

Award No. 5314

Docket No. CL-5149

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

**THE LONG ISLAND RAIL ROAD COMPANY, Debtor
David E. Smucker and Hunter L. DeLatour, Trustees**

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

1. The Carrier violated the Scope Rule and other provisions of the Clerks' Agreement when it removed the duties of operating motor trucks, work that was performed by chauffeurs since December 1, 1935, the date of the original Clerks' Agreement, and
2. The Carrier shall restore the duties and work of operating motor trucks to employees who hold seniority rights under the Clerks' Agreement and shall pay all affected employees for monetary losses retroactive to September 2, 1949.

EMPLOYEES' STATEMENT OF FACTS: During April 1935, a representation election was conducted by the National Mediation Board which resulted in this Brotherhood being certified as the duly authorized representative of the employees who took part in the election. The list of eligible voters included all chauffeurs and truck drivers on the Long Island Rail Road. All trucks were operated by chauffeurs at that time, except Truck No. 2, used by Electric Traction Forces and operated by 3rd rail electricians, Truck No. 5 used by maintenance of equipment forces as Wreck Truck and operated by Freight Car Repairmen and Truck No. 8, used by Telephone and Telegraph forces as Line Truck and operated by Telephone Repairmen. The employees who operated the three mentioned trucks did not vote in the representation election. Under date of July 26, 1940, the National Railroad Adjustment Board, Third Division, issued Award No. 1149, dealing specifically with trucks 2, 5 and 8, stating in part as follows:

"Under these circumstances there is every reasonable basis for holding that the exception in the Scope Rule of the Clerks' Agreement excluded this work from its incidence."

After the issuance of Award No. 1149, all trucks, except Trucks 2, 5 and 8 were operated by chauffeurs under the Scope Rule of the Clerks' Agreement. On October 9, 1946, two new trucks were placed in operation and were operated by chauffeurs. On October 12, 1946, a Bulletin was issued by the Division Engineer advertising these two positions to employees in the Maintenance of Way Department.

OPINION OF BOARD: This claim is based upon an asserted violation of the Scope Rule because of the action of the Carrier in abolishing certain positions of Chauffeur under the Clerks' Agreement and assigning the work thereof to employes covered by the Maintenance of Way Agreement. The Scope Rule of the Clerks' Agreement under Group 2 thereof lists the classifications of Chauffeur (except those covered by M. of E. or M. of W. Department Employes' Agreement).

Many Awards of this Board are authority for the proposition that although a Scope Rule does not define and enumerate work as such and contains merely classifications of positions, it is the work attaching to those positions which is covered by the Scope of the Agreement. Similarly, where the parties except positions from the operation of an Agreement, it is elementary that the work attaching to positions of the character designated as being excepted, was intended to be excluded from the operation of the Agreement. Consequently, the clear language of the exception involved herein excepted, from the coverage of the Clerks' Agreement, such Chauffeur work as was required in connection with and in furtherance of the work of the Maintenance of Way Department.

In this docket, it is apparent that the employes to whom the work of operating the trucks involved although spending a considerable part of their day in Chauffeur work, performed other services in the Maintenance of Way Department. Such truck operation as they did perform was in connection with and in furtherance of the work of the Maintenance of Way Department. When performed under such circumstances, it is an irresistible conclusion that the work involved was embraced within the clear language of the exception.

The vacillating and inconsistent action of the Carrier in connection with the assignment of the work involved herein in assigning it to employes under the Clerical Agreement and then to employes under the Maintenance of Way Agreement cannot be used as a basis for sustaining the claim. This Board has frequently sustained claims of employes on a current basis where for years a practice inconsistent with the clear terms of an Agreement has been followed on the property. So here, the failure of Management to act in conformity with the clear language of the exception contained in this Agreement does not foreclose it from conforming its action to the unambiguously expressed intention thereof.

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 Employes 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of April, 1951.