arose, no janitor work was performed on Saturday or Sunday, the rest days of the Maintenance of Way laborer.

Due to complaints as to the condition of the facilities over the week ends, arrangements were made beginning about September 1, 1969 for the clerk on duty to clean the yard office, waiting room and rest rooms in the early morning hours on Saturdays, Sundays and holidays. This consumes about one hour of the clerk's time on these dates and imposes no burden, since the clerk does no yard checking on Saturdays, Sundays and holidays.

Claim has been filed and progressed by the Employees party hereto, seeking payment of a call in behalf of the claimant for each Saturday, Sunday and holiday beginning December 13, 1969 that a clerical employee performed janitor work at Bend, Oregon. Such claims are premised upon the contention that the claimant had exclusive right to the performance of all janitor work performed on his rest days and holidays by clerical employees.

A copy of General Chairman Funk's letter of February 10, 1970, appealing the claim to Roadmaster Mason, is attached as Carrier's Exhibit No. 1. This appeal was declined on February 13, 1970, and the claim was then appealed to General Roadmaster Straughan on February 20, 1970. A copy of this appeal is attached as Carrier's Exhibit No. 2. A copy of General Roadmaster Straughan's declination of February 24, 1970 is attached as Carrier's Exhibit No. 3.

A copy of General Chairman Funk's letter of March 19, 1970, appealing the claim to Vice President DeButts, is attached hereto as Carrier's Exhibit No. 4, and a copy of Mr. DeButts' declination dated May 11, 1970 is attached as Carrier's Exhibit No. 5. Copies of General Chairman Funk's further letters of May 15, 1970, May 25, 1970, and July 9, 1970, are attached hereto as Carrier's Exhibits Nos. 6, 7 and 8 respectively. Copies of Mr. DeButts' further letters of May 28, 1970, July 8, 1970 and July 10, 1970 are attached as Carrier's Exhibits Nos. 9, 10 and 11 respectively. The basic positions of the parties are set forth in this correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: It is undisputed that for at least twenty years and down to date the cleaning of the depot at Bend, Oregon was assigned to a Maintenance of Way laborer 5 days a week. (Claimant works 8 hours on Monday and 1 hour each day Tuesday through Friday performing this work.)

It is also undisputed that the depot was not cleaned on week-ends and holidays by anyone. On or about September 1, 1969 after receiving complaints as to the condition of the depot Carrier assigned Clerks on their regularly assigned days of work to clean the depot on those days. The record reveals that this work takes about one hour.

Carrier urges that the Petitioner has failed to carry its burden of showing that cleaning of the depot has been reserved exclusively for Employees. The basis for this contention is that cleaning work is assigned to various crafts and classes at various locations in Carrier's system and more particularly that Clerks perform some cleaning work during week-days at the Bend depot. The Organization contends that the dispute is controlled by Rule 27(h) of the present agreement. Thus the issue has been drawn. The rule reads as follows:

"Rule 27(h) Work on Unassigned Days

Where work is required by the carrier to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

Carrier states in its submission "janitor work has been performed in part by clerical employees and in greater part by a Maintenance of Way laborer Monday through Friday." It is significant that Carrier does not state the nature of the work performed by Clerks on week-days nor the amount of time spent on it. Thus there is no showing in the record by Carrier that the cleaning done by Clerks on week-days was not incidental to their clerical tasks. While no finding can be made as to the time spent by Clerks, in the Board's view of this case there is insufficient evidence in the record to find that Clerks are the "regular employee" under Rule 27(h). This is crucial in the view of the Board. There is however ample evidence to conclude that Claimant is the "regular employee" within the meaning of the Rule. Therefore, in the circumstances of this case, reliance on the exclusivity concept is misplaced. (Award 17619 and others).

Accordingly, as there is no evidence that an "extra" or "unassigned employee" was available for assignment to the cleaning work on week-ends and holidays pursuant to Rule 27(h) of the Agreement such work should have been assigned to the "regular employee" who we find, based on the record as a whole, to be the Claimant herein. Claim will be sustained.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1971.