

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21117
Docket Number CL-21099

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: { (Brotherhood of Railway, Airline and
{ Steamship Clerks, Freight Handlers,
{ Express and Station Employees
{ (Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7768) that:

(1) Carrier violated and continues to violate the terms of Appendix "H" - union Shop Agreement - of the Clerks' Working Agreement, effective March 3, 1970, when it failed and refused to notify Mr. Jerome B. Larson that he was charged with noncompliance of the Union Shop Agreement.

(2) Carrier shall now be required and ordered to comply with the terms of Appendix "H" - Union Shop Agreement.

OPINION OF BOARD: This dispute involves Carrier's refusal to notify the named employee that he was in non-compliance with the Union Shop Agreement. That Agreement provides, inter alia, that an employee who disagrees with an allegation of non-compliance may request a hearing and the hearing may be followed by appeal and ultimate resolution through the arbitral process.

In this dispute, the employee involved occupies the position of Chief Clerk (office manager) to the Sales Manager at Bend, Oregon. Prior to the merger of the SP&S Railway, in 1968 the position in question had been titled Steno-Clerk. On March 18, 1968 Carrier requested that the position be reclassified to Assistant to the General Agent, an excepted position. This was agreed to by the Organization on April 9, 1968 with the stipulation that the position would remain under the provisions of the Union Shop Agreement. Elwood Smith was selected for the position effective May 1, 1968 and held the position until his death on April 24, 1973. He maintained his membership in the Organization during this period. Carrier states that the position was reclassified to Chief Clerk on March 3, 1970, the effective date of the merger of the SP&S with the Burlington Northern, on which date Carrier assigned a Sales Manager to Bend instead of a General Agent to handle the anticipated increase in activity.

At the heart of this dispute is Appendix L of the Agreement, and in particular Sections 1 (a) and 4:

"APPENDIX L

1. (a) There shall be **no changes in** the rules and agreements heretofore negotiated respectively by the **Brotherhood of Railway and Airline Clerks** and the **Great Northern Railway**, the **Northern Pacific Railway**, the **Chicago, Burlington & Quincy Railroad** and the **Spokane, Portland and Seattle Railway** providing for the exception or exemption **from** the application of certain rules for various employees, positions and departments, except as specifically provided herein.

• * * *

4. All Positions individually listed in Rule **3(a)2** and 3 of the **Great Northern clerks' Agreement**, Rule **1(c)** of the **Northern Pacific clerks' Agreement**, Rule **2(a)** of the **CB&Q clerks' Agreement** and Rule **1(c)** of the **SP&S clerks' Agreement** and all clerical positions **in** off-line and on-line Traffic or Marketing Departments and successor Positions to such positions, and the **employees** incumbent thereto, shall be subject **only** to Rules 1, 3, 8, 9, 63, 64 and 71 of the **Burlington Northern clerks' Agreement** as provided by Section 3 of this Appendix, and, except for the Positions listed below and the incumbents thereto, shall in addition be subject to the Union Shop and Dues Deduction **Agreements**. (Appendices Ii and I):

Chief Clerks (Office **Managers**) to System Officers not listed **in** wholly excepted offices.

Chief Clerks (Office **Managers**):

Superintendents
Marketing or Sales Managers or equivalent rank
or higher
General **Freight** Agents
Accounting Offices (1 each office)

District or Division Storekeepers (Assistant Regional
Material **Managers** and Material Managers)

Supervisors **Multigraph** Department (3)
Shop Accountant (Department Head) Omaha
Traffic Department Solicitors
Tax Agents"

It is noted that 4 above specifically excludes from the Union Shop Agreement Chief Clerks to the Sales **Managers**. Also, **relevant**, to place the dispute in perspective, were two other **letter** Agreements. **An Agreement** dated October 21, 1969 provided:

"October 21, 1969

File: 604-D

Mr. Kenneth F. **Lassell**, General **Chairman**
Brotherhood of Railway, Airline and
Steamship Clerks
738 **Northeast 198th** A-e
Portland, Oregon 97230

Dear Mr. **Lassell**:

This letter will confirm **our understanding** in conference yesterday that when the **Management** desires to establish excepted positions under Rule 1 (c) of the current Clerks Schedule, it may do so, provided the appointees are selected **from** one of the clerical rosters, **and** with the understanding the appointees will continue to be subject to the Union Shop Agreement while **filling** such excepted positions.

This **understanding** will remain in effect until July 1, 1971 and thereafter until **changed** in accordance with the amended Railway Labor Act.

Very truly yours,

Chief of **Personnel**

AGREED TO:

General Chairman, **BRAC**"

That **understanding** was effectively terminated by the letter dated March 29, 1971.

Carrier's argument is based primarily on the clear exclusion of the position by Section 4 of **Appendix L, supra**. It is **argued** that the entire agreement must be viewed, **not merely** the Union Shop provisions and thus **Appendix L** modifies the Union Shop Agreement. Also, Carrier asserts that the cancellation of the October 21, 1969 **Agreement** supports its right to make the position excepted **from the Union Shop provisions**. By analogy, Carrier **suggests** that it **would** be just as appropriate for a notice to be served on the President of the Company as on the incumbent of the position

herein. As an additional **point**, the Carrier observes that the Organization was silent on the question of the Union Shop provision⁸ applicable to the position **in** question from 1970 until the notice served on March **14, 1974**. At the very least, Carrier observes that a fourteen **month** period **passed** after the incumbent was placed on the job until the March **1974** notice was served. Carrier argues that the doctrine of equitable **estoppel** should be applied.

Petitioner first observes that it was **unaware** of the change in the title of the position until the Carrier's letter of March 22, **1974**. Further, Petitioner presented evidence to indicate that on the Seniority Rosters dated **January 1, 1970** and **January 1, 1971** the position was listed as Assistant to the General Agent. The Organization **al**⁸⁰ challenges the assertion that the incumbent indeed **performs** the function⁸ of Chief Clerk, claiming that he **supervises no clerks**. The Organization argue⁸ that from the time the position was reclassified to **Assistant** to the **General Agent** in **1968**, it was understood **that** the position would remain under the **provisions** of the Union Shop Agreement. It also contended that since the former **SP&S** Agreement did **not** list a Chief Clerks' position at Rend, such position could not be created following the **merger**, except by written **agreement**, which **&es** **not** exist. The Organization conclude⁸ that the **dispute** should have been resolved by the **hearing** and appeals procedure⁸ provided by the Union Shop Agreement.

We **note** that there is **no** evidence to indicate the Organization's knowledge of the change in title prior to the March **1974** letter. Carrier, in its argument, relating to earlier Awards on similar **issues**, state⁸ that those case⁸ may be **distinguished in that there** was genuine doubt **in those** situations as to whether or **not** the jobs in question were covered by the union shop agreements. That is precisely where the problem exists in this dispute. The only evidence **submitted by** Carrier with **respect to the** change in job title of the position herein, was a **Recommendation** for Transfer dated March 3, 1970. On the other ham, the **Organization** has submitted seniority rosters after that date indicating the old title **and** also has challenged the right of Carrier to sake the change unilaterally and further **questions** the substantive content of the new position. It **is** quite clear that based on the **language of Appendix L** the title in dispute is exempt from the Union Shop provisions. **However**, significant doubt has been **cast** on the fact⁸ **surrounding** the **change** in title which we are unable to **resolve**; the record simply is devoid of sufficient **information** to **make** a determination and in sddition, this **is** mt the proper **forum**. This Board **has** had similar **disputes** in the past **and** we have held consistently that Carriers could **not** arbitrarily refuse to give **notice** to individual **employees**, to inaugurate the special procedure⁸ specifie⁸ in **Union Shop Agreements**, simply on the **basis of** Carrier's⁸ claim that the **employees** were **not** subject to that **Agreement** (see Awards 6744, 7085, 16590 and 18810 among others). The appropriate **8**olution to this **dispute**, under the circumstances, is remand to the property **for** handling under the terns of the Union Shop **Agreement**; accordingly, the Claim **must** be sustained.

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 **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.

A W A R D

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
BY Order of Third Division

ATTEST:

A. W. Pambor
Executive Secretary

Dated at Chicago, Illinois, this 16th **day** of July 1976.