

Award No. 7785
Docket No. CL-7530

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

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

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated and continues to violate the Clerks' Agreement:

(1) When effective July 15, 1952, it discontinued the position of Yard Clerk at Keyser Valley Yard, Scranton, Penna., held by John J. Walton, and concurrent therewith, assigned the duties attached thereto, to a Yardmaster—not covered by the Scope of the Clerks' Agreement as herein described:

(2) The Carrier shall be required to restore the position and work, which was improperly removed from the scope of the current Clerks' Agreement, to employees covered thereby, and that John J. Walton and any other employees who may have been adversely affected by this violation of the Agreement, shall be reimbursed for all monetary losses sustained as a result thereof, retroactive to July 15, 1952, such claim to run until the condition is corrected.

EMPLOYEES' STATEMENT OF FACTS: Among the many clerical positions falling within the confines of the Scope and operation of the Clerks' Agreement at Keyser Valley Yard, prior to July 15, 1952, the Claimant was the regularly assigned incumbent of one of such positions, identified as Yard Clerk, hours of service 8:00 A. M. to 4:00 P. M. (20 min. lunch period) daily with Saturdays and Sundays as rest days. The position was rated at that time at the monthly rate of \$373.027, which did not include service on the aforementioned rest days and the seven specified holidays in the applicable Clerks' Agreement. The duties regularly assigned to the position entailed the following items of work:

 Weighing of cars
 Billing empty cars
 Yard checking

 Daily report to Scranton Yard Office of all cars placed or released at Keyser Valley and daily notification to Trainmasters of number of cars to be moved from Keyser Valley.

abolishment of the clerical position flow back to the foreman—Award 2334. Remaining clerical work may properly be distributed to others within the Clerks' Agreement."

The Board in Award 6610, Referee Norris C. Bakke participating, very appropriately expressed the position of the Carrier in this case, when it said:

"It must be obvious that the net result of the Organization's contentions, if sustained, would be to give it the power of veto over the Carrier's right to readjust its operation facilities and labor demands in response to the 'ebb and flow' of the traffic load, and to freeze all positions and wage rates as of a given time. The Carrier has not surrendered to that extent in this docket."

There is no rule, precedent or practice to support the Employees' position in this case. The claim is without merit and should be denied.

All data in support of the Carrier's position have been handled on the property with the Employees' representatives.

OPINION OF BOARD: Appearing in the docket of this case are copies of identical resolutions bearing on the third party notice issue which were presented to meetings of the permanent members of this Board May 6, 1955 and June 14, 1955. Both resolutions failed of adoption.

The issue was not raised while the dispute was being handled on the property. We, therefore, hold the issue is not properly before us now and shall forthwith proceed to dispose of this case on its merits.

From 1910 until July 15, 1952 Carrier maintained a Yard Clerk position at its Keyser Valley Yard, Scranton.

On July 15, 1952 Carrier abolished the Yard Clerk position and on the same date created a Yardmaster position at Keyser Valley Yard and, according to the Organization, assigned to such Yardmaster the duties performed by the Yard Clerk.

The Organization asserts Carrier thereby violated Rules 1 (Scope), 2 (Definition of Clerk), 23 (Seniority), 25 (Seniority Districts), 39 (Reducing Force) and 54 (Mutual Agreements).

Carrier asserts it abolished the Yard Clerk's position, and the only work (of Yard Clerk) which reverted to the Yardmaster was the weighing of cars; that it did not "create" the position of Yardmaster, it "reestablished" the Yardmaster position which it had abolished at Keyser Yard in 1929.

Carrier asserts the burden of proof is upon the Organization, and in its argument offers the "ebb and flow" principle, claiming that such duties which may have "flowed" to the Yard Clerk when the Yardmaster's position was abolished in 1929 "ebbed" back to the Yardmaster on July 15, 1952 when Carrier abolished the Yard Clerk position.

Carrier cites Award 7031 (Carter):

"* * * Where work may properly be assigned to two or more crafts, an assignment to one does not have the effect of making it the exclusive work of that craft in the absence of a plain language indicating such an intent. Nor in the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement. We conclude that the work here in question was not the exclusive work of Clerks on this Carrier. * * *"

Carrier also cites Award 806:

"* * * As this Division has previously pointed out, there are few, if any, employes of a carrier, from the president down to the laborer, who do not perform some clerical work in connection with their regularly assigned duties."

It cites many Awards of this Division as being in support of what it terms "the extremely thin line division" between the duties of a Yardmaster and a Yard Clerk.

Carrier argues that the "Organization under the burden of proof rule must show that these disputed duties are not of an over-lapping nature but rather are reserved exclusively to Clerks. We submit that although in substance their claim for the restoration of this position necessitates such a broad finding by this Division, they have not presented any valid arguments and/or evidence to sustain such a holding."

Carrier further states that from 1929 to 1952 only a (Yard) Clerk worked at Keyser Valley Yard, which was under the supervision and direction of the Yardmaster at Scranton. In 1952, Carrier "in the exercise of its managerial prerogative" determined that this Yard needed direct supervision and hence "reestablished" the position of Yardmaster. Since there was not an adequate amount of work, Carrier argues, to justify the retention of two positions, and since "neither craft had an exclusive right" to perform this disputed work, Carrier abolished the position of Yard Clerk.

But what were the duties of the Yard Clerk prior to July 15, 1952 and which of them is now being performed by the Yardmaster? We find the parties in wide disagreement.

The Organization lists ten categories of work performed by the Yard Clerk prior to the change and eight categories of Clerk's work it asserts are now being performed by the Yardmaster. It also estimates such duties would consume 6 hours, 50 minutes per day in performance.

Carrier, on the other hand, asserts the total work assignment of duties of the Yardmaster falls into four categories: "Supervision of engines; sees that work is properly performed; weighs cars, and notifies the Terminal Trainmaster the number of cars to move out of Keyser Valley each night." It claims none of these duties "may be appropriated by Clerks to the exclusion of Yardmasters * * * they are duties which are historically and universally performed by Yardmasters."

The record does disclose a wide variance between the parties not only in number of work categories, but in the language used to describe them.

The Organization pressed Carrier, while the claim was being handled on the property, to agree to a joint check on the question of the duties involved in the two positions. Carrier "denied the claim with an adamant refusal to participate in any such arrangement."

Carrier defends its refusal to participate in a joint check, by stating it "has no duty to develop claims for the Organization", old Award 1256 notwithstanding. The current and correct rule is stated as follows:

"This Division has held that it is not proper to direct a Carrier to search and evaluate records to make a claim for the proponents of one." (Award 13296—1st Division decided 1950)."

The Organization has quoted Award 1256, a portion of which holds:

"Moreover, there is evidence in the record that the petitioner made several efforts to get the carrier to agree upon a joint check to determine the dispute, but carrier refused leaving the inference that the petitioner's position was correct; * * *."

While any Carrier might be reluctant to search its records "to make a claim for the proponents of one," nevertheless it would seem that in a situation like this, where the Organization delineates the Yard Clerk's duties it alleges were assigned to a Yardmaster outside the Agreement and in violation thereof—which is the Organization's claim—and Carrier's position is directly opposite—if Carrier were as firmly in the right as the instant Carrier asserts itself to be, it would welcome the opportunity to prove itself innocent as charged through the medium of a joint check of the facts in the dispute.

Instead, we have two different sets of "facts", a situation not wholly unlike that referred to by Award 1256. And we find ourselves with a reasonable doubt, by virtue of Carrier's failure to avail itself of the opportunity it had to establish, by joint check, the actual duties involved in the two positions.

It is a doubt which must be resolved in favor of the Organization for several reasons:

1. Accepting Carrier's four categories of work now being performed by Yardmaster at face value, we find the first (supervision of engines) was never performed by the Yard Clerk at any time; the third category (weighs cars) consumes but an hour per shift, according to the Organization's statement; the fourth (notifies Terminal Trainmaster number of cars to move out of Keyser Valley each night) would consume, according to the Organization, 20 minutes per shift, but the second category (sees that work is properly performed) could well be as wide as the proverbial "barn door" and as high as the proverbial "church steeple". The Organization had not listed such a duty.

2. The Yard Clerk's position was a position covered by the applicable Agreement, functioning at Keyser Valley Yard. Whether we accept Carrier's abolition of the job per se, or its elimination of the job because of a decline in business, we can find no fault with Carrier's action, except insofar as Carrier has restricted itself by the Agreement.

3. Cited on behalf of Carrier, as a defense, is Award 4446 (Wenke):

"* * * Ordinarily the Carrier will not be required to employ a greater force than is necessary in the efficient handling of its business. The determination of such matters is the prerogative of management and rests primarily with it except to the extent it has limited itself by contract. * * *"

4. The Organization's claim before this Board is that the Carrier "violated and continues to violate the Clerks' Agreement." Rule 15 of the applicable Agreement reads:

"Established positions shall not be discontinued and new ones created under the same or different titles **covering relatively the same class of work**, which will have the effect of * * * evading the application of these Rules." (Emphasis added.)

5. We must hold that most of the duties transferred to the newly created Yardmaster position—or enough to meet the requirements of Rule 2—constitute work of the type envisaged by Award 6284 (Wenke): "the work is without doubt of a clerical nature."

6. The conclusion is therefore inescapable that under the applicable Agreement, Carrier's prerogative of management in this case is limited by Rule 15; that its action of July 15, 1952 in abolishing the position of Yard Clerk at Keyser Valley Yard and the concurrent creation of the position of Yardmaster at the same yard is violative of the applicable Agreement as charged. Award 139 (Spencer) inter alia.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of March, 1957.