Award No. 6346
Docket No. CL-6340

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the Clerks' Agreement at Superior, Wisconsin when it removed work which, for many years, had been performed by clerks and was a part of the Clerks' Agreement, and contracted this work to an employe entirely outside of the Agreement, one Hugo Nordquist and in turn he employed approximately twenty-one employes outside of the Clerks' Agreement to perform work which consists of checking, stowing, trucking and janitor work on a contract tonnage basis and thus deprived regular employes under the Clerks' Agreement of the right and opportunity to perform this work.

1. That the Carrier shall now reimburse A. E. Shook for the date June 9, 1951 at his regular rate of pay for the work denied him on June 9, 1951 and each and every day thereafter that he was not allowed to perform the work which was contracted and performed by Hugo Nordquist.

2. That the Carrier shall now reimburse Ernest Landin, Napoleon Archambeau, Harry Mathison, Adolph Anderson, Thomas Sheridan, David Flood, Eugene Oveson, Joseph Tierney, Arthur Jarvela, Frank Heinen, James O'Brien, Geo. Landrum, Daniel Burnes, Arthur W. Peterson, Carl DeMars, Emmitt Fitzpatrick, Raymond Peterson, Marion Linbald, Richard Krause, Allen Byrnes, William Kelly and Leon Wagnild for one day's pay at their regular rate of pay for work denied them on June 9, 1951 and each and every day thereafter that they were not allowed to perform said work.

EMPLOYES' STATEMENT OF FACTS: There is located at Superior, Wisconsin, what is known as a Merchandise Dock. A considerable amount of space on this Merchandise dock is leased to outside concerns and many cars of merchandise arrive there, billed to these firms. In some cases, but not all, boat shipments are unloaded at the dock and transferred to rail shipments. Prior to World War II, the Carrier performed the work of billing, checking, stowing, trucking and janitor work with regular assigned employes covered by the Clerks' Agreement, but during some period, date unknown to us, the Carrier removed our employes and contracted this work to one Hugo Nordquist, and he, in turn, hired employes and supervised them in perform-

It is hereby affirmed that all data herein submitted in support of Carrier's position has been submitted in substance to the Employe Representatives and made a part of the claim.

OPINION OF BOARD: Claim is here made in behalf of one A. E. Shock and some twenty-two other named individuals for a day's pay on June 9, 1951, and all other subsequent dates account of the alleged failure of Respondent to permit claimants to perform work which was contracted out to one Hugo Nordquist and performed by him and other individuals hired by him.

The locale of this dispute is a Merchandise Dock at Superior, Wisconsin. This dock contains space which is leased to various companies for storage and warehousing purposes, however, the only portion thereof with which we are here concerned is that portion leased to the American Crystal Sugar Beet Company and work performed in conjunction with its operations.

The record discloses that prior to World War II the complained of work was performed by employes covered by the Clerks' Agreement; that all of the merchandise (beet pulp) arrives at and departs from the dock by rail or truck, and that neither Nordquist nor any of the employes hired by or working for him held seniority under the effective Agreement.

The Organization asserts that the work which has been performed by Nordquist and others is work of a kind that has traditionally and customarily been performed by the class of employes covered by the scope of the effective Agreement; and the exception containd in paragraph (j) of Rule 1 is not applicable here inasmuch as this operation is not presently a waterfront facility or operation within the commonly accepted meaning of and use to which such a facility is put.

The Respondent takes the position that the work here is in truth and in fact work for another, and is performed on a waterfront facility and as such, is work of a type and at a location which, by virtue of the exception contained in paragraph (j) of Rule 1, is clearly exempted and excluded from the scope of the Agreement.

The exception to paragraph (j) of Rule 1 reads as follows:

> "These rules do not apply to . . . Positions other than clerical or office force on coal and ore docks, elevators, piers, wharves or other waterfront facilities; * * *

It is the opinion of this Board that this dispute turns upon the question of whether the locale here is a waterfront facility within the meaning of the exception contained in paragraph (j) of Rule 1. There is no doubt that if the work here concerned were performed at an ordinary freight house not specifically named in the exception, it is of the character, kind and class that would belong to the employes covered by the confronting collective bargaining Agreement. The Carrier, in making Railroad Retirement Tax deductions from the employes presently doing the work, apparently considers the work performed as work done for its benefit and not for the benefit of a third party.

Regardless of the purposes this warehouse was intended to and did serve, prior to the period covered by this dispute, there is no question but that it is not now a "waterfront facility" within any acceptable parlance.

The geographical proximity of this warehouse to the water does not make it a "waterfront facility". The purpose for which it is now being used is controlling.

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 the Carrier violated the Agreement in accordance with the Opinion.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of September, 1953.

DISSENT TO AWARD NO. 6346, DOCKET NO. CL-6340

When a "neutral person, to be known as 'referee' " (U.S.C.A., Title 45, Sec. 3. First (1) will decide that a waterfront facility at which ships load and unload is "not now a 'waterfront facility' within any acceptable parlance", why should there be any disposition to dispose of a dispute without the aid of such a "neutral person, to be known as 'referee' "?

The rule in this case (Rule 1 (j)) clearly provides that the entire collective bargaining agreement does not apply to:

> "Persons other than clerical or office force on coal and ore docks, elevators, piers, wharves or other waterfront facilities."

Therefore, when the referee stated "It is the opinion of this Board that the dispute turns upon the question of whether the locale here is a waterfront facility within the meaning of the exception contained in paragraph (j) of Rule 1", he found that the positions in question were **other** than "clerical or office force": else he would not have to go into the question of whether the facility was "waterfront" in character. This is inescapably true because such positions **must** be "other than clerical or office force" in order to be execpted from the agreement in the first place. Finding then that they were such "other" positions, he went on to the question of whether they were employed on a "waterfront facility". The error lies in his determination that it was not such a facility.

The record before this referee clearly shows, without a vestige of contradiction, that during the period involved in the dispute the Steamship Buckeye docked at this facility and discharged its cargo. How then could there be any judicial effect in this holding that a steamship moored, discharged cargo at and sailed from **other** than a waterfront facility?

This referee readily recognized the single question as going only to the character of the wharf in question. He found that the dispute **turned** upon that very question. But then, and without displaying further cerebration, and without making any findings of fact, he reached the bald conclusion that a waterfront facility is not a waterfront facility. He calls it a "warehouse" in proximity to water.

By way of a mere ancillary observation, the Opinion remarks that the Carrier here, in making Railroad Retirement tax deductions in favor of the employes on these other than clearical positions, **apparently** considered the work performed as work done for its benefit. This observation is entirely irrelevant to the finding that the positions were other than clerical and that the dispute, therefore, turned upon whether the facility was waterfront in character. Moreover, that point has been disposed of by the United States Court of Appeals for the Eighth Circuit in an action originally brought by a carrier to recover taxes paid by it under the Railroad Retirement Act upon the earnings of persons who worked on the carrier's property but who were, as in our case here, hired, directed, supervised, paid and fired by an independent contractor in the performance of service in connection with the operation of the railroad. There the carrier was not liable (**Elmer F. Kelm, Collector of Internal Revenue, Appellant, vs. C.St.P.M.&O. Ry Co.,** Appellee, August 10, 1953, as yet not officially reported).

This Award, having no findings of fact and consisting only of a bare announcement that a wharf at which a steamship moored and discharged cargo is not a "waterfront facility," is completely devoid of any forceful effect and is legally insufficient.

We are constrained from offering a critical appraisal of a neutral person's efforts in his obligation to reach a determination of these disputes, but we urgently submit in this dissent that wholly unsupported conclusions when allowed to stand, militate strongly against the possibility of carriers and employes settling disputes, with all expedition, in conference between their respective representatives (Sec. 2. Second of the amended Act, supra).

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ E. T. Horsley

Serial No. 151

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 6346
DOCKET NO. CL-6340

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Great Northern Railway Company

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The Organization here requests interpretation of this Award, citing that in its (the Organization's) opinion, the Carrier is seeking to improperly limit the scope of (that is the period of time) the Award found the Respondent was in violation of the effective Agreement; and likewise is seeking to compute reparations due for the violations the Board found to exist in a manner that is not in accordance with the intent of the Board. Section 3, First (m) of the Railway Labor Act provides: "In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

The sense of the Award was, and is, to find and hold that the work in question came within the scope of the effective Agreement, and that the employes covered thereby (in this instance, the claimants) were improperly denied the right to perform such work, by virtue of which they are entitled to be compensated therefor.

The claim requests pay for that period of time commencing June 9, 1951, and every day thereafter that the claimants named were not allowed to perform such work.

The Carrier now asserts that the Award limits the claim here to that period of time commencing with June 9, 1951, through September 15, 1951, said latter date being the date the American Crystal Sugar Beet Company gave up its lease on the portion of facility with which the Award concerned itself, relying on that portion of the Award reading as follows:

> "The locale of this dispute is a Merchandise Dock at Superior, Wisconsin. This dock contains space which is leased to various companies for storage and warehousing purposes, however, the only portion thereof with which we are here concerned is that portion leased to the American Crystal Sugar Beet Company and work performed in conjunction with its operations."

On September 15, 1951, the American Crystal Sugar Beet Company gave up their leased space and the Ralston Purina Company leased and occupied this same space (with greater square footage) as of this date.