

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23535
Docket Number CL-22684

Dana E. Eischen, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and Station Employees
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
GL-8646, that:

(1) The Carrier violates the Clerk-Telegrapher Agreement, when commencing August 2, 1976 and continuing, it requires and permits non-covered persons to perform Claim Clerk clerical work covered by Clerks' Agreement at Dayton, Ohio and such work includes visual inspection of damaged freight, photographing damage, preparing, maintaining and forwarding records, reports and statements incident therewith; and

(2) As a result thereof, Carrier shall compensate Claim Clerk R. Ii. Horsley, Dayton, Ohio, eight (8) hours' pay at overtime rate beginning August 2, 1976 and continuing, five-days each week, until the Agreement violation is corrected.

OPINION OF BOARD: Carrier maintains an Agency station in its General Office Building at Dayton, Ohio. Among the station force at the freight office, Dayton, Ohio, at the time of the case before us was Claim Clerk position 0270. In August, 1975 Position C-270 became vacant and was advertised for bids on Superintendent's Bulletin No. 27 dated August 18, 1975 at Cincinnati, Ohio. Claimant assumed the assignment in August of 1975, including performance or Class "A" inspections (shipments inspected in car before unloading).

One of Carrier's customers at Dayton, Ohio is the Dayton Press, Inc. which receives numerous rolls of paper originating on the (then) Seaboard Coastline and Southern Railway. For some time a high number of damage claims had been submitted to Carrier by Dayton Press, and Carrier had been paying nearly \$150,000 per year in damage claims. With a view to reducing the amount of damage claim, by agreement with Dayton Press, Inc., the Eastern Weighing and Inspection Bureau (E.W.I.B.) was retained. Two E.W.I.B. employees were stationed on the unloading dock at Dayton Press. These employees inspected each car placed for unloading before it was unloaded. They also observed the actual unloading of every car. In those instances where damage occurred by fault of the Carrier a damage claim was presented to the Dayton agent.

The E.W.I.B. employees commenced work on or about June 1, 1976. At the same time, Claimant was informed by Carrier that he would no longer be required to make any inspections or Exceptions Reports incident to Dayton Press shipments. On July 26, 1976, Claimant submitted a claim for eight (8) hours

pay for various dates in June and July, 1976. The claim was denied and not progressed further by the Organization. On September 23, 1976 Claimant submitted a new claim for eight (8) hours for August 2, 1976 and each subsequent date, which claim was also denied. It was appealed by BRAC General Chairman E. J. Reynolds in his letter of December 10, 1976 to Director of Labor Relations, B. C. Massie. The claim was discussed in conference and denied by Mr. Massie in his letter of May 9, 1977.

The Organization maintains that Carrier has violated the Agreement between the parties by assigning to outside employees recognized Claim Clerk work allegedly reserved to employees covered by the B&O/BRAC Agreement. In support of this argument it cites Rule 1-the Swpe Rule-and tradition, custom and practice on the property "gained from years or performing freight claim work by Employees," as instructed through Carrier guidance manuals.

Rule 1 of the Agreement reads as follows:

"ROLE 1

Positions and Employees Affected.

(a) These rules shall constitute an agreement between The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, and The Staten Island Railroad Corporation and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and shall govern the hours of service, working conditions, and rates of pay of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees, which shall include all employees formerly covered by clerical agreement effective July 1, 1921 (as revised December 15, 1969) as amended, and all employees engaged in the work of the craft or class of Transportation-Communication Employees, which shall include all employees formerly covered by the Transportation-Communication Agreements; The Baltimore and Ohio Railroad Company effective July 1, 1928, as revised June 16, 1960, as amended; The Baltimore and Ohio Chicago Terminal Railroad Company effective June 3, 1963, as amended; and The Staten Island Railroad Corporation effective August 1, 1959, as amended.

Clerical Workers.

Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, writing and transcribing letters, bills, reports, statements and similar work, and to the operation of office mechanical equipment and devices in connection with such duties and work shall be designated as clerks.

"The following employees and/or positions are also covered by this Agreement:

Office Boys	Chauffeurs
Messengers	Tractor operators
Train Announcers	Motor Car operators
Gatemen	Red Caps
Baggage & Parcel Room	Telephone Switchboard
Employees	Operators
StationHelpers	Telephone-operators
Warehousemen	Tower Directors
Operators or Office & Station	Towermen
Equipment, Appliances	Levermen
& Machines	Bridge Operators
ElevatorOperators	Assistant Agents
Office, Station&Warehouse	operators
Watchmen	Block Operators
Janitors	Sidewire Operators
Porters	Wire Chiefs & Assistant
Laborers employees in &	Wire Chiefs
around stations, ware-	Managers & Wire Chiefs
houses, freight houses	of Relay Offices
and store houses	Relief Agents
Callers	Exclusive Agents
Stowmen	Operators handling switches
Truckers	Ticket Agent-Operators
Sealers	selling tickets
Coopers	Exclusive Ticket Agents
Storehelpers	CoalBilling Agents
Lumbermen	Target Men
Scrap Assorters	Train Directors

and any other positions of the crafts and classes not listed above.

Assignment of Work.

(b) When the assignment of clerical work in an office, station, warehouse, freight house, store house, or yard, occurring within a spread of ten (10) hours from the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all such employees at a facility specified herein shall not exceed four (4) hours per day.

"Interpretation of Rule 1(b).

The word 'employee' in Rule 1(b) means one in the employ of this Company, whether coming under the Scope of this Agreement, another agreement, or outside the Scope of any agreement.

(c) When a position covered by this Agreement is abolished, the work assigned to same which remains to be performed will be reassigned in accordance with the following:

- (1) To position or positions covered by this Agreement when such position or positions remain in existence at the location where the work of the abolished position is to be performed.**
- (2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by a Yardmaster, Foreman, or other supervisory employee, provided that less than four (4) hours' work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of a Yardmaster, Foreman, or other supervisory employee.**
- (3) Where the remaining work of an abolished position is reassigned to positions coming within this Agreement, an effort will be made, where practicable, to reassign the work to a position or positions assigned similar work, higher rated work to higher rated positions and lower rated work to lower rated positions.**
- (4) Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, maybe performed by employees or such other craft or class.**

"Exceptions.

(d) These rules shall not apply to laborers on coal and ore docks or to laborers on piers, wharves and other water front facilities not a part of the regular freight station forces, nor to individuals where amounts of less than Forty-Eight Dollars (\$48.00) per month are paid for special services which take only a portion of their time from outside employment or business, and not more than one (1) such individual shall be employed at any one point.

The term 'Special services' is not intended to apply to clerical work, except by mutual agreement between the parties signatory hereto."

Carrier counters that neither Rule 1 nor any other part of the agreement supports the Organization's claim. It argues that Rule 1 is "general" in scope and does not describe work to be performed. Further, Carrier asserts, no work was taken from any clerical position at Dayton and given to E.W.I.B. employees. Whether, Carrier states, the work being performed by E.W.I.B. employees never existed prior to their employment by Carrier.

At issue in the instant dispute are three questions. The first, and threshold issue, is whether Rule 1(b) specifically reserves the work in question to the Clerks. If the answer to this first question is to be affirmative, then it must be demonstrated that such work therein defined was performed for more than four (4) hours per day by other than Clerks per Section (b) of Rule 1 (supra). If, the evidence does not establish reservation by the express language of Rule 1(b) then it must be determined whether the Organization has demonstrated by system-wide past custom, practice and tradition that such work has been assigned by Carrier exclusively to Clerks.

According to Rule 1 work designated as belonging to Clerks includes:

"(b) When the assignment of clerical work in an office, station, warehouse, freight house, store house, or yard, occurring within a spread of ten (10) hours from the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all such employees at a facility specified herein shall not exceed four (4) hours per day."

Clerical workers are those employees who regularly spend not less than four (4) hours per day performing such work. It is not disputed that Position C-270 was a clerical position. What is disputed is whether part or all of the work performed by E.W.I.B. workers is clerical work which under Rule 1 of the Agreement by rights belonged to the incumbent of position C-270. We find the record evidence to be unclear with respect to the work at issue. While filling out of forms such as those used subsequent to making a "Class A" inspection may be viewed as the "writing and transcribing . . . reports, statements and similar work" described in Rule 1 (supra), actual performance of "Class A" inspections (shipments inspected in car before unloaded) is not specifically reserved to Clerks by that Rule.

It is **therefore incumbent** upon the **Organization** if it **is** to prevail in **this** claim to show either **exclusive** *System-wide* past **practice, custom, and tradition of reservation of such work to Clerks** or that **that** work clear⁴ reserved to Clerks by Rule 1, **viz.** "writing **and** transcribing . . . reports, **statements and similar work**" was **performed** for **more** than four (4) hours per day by (in **this** case) E.W.I.B. employee.

Based upon the record before us the **Organization** has failed successfully to **demonstrate** a system-wide past pattern, practice **and custom of reserving exclusively** to Clerks the work of "Class A" inspections. Neither has the organization **shown** that more than four (4) hours of the E.W.I.B. employe's work day was devoted to work reserved **to Clerks** under the Scope Rule.

Accordingly, based upon the foregoing, the **claim must be denied.**

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 not violated.

A W A R D

Claim dented.

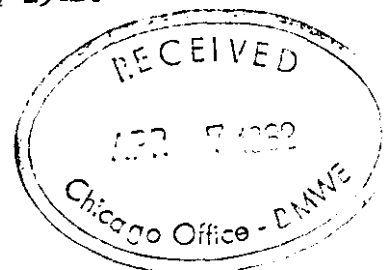
NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen

Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1982.



LABOR ~~MEMBER'S~~ DISSENT
TO
AWARD 23535, DOCKET **CL-22684**
(Referee Eischen)

Award 23535 is in palpable error and requires dissent. The facts as set forth in the record and correctly recited in the Award demonstrate that the Carrier, rather than authorizing overtime or directly increasing the number of clerical positions, chose instead to contract out a substantial portion of work involving OS&D functions at Dayton, Ohio. Simultaneously, with such sub-contracting, and the stationing of two Eastern Weighing and Inspection Bureau employees at the facility, functions of work previously assigned to a clerical position under the agreement were removed and thereafter performed by outsiders, EWIB employees.

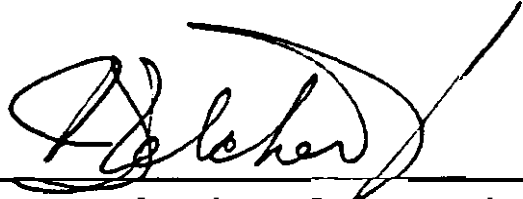
The facts were not disputed. The arguments advanced by both sides *in* support of their contentions were relatively basic. The Organization argued that the permitted exceptions to the scope rule did not allow **EWIB** employees to perform work heretofore assigned to employees under the *agreement*. **The** Carrier's basic *argument* was that "No work was taken from any clerical position at Dayton and given to employees of the *Eastern Weighing and Inspection Bureau*." The Carrier did not argue the definition of clerk clause, Rule 1(b), i.e., the four (4) hour prophylactic that classifies clerks and others working under the agreement for pay purposes, as a basis for defeating the claim. Nor did the Carrier see fit to argue

the archaic and imperfect systemwide exclusivity concept as a basis for defeating the claim. For the Carrier knew, and the Referee had ought to have known, that neither argument would be valid. Rule 1(b) (quoted in the opinion) deals with Carrier's employees specifically, (e.g., the references to "...all such employees at a facility...") and not to outsiders and non-employees as was the case here. More importantly it applies only to clerks and others working under the agreement. The Carrier also knew and the Referee had ought to have known that the "exclusivity argument" was not in issue. Careful review of everything written by the Carrier in their Ex Parte and Rebuttal Briefs fail to disclose even a hint of an "exclusivity argument" on their part.

The docket was presented to the Referee on February 28, 1980. Referee Eischen had the claim in his possession for two years and released a proposed Award on February 23, 1982. Referee Eischen did not see fit to decide the claim on the basis of arguments and authorities contained in the record. Instead, he chose to manufacture new and additional reasons to support a denial. Such conduct in and of itself makes the Award a ludicrous nullity. While the Award disposes of the instant claim it cannot and will not be considered as an authoritative decision.

It is tragic that the parties, after patiently waiting for a decision on a dispute they sincerely wished resolved on the basis of the record and arguments they had developed on the

property and honestly presented to the Referee now have the case disposed of on grounds neither saw fit to deal with - grounds manufactured by the Referee.

A handwritten signature in black ink, appearing to read "Fletcher", written over a horizontal line.

J. C. Fletcher, Labor Member

Date: 3-16-82