

Award No. 13754
Docket No. CL-14324

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5390) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope Rule, when it established a so-called position of "Material Chaser" at Crestline Diesel Shop, Crestline, Ohio, Lake Region, and assigned it to an MofE Shop employe not covered by the Scope of the Clerical Rules Agreement.

(b) Claimants W. J. Reindl, R. E. Fullenlove, regularly assigned employes in the Stores Department at the Diesel Shop, L. E. Neeld, Jr., regularly assigned Group 2 Extra List employe, and their successors, be allowed eight hours' pay a day for May 22, 1961, and all subsequent dates until the violation is corrected. [Docket 1249]

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employes in which the Claimants in this case held positions and the Pennsylvania Railroad Company, hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various rules thereof may be referred to herein from time to time without quoting in full.

Prior to May 22, 1961, Claimants W. J. Reindl, R. E. Fullenlove and L. E. Neeld, Jr., were assigned as follows:

" . . . Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be prima facie evidence of the facts therein stated."

This provision contemplates that such suit "shall proceed in all respects as other civil suits" with the exception that the findings of the Adjustment Board as to the stated facts will be accepted as prima facie evidence thereof. It is clear this provision contemplates the application of the same rule of damages and the same rule against penalties in enforcing contracts as are applied in civil suits generally. An award contrary to these principles would be unenforceable as a matter of law.

For the foregoing reasons, it is respectfully submitted that your Honorable Board may not properly enter such an award in this case.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that the work performance of the Material Chasers at Crestline Diesel Shop does not constitute any violation of the clerical Rules Agreement, and that the Employees have produced no valid evidence whatsoever to the contrary.

Therefore, the Carrier respectfully requests your Honorable Board to deny the claim of the Employees in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: The Parties to the instant dispute agreed on June 25, 1962, to a "Joint Statement of Agreed Upon Facts":

"Prior to May 22, 1961, a working stock section was located outside the Diesel Shop and supplied by the Storeroom employees. This material is charged out as used, and is still supplied by the Storeroom employees.

On May 22, 1961, a position was established at Crestline, Ohio, and a shop craft employe was assigned to this position. One of the duties of this position is handling material."

The Organization contends that Carrier violated the Scope Rule when it removed the work of handling material from the Storeroom and the working stock section, to racks and bins set up at four different work locations in the Diesel Shop, from under the Scope of the Clerical Rules Agreement and assigned it to MofE employes not covered by the Clerical Agreement.

Carrier asserts that the "Material Chasers" or Assigned Laborers positions, in the handling, delivering, or transporting of material, tools or equipment, charged out to MofE employes, from a Storeroom or stockpile to the four different work locations in the Diesel Shop, where such material is to be used, has long been recognized as service properly performed by the using forces; that such service does not accrue exclusively to Group II Clerical Employes; such work performance of the "Material Chasers" does not constitute a violation of the Agreement.

The question to be decided is whether or not the Carrier violated the Clerks' Agreement, particularly the Scope Rule, when it assigned the work of placing materials, obtained from the Storeroom and/or working stock section, located adjacent to the Diesel Shop, in racks and bins located in the Diesel Shop, to MofE employes not covered by the Clerks' Agreement.

The Scope Rule of the Agreement is general in terms, listing positions rather than specific work; therefore, the right to work must be decided through tradition, historical practice and custom. In the instant dispute it is also necessary to determine whether the work in question is incidental to and not in violation of clerical duties, as set forth in the record.

Prior awards of this Division were submitted by both parties in support of their respective positions. The awards submitted interpret abolishment of established positions and reassignment thereof or interpretation of specific rules, which are not pertinent to our instant fact situation; therefore, we will proceed on the merits of the case.

Carrier alleges that there can be no showing by the Employees that they are entitled by tradition, historical practice or custom to the work in question, as the racks and bins holding supplies and materials at the four spot repair locations were not in existence prior to May 22, 1961; therefore, the work did not exist, nor had it been performed by the Employees. Further, that at most, not more than three hours per tour of duty by the two "Material Chasers" is spent in obtaining material from the storeroom and working stock section for MofE Mechanics and in keeping the bins and racks at the spot repair locations stocked. Therefore, the work in question was not a sufficient amount to constitute a position under any circumstances, and would not be work that accrues to Employees covered by the Clerical Rule Agreement.

It is not disputed by the Carrier that prior to May 22, 1961, MofE Mechanics, in the course of making repairs at their work spots, did, as an incident to and a consequence of their repair work, obtain materials direct from the Storeroom or adjacent working stock section. The material was taken to their work spot and used immediately for repair. The material obtained by the mechanics was not stockpiled at these repair spots. In other words, the handling, delivering, and transporting of material by the mechanics to their

work spot for immediate use was obvious and necessary as an incident to their primary function. This Board has repeatedly held this to be an exception to the Clerks' Agreement, and not in violation thereof.

The Record is clear and the Carrier states that the duties of the two "Material Chasers" is to obtain and deliver material to replenish and fill the four stockpile locations within the Diesel Shop. Said material, not to be used by the laborers for immediate repair, but to be subsequently used by the MofE Mechanics. Page 32 of the Record reads:

"... not more than three hours per tour of duty is spent by the Material Chasers in obtaining supplies from the storeroom and working stock section for the MofE Mechanics and in keeping the bins and racks at the spot repair locations stocked. . . ." (Emphasis ours.)

We find that such performance of work is not incidental to the primary function of repair work, when such was the case when material was handled by the mechanics, but the "Material Chasers" are, in fact, engaged in the performance of work that has historically been performed as a primary function of the Stores Department. We do not agree that the only difference was the storeroom personnel "issued material and supplies to the Material Chasers rather than to the individual MofE Mechanics." Such fine line substitution is a violation of the Agreement in the instant dispute where the character of work determines the issue involved, and not merely the method of performing it.

It is clear that the Storeroom delivery, handling, filling bins with materials prior to May 22, 1961, was assigned to and performed by clerks. Work once placed under the coverage of a valid and effective agreement may not arbitrarily or unilaterally be removed therefrom. The work in question was placed under the coverage of the effective Agreement between the parties until May 22, 1961, and from the Carrier's own statements, the "Material Chasers" are now performing the same character of work. The Carrier only alleges three hours per tour of duty for each, but do not support this assertion with probative evidence, as the two laborers were assigned regular eight hour positions.

There can be no question that this is work belonging to the Clerks, as historically, on this property, the Clerks' primary function is delivery of material and supplies to stockpiles for the use of other departments. The mere installation of racks and bins, at four different locations within the Diesel Shop, is not new work, nor is it an extension of the Storeroom, but it is the character of work historically performed by the Clerks.

Carrier contends the Claimants in this case are not entitled to compensation claimed, as they did not suffer any monetary loss. Here the Scope has been violated and claims (a) and (b) will be sustained to preserve the sanctity of the Agreement, but only to the extent that the Claimants have suffered a monetary loss, and then they shall recover only the difference between what they earned or what they would have earned in the Material Chaser position.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 to the extent as set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of July 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13754, DOCKET CL-14324 (Referee Mesigh)

This decision is in error for the following reasons:

1. The Majority admits this is a general type Scope Rule; consequently, tradition, custom and practice determine its coverage. With this we agree. Unfortunately, the Majority then corrupts this holding by
 - (a) Erroneously describing the practice and tradition, and
 - (b) Disregarding a fundamental fact vital to the proper resolution of the dispute.
2. The award summarily dismisses consideration of other decisions involving very similar facts.

At the heart of the Majority's holding here is their conclusion:

"We find that such performance of work is not incidental to the primary function of repair work, when such was the case when material was handled by the mechanics, but the 'Material Chasers' are, in fact, engaged in the performance of work that has historically been performed as a primary function of the Stores Department. * * *"

To reach this conclusion, the Majority had to meet and answer several unchallenged assertions advanced by Carrier when the claim was handled on the property. It did neither. For example, the Carrier asserted:

"Furthermore, a check of our records discloses that the service being performed presently by the Assigned Laborer at Crestline is the same service performed, as far back as 1940 and 1941, when it was also performed by Assigned Laborers."

Further on in the same document (Joint Submission), the Carrier asserts the system practice:

"In any event, the handling, delivering or transporting of material, tools, or equipment, charged out to MofE Employees, from a store-room or stock pile to the point where such material is to be used has long been recognized as service properly performed by the using forces, service which has been and is performed by many crafts and classes of employees, and service which does not accrue exclusively to Group II Clerical Employees." (Emphasis ours.)

These undenied assertions represented conclusive evidence of the historical practice in the performance of the claimed work. Moreover, these allegations were further buttressed by the statements of the TWU Organization, submitted as part of the record. There, we find the following unequivocal assertion:

"The Union submits that the work in question has by custom, practice and tradition, always been performed by employees classified as Assigned Laborers (Material Chasers).

At the Crestline Enginehouse prior to the Dieselization of the equipment, there were always employees designated as assigned Laborers (Material Chasers) who performed in conjunction with the duties as Assigned Laborer, the task of securing material required for the service and repairs of the Steam Locomotives."

The Majority made no attempt to dispute or refute these statements. From the opinion of the Majority, one might mistakenly conclude the Carrier offered no evidence other than that found by the Majority to be in support of Petitioner's case. In shaping their decision, the Majority apparently failed to take into account the determinative facts.

Another error is the Majority's misconstruction of the Carrier's assertion which appears at page 32 of the record. They assert:

" * * * the character of work determines the issue involved * * * "

and

" * * * The work in question was placed under the coverage of the effective Agreement between the parties until May 22, 1961, and from Carrier's own statements, the 'Material Chasers' are now performing the same character of work. * * * "

This is another misstatement of the record. It fails to include a very important and decisive fact which clearly proves the work involved was not the same character of work performed by clerical employees who attend the working stock section. Again, we go back to the handing of the claim on the property. There, the Carrier asserted: (R., p. 44)

" * * * The material is charged out to the MofE Department by the Store Attendant, prior to being handled by the so-called 'Material Chaser.' "

For comparison, when the material was handled by clerical employes filling the "working stock section", it was material charged to the Stores Department, and not to the MofE Department. It was not charged out to the MofE Department until it was secured by the MofE forces. Thus, the character of work was not the same. The Carrier repeatedly stated:

"It was not the Storeroom's responsibility to get the material to the locomotive from the Storeroom."

and it necessarily follows, when the material has been charged out to the MofE Department, any claim to the handling of that material by the Clerks must cease, because the character of work is no longer the same.

Attention was directed to a number of awards containing similar facts and arguments where the validity of Carrier's contentions, repeated here, was upheld. In Award 3216 (Carter), we said, in part:

"* * * From that time on, Mechanical Department employes, and not Storehouse employes, were charged with all material taken out. Mechanical Department employes helped themselves to the material in the same manner they would have done had they requisitioned and obtained the material at the Division Store and shelved it in the Car Repair Shop for their use as needed." (Emphasis ours.)

We especially noted the emphasized portion of the foregoing opinion. That represents our case. Whether the material was scheduled for "immediate use", a fact which the present Majority apparently found significant, or intended to be shelved in the Repair Shop for use as needed, was considered immaterial. What we did find determinative in that dispute and subsequent cases was whether the material had passed from the jurisdiction and responsibility of the Stores Department to the MofE Department. When it does, its handling no longer accrues to Clerical employes. Particularly in the light of these facts, the Majority's Opinion is erroneous.

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R. A. DeRossett
C. H. Manoogian
G. L. Naylor
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