

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

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

**THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employes that:

(1) The Carrier is violating the terms of the current Clerks' Agreement at East Stroudsburg, Pa., Freight Station, by permitting outside truck drivers to handle freight from various locations on the freight house floor to their motor vehicles, using the two-wheel trucks and other railroad freight handlers equipment in the performance of such work. Also:

(2) Claim that the Carrier, therefore, be required to refrain from allowing such outside people to perform the freight handling work here involved and that such work shall be assigned to employes of the Carrier holding seniority rights under the Clerks' Agreement, with further claim that:

(3) Employes, J. L. Strunk and H. D. Larison be reimbursed for any and all monetary losses sustained as a result of the agreement violations cited herein, retroactive to May 2, 1949.

EMPLOYEES' STATEMENT OF FACTS: Among the many freight stations maintained by the Railroad Company over its entire line of road, is one at East Stroudsburg, Pa., involved in this dispute. Such freight station deals in the handling of in-bound and out-bound freight shipments of freight, with regular service hours of 8:30 A.M. to 5:00 P.M.

This dispute centers strictly around the improper assignment of P&D outside truck drivers in the use of handling freight from various locations on the freight house floor to the tailgate of their motor vehicles. It is understood by the employes that such P&D trucking concerns do not have a lease contingent with their trucking contract for P&D service, for any space in such freight station.

SUMMARY

In summary, such a long continued practice, acquiesced in for over 9 years by the Organization, established that there was no violation of the agreement, a fact which is further established by the proposal of the Organization to negotiate a new rule which would reserve such work exclusively to the Clerks.

Clearly, whatever may be the rule as to other properties, the Organization's own admission that it must obtain the desired rule by negotiation calls for a denial award in this case.

(Exhibits not reproduced.)

OPINION OF BOARD: For some considerable time our awards dealing with the scope rules of agreements have followed a rather consistent pattern. As to scope rules similar to that here involved, we have held that while they do not purport to describe the work encompassed but merely set forth the classes of positions to which they are applicable, yet the traditional and customary work assigned exclusively to those positions constitutes work falling within the scope of the agreement and it is a violation of the agreement for the Carrier to permit persons not covered by the agreement to perform it.

In Award No. 1647 and several others which followed it, we held that checking and trucking freight inside the warehouse was within the scope of an agreement which was similar in terms to that here involved and that pickups and deliveries by outsiders should be on the platform or on the floor at the door of the warehouse, in order not to impinge upon the rights of the employees covered by the agreement. Certainly the scope rule in this Agreement clearly encompasses the handling of freight inside the freight house, and upon the authority of those awards it is clear that the handling of freight inside the warehouse by pickup and delivery drivers is an infringement of the rights of employees covered by the Agreement.

The Carrier here relies on a practice to the contrary existing for several years but we have consistently held that while acquiescence in repeated violations of a rule acts as a bar to retroactive claims, it does not and cannot effect a change in a clear and unambiguous rule. Moreover, we think the Carrier recognized such to be the fact when the Superintendent instructed the Agent on May 2, 1949 that the trucking being done by P. and D. men "comes within the scope of the Clerks' organization and must be performed by our own employees."

However, we think the practices shown amounted to acquiescence in the violations so there is no merit to the request for retroactive reimbursement. Hence the claim will be sustained from October 8, 1949 when it was first presented to the Carrier.

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 Carrier violated the Agreement.

AWARD

Claim sustained from and after October 8, 1949.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of October, 1951.