Award No. 5726
Docket No. CL-5555

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

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

ATLANTIC COAST LINE RAILROAD COMPANY

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

(1) The Carrier violated and continues to violate the Clerks' Agreement at Winter Haven, Florida, when, on or about October 15, 1949, it removed the billing of solid carloads of perishables on Saturday out from under the scope and operation of the Clerks' Agreement and assigned such work to an employe not covered thereby, and

(2) That Clerk C. L. Freeman be used on Saturdays to perform this service, which is now performed by him from Monday through Friday each week and on Sundays when necessary and which was performed by him on Monday through Saturday and on necessary Sundays prior to September 1, 1949, and

(3) That he be compensated for two hours at the rate of one and one-half times his regular rate for each Saturday retroactive to October 15, 1949, that he has been denied the right to perform such work.

EMPLOYES' STATEMENT OF FACTS: C. L. Freeman was assigned to the position of Ticket Clerk, Winter Haven, Florida, in January or February of 1946. Prior to September 1, 1949, his assigned hours were from 1:00 P. M. to 10:00 P. M. with one hour lunch period. His assigned work week was Monday through Saturday, with Sunday as day of rest.

When the forty-hour work week became effective on September 1, 1949, his assignment was changed to 2:00 P. M. to 11:00 P. M., with one hour lunch period, and he was assigned a work week of Monday through Friday, with Saturday and Sunday as days of rest. His assigned duties remained the same as they were prior to September 1, 1949, with the exception that his work week was reduced from six to five days and among other work included the following:

From 2:00 P. M. to 3:00 P. M. he rated, expensed and reported all inbound waybills on carload and less than carload freight received at this station.

The two hours from 5:00 P. M. to 6:00 P. M. and 7:00 P. M. to 8:00 P. M. was devoted to the billing of outbound carload of freight mostly perishable. From 6:00 P. M. to 7:00 P. M. was his lunch period.

In a more recent award of your Division, No. 5250, involving the Clerks' Organization and the Northern Pacific Railway Company, with Referee Robert O. Boyd participating, the same situation was involved except that the cause for the claim occurred subsequent to the inauguration of the 40-hour workweek. Here again the claim of the Clerks' Organization was denied and again it was stated that the determining factor was "whether the work here involved is reserved exclusively to employes covered by the Clerks' Agreement". In the award it was found "that the work involved is not exclusively Clerks' work and not protected by the scope rule of the Clerks' Agreement".

The principle involved in these two awards is exactly that involved in the instant claim, and, as Carrier has pointed out herein, there is in the applicable scope rule nothing which reserves entirely to the Clerks covered thereby the exclusive performance of billing. Since memory runneth not to the contrary, billing has been performed by both employes subject to the Clerks' Agreement and employes subject to the Telegraphers' Agreement, and there has never been an exclusive reservation of this work to employes of either craft.

The instant claim can be interpreted as nothing less than an effort by the Employes to seek, through a Board award, a rule which does not now appear in the current agreement. This Board has on many occasions held that it is its function to interpret the rules as they are drawn and not, so-to-speak, as the parties to the agreement wish they had been drawn. There being no rule in the current agreement which will sustain this claim, your Board is respectfully requested to deny the claim of the Employes.

The respondent carrier reserves the right, if and when it is furnished with the ex parte petition filed by the petitioner in this case, which it has not seen, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may have been advanced by the petitioner in such petition and which have not been answered in this, its initial answer.

Data in support of the Carrier's position have been presented to the Employes' representative.

(Exhibits not reproduced).

OPINION OF BOARD: This claim is advanced by the System Committee of the Brotherhood for and on behalf of one Freeman. The claim describes the work we are concerned with as billing of solid carloads of perishables. The gist of the claim lies in part three (3) thereof.

Freeman alleges at no time prior to October 15, 1949, did an employe outside of the Schedule perform the work in question. He further alleged that beginning with the above mentioned date Carrier deprived him of his exclusive right to perform said work on each and every Saturday thereafter to his damage as pleaded in said claim. Freeman further averred he was regularly assigned to perform said work.

By reason of the hereinabove described act on the part of the Carrier, Freeman, hereinafter called Petitioner, claimed the following issue was raised, viz.: "whether or not the Carrier may remove work from under the cover and application of the Clerks' Agreement on the sixth day of each week, where such work is assigned to an employe coming under the scope of Clerks' Agreement the other days of the week."

Petitioner relied on statements identified as Employes' Exhibits Nos. 1 and 2 to support his allegations. Before discussing the probative value of the evidence contained in said exhibits we think we must bear in mind five (5) elementary rules which are (1) the burden of proof never shifts; this is true notwithstanding Petitioner's assertion to the contrary; (2) as a general rule one is bound by his own evidence or statement and may not be permitted to impeach it; (3) the allegation of the ultimate fact must be supported by the evi-

dence; (4) construction and interpretation of a written instrument is reached and determined by taking the instrument by its four corners and examining all of it to see that one portion does not contradict another portion; and (5) the best evidence rule, which is where the evidence supporting the ultimate fact is a written instrument it is the best evidence to establish such fact in the absence of a showing the instrument itself is not obtainable.

Turning now to an examination of said exhibits we find in Exhibit No. 1, the Petitioner does not state he performed the work in question on Saturdays between September 1st and October 15th, 1949, but rather that one not under the Clerks' Schedule did. With reference to Exhibit No. 2, the employe outside of the Schedule herein stated he "had not done any billing for quite a long time" which statement may be construed as meaning he had at some time performed some of such work. Likewise the statement indicates the assignment of such work was not made until on or about September 1st, 1949. Thus it occurs to us the question in this case is: has petitioner submitted evidence which if believed would allow us to dispose of the matter under the rule set out in Award 5623? In that case the Referee said, "under such circumstances when clerical work has been assigned exclusively to the clerical position during the week that same work may not be assigned to employes not under the Clerks' Agreement on the assigned off days of the clerical position." If the assignment under which Petitioner performed his work be written it is not in evidence nor do we know its provisions or when it was made. If it be an oral assignment we are faced with similar difficulties. We therefore are unable to determine whether Petitioner performed his work under an exclusive assignment especially so in the light of our foregoing comment on the probative value of the evidence adduced on his behalf.

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 Claimant's allegations are not supported by the evidence.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of April, 1952.