

Award No. 2988

Docket No. CL-2926

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Mart J. O'Malley, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement at Jersey City, New Jersey, when it diverted work covered by the Clerks' Agreement to Pier 20 and 21, N. R. New York, New York, where such work was performed by the Seaboard Terminal and Refrigeration Company, a contractor, and thus deprived employees at Dock 8, Jersey City of the right and opportunity to perform this work, and

That Carrier shall now reimburse 28 employees for a day's pay at their regular rate of pay for work denied them on November 25, 1943.

EMPLOYES' STATEMENT OF FACTS: On Wednesday evening November 24, 1943 Mr. R. E. Cusick, Foreman at Dock 8, Jersey City, New Jersey advised the men in the operation prior to their regular starting time of 5:30 P. M. that there would be no operation at Dock 8 Thursday night, Thanksgiving Day, November 25, 1943.

At the request of the Erie Railroad, a total of 46 cars of freight was diverted to Piers 20 and 21, N. R. New York, New York where it was handled by the Seaboard Terminal and Refrigeration Company, a contractor. This was freight that would have been handled at Dock 8 Jersey City, New Jersey had the operation worked on Thursday, November 25, 1943.

POSITION OF EMPLOYES: There is in effect between the parties an agreement bearing effective date of September 1, 1936 which contains the following rules:

Rule 1 (Scope) reads as follows:

"These rules shall govern the hours of service and working conditions of the following employees of the Erie Railroad System Lines, subject to the exceptions noted below:

Group 1. Clerks as defined in Rule 2, including baggage agents, foremen, assistant foremen, receiving clerks, delivery clerks, checkers, flag clerks, ballot collectors, icing inspectors, sectional storekeepers, leading stockkeepers, stockkeepers, chief stockmen, car receivers and checkers (Stores Department), brass checkers (Stores Department), train and engine crew callers, telephone switchboard operators, waybill or ticket assorters, messengers, office boys and others performing similar work.

Group 2. Station baggagemen, gatemen, ushers, matrons station, freight house, transfer, pier and warehouse forces, such as callers, loaders,

tract, and any repudiation of the contract would violate the Railway Labor Act.

While representatives of the Longshoremen recognized that the Erie officials were entitled to a little time to consider the matter, a definite reply by April 24th was insisted upon.

April 23rd, the National Mediation Board handed down a decision dismissing the claim of the Longshoremen to represent marine freight handlers employed by the Erie Railroad Company and holding that employees of the Seaboard Company were not subject to the provisions of the Railway Labor Act."

Since that time the Seaboard Terminal and Refrigeration Company dock forces, except checkers and clerks on New York side, are represented by Longshoremen and the Seaboard Terminal and Refrigeration Company employees on New Jersey side are represented by the Clerks. The Clerks recognize the Seaboard Terminal and Refrigeration Company as an independent contractor and have negotiated an agreement for these employees with the Seaboard.

This claim involves work by employees represented by the Longshoremen and employees represented by the Clerks. In handling this claim on the property the clerks have not shown violation of any negotiated rule. Carrier is not therefore in position to make full answer until such time as we receive details of the claim which is filed ex parte.

OPINION OF BOARD: The question of the jurisdiction of this Board to pass on the instant claim has been raised.

It is asserted that because the claim alleges that work was diverted to Piers 20 and 21 and there performed by contractor's employees affiliated with the International Longshoremen's Association, a jurisdictional dispute was involved. With that claim we cannot agree. This is not a claim similar to Award No. 1184 where the dispute was as to which of two unions had the right to act for and on behalf of the employees at Pier 22. Here, it is immaterial where the freight went. The Longshoremen are merely mentioned in an incidental way as proof of a diversion.

The other question is as to whether or not there was a diversion of work which belonged to Claimants under the terms of their Contract.

The letter of Superintendent Adams under date of December 27, 1943 is in effect an acknowledgment that freight which normally went to Dock 8 was sent to Piers 20 and 21. His letter is in effect in confession and avoidance, and might be effective to avoid a penalty if the crew on Dock 8 had not been denied the right to work on November 25, 1943.

In Award No. 1122 it was said:

"It has been repeatedly held by this Board that work embraced within the scope of an agreement may not properly be removed from such agreement and assigned to employees not subject to its terms."

It has been said that any exception to the "Scope Rule" must, if not in writing, be definitely proved. Award No. 779.

There is an assertion that no work was diverted, but that does not seem to be in accord with the record. From the record before us it seems clear that the Carrier changed the normal course of freight on the one day in question, to-wit: November 25, 1943. Having done so they thereby permitted persons not within the Agreement, to perform work which belonged to the members of the Clerks.

The claim should be allowed.

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 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 Carrier violated the Agreement as claimed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 26th day of November, 1945.

DISSENT TO AWARD No. 2988, DOCKET CL-2926

This Award, in its careful restriction of the violation to that of the Scope Rule in respect only to a diversion of freight from one location to another which resulted in its handling by other than employes covered by the Clerks' Agreement, conforms with the similarly restricted contentions made on behalf of the Petitioner.

Thus the decision represents acceptance of that which reasonably had not and could not otherwise be contended, i. e., that there is nothing in the Agreement between the parties inhibiting the Carrier from designation under any circumstances of the locations where commodities with whose transport it is entrusted will be handled, whether such designation was by original consignment or by later diversion.

The error of the decision lies in the assumption in the Opinion of Board that because the location designated for handling the freight in this instance, was one at which the handling of freight was performed by others than employes covered by the Clerks' Agreement, that element in a circumstance of this single character constituted the violation.

That decision disregards the prior decision by this Third Division in Award No. 1184 which was founded on earlier arrangements agreed upon by various railroads and organizations in 1937, including the parties to the instant dispute, which arrangements and agreement of 1937 referred to in Award No. 1184 were a part of a Report to the President of the United States by an Emergency Board of the President's appointment, holding to the effect that the work of handling freight at the locations here again involved, Piers 20 and 21, by employes other than those covered by the Clerks' Agreement was not work exclusively within the scope of the Clerks' Agreement.

The diversion of freight which permitted its handling at Piers 20 and 21, therefore, in consistency with the Agreement between the parties, with said Report of the Emergency Board, and with Award No. 1184, may not properly be declared a violation of the Scope Rule of the Clerks' Agreement, as here it is held to be.

(s) C. C. Cook
(s) A. H. Jones
(s) R. H. Allison
(s) R. F. Ray
(s) C. P. Dugan