Award No. 13914
Docket No. CL-14234

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY
(Northwestern District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5335) that:

(a) Carrier violated and continues to violate the Clerks' Agreement when it contracted out work of unloading bi-level and tri-level auto carriers at Portland, Oregon (Albina).

(b) Carrier shall now be required to reimburse B. J. Tipton and M. E. Palmer, incumbents of Jobs Nos. 139 and 141 at Portland Freight Station, a total of eighteen (18) hours and thirty (30) minutes each at premium rate for January 1, 3, 8, 12, 13, 14, 17, 20 and 22, 1962. Claim to continue for these claimants, or their successors, until the work is assigned under the provisions of the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: On or about January 1, 1962, the work of unloading bi-level and tri-level auto carriers was performed by employes of the Transport Storage and Distributing Company (a contract firm). The tariff covering the unloading of these cars provides that when a delivery is made at a railroad or motor carrier ramp, rates will include the service of unloading and placement at the available location adjacent to the ramp.

The specific tariff provisions covering this are quoted below:

"Pacific Southcoast Freight Tariff 1-S, Item 10321, Note 1 (a), reads — 'When delivery is made at railroad ramp, rates include service of unloading and placement at available location adjacent to damp.'"

"Transcontinental Freight Bureau Tariff 1-K, Item 1240, Note 5 (b), carries a similar provision, and which is quoted as follows — 'When delivery is made at a railroad or motor carrier ramp, rates will include service of unloading and placement at available location adjacent to ramp.'"

function, then it cannot be said that such work function is "ordinary." When the work function requires special equipment and such special equipment is not provided by the Carrier, then the skill required in such work function is not "ordinary." At Portland the Carrier does not have the facilities available for the unloading of the multiple-level auto transport carriers and the Carriers cannot, in those circumstances, require its employes to safely and efficiently perform the work functions involved in such unloading procedures.

In asserting that the work involved is "ordinary" station work and that employes of the Clerks' craft and class should be used to perform such work functions, the Organization is, by inference, stating that the Carrier should be compelled to construct the facilities at Portland to accommodate the unloading of the multiple-level auto transport cars. This Board cannot require such.

For this Board to sustain the position of the Organization and hold that the unloading of automobiles from the multiple-level auto transport cars at Portland, or at any other station on this Carrier's lines, is work which is reserved exclusively to the Clerks' craft and class would have the effect of writing a new rule into the Agreement between the Brotherhood of Railway Clerks and the Union Pacific Railroad Company.

In summary it is the Carrier's position that the claim must fail for the following reasons:

(1) The claimants were not and are not entitled either by specific or implied provisions of the current Agreement to perform the work in question.

(2) The past practice involving this type work function does not make the Clerks' craft and class heirs to such duties.

(3) There are no facilities at Portland which would permit employes of this Carrier to safely and efficiently perform the work functions involved in the unloading of multiple-level auto transport carriers.

(4) The work involved is not "ordinary" station work as specified in the Scope Rule of the Clerks' Agreement.

(5) The claim is not based on any provision of the Agreement and is, therefore, a request for a new rule which this Board has consistently maintained it does not have authority to grant and that it will not, therefore, do so.

(6) The Agreement was not violated and the claim should, therefore, be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The central issue in this dispute is whether Carrier had the right to contract out the work of unloading automobiles from multiple level cars at Portland, Oregon.

The Brotherhood contends that this work falls within the Scope of the Agreement and thus may not be assigned to outside forces. Furthermore, it emphasizes that Carrier has recognized that this work under the agreement

belongs to the clerks because this class of employes has always performed unloading work. Also since the tariff covering the unloading of the cars provides that when a delivery is made, rates include the service of unloading automobiles, and since the vehicles are in the possession of Carrier until delivered to the consignee at the unloading point, it maintains that it is Carrier's obligation to unload the automobiles and it is the right of employes covered by the agreement to perform the work.

In its denial, Carrier argues that the Scope does not reserve the work in question exclusively to clerks and that there is a practice for other than Carrier's employes to unload the automobiles from multiple cars with the use of portable ramps. It states that the tariff rates are established by contract between the railroad and shipper and they do not include the obligation to have the clerks perform the work.

Prior to the introduction of the bi-level and tri-level auto transport carriers, automobiles which were transported in flat cars were unloaded by the clerks at a location on the ground in the freight house area where the consignee would take possession; or if shipped directly to the consignee, the cars were placed in a public team track where the consignee unloaded them without railroad personnel participating in the unloading.

To handle the unloading of automobiles from the new multiple level auto transport carriers, different unloading facilities were required. Before Carrier constructed permanent facilities at some locations, the unloading from the multiple level cars was handled on a contract basis. When permanent facilities were installed, the work of unloading was taken over by Carrier's employes. Where permanent facilities were not erected, Carrier contracted out the unloading work and the contractor would supply his own temporary buck ramp to facilitate the unloading.

At Portland, Oregon before the advent of the multiple level cars, the clerks performed the unloading, except when the automobiles were shipped directly to the consignee. Here Carrier decided not to build a permanent ramp and there is evidence that it employed a transport company which furnished its own ramp for unloading the automobiles. Although the record is not clear as to how long this practice of contracting out the work prevailed at Portland, such a practice did exist here, just as it did in other locations in the system. The Brotherhood does not deny such a practice, but merely states that it did not acquiesce in it. The contract with the Transport Storage and Distributing Company, which provoked this claim, was not the first agreement in which an outside force handled the work at Portland.

Not only has the Brotherhood failed in its burden of adducing clear and convincing evidence that the work in this dispute has been traditionally performed by the clerks, but a reading of the Scope fails to reveal that unloading of cars is designated by the rule as a function reserved exclusively to clerks. While clerks have performed the work of unloading automobiles from flat cars, they have not performed this work of unloading from multiple level auto transport carriers at Portland or at other locations, except where Carrier has installed a permanent ramp.

Although it is true that the responsibility for unloading automobiles rests with Carrier, for the tariff rates include this service, it does not follow that this work accrues to the clerks under the agreement. The Brotherhood must

support its right to the work either by the agreement or past practice, neither of which it has done.

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

For the foregoing reasons, we hold that the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October 1965.

LABOR MEMBER'S DISSENT TO AWARD 13914, DOCKET CL-14234

Employes feel that although the central issue was correctly recognized by the Referee as being whether or not Carrier had the right to contract out the work of unloading automobiles from multiple level cars, he erred in the choice and use of the various "tests" usually employed as well as his conclusion that the Organization did not support its right to the work.

Past practice conclusively showed that employes under the Clerks' Agreement had exclusively performed the work of unloading automobiles whenever that function was required of the Carrier. The Referee, however, ignored or gave no weight to that practice and instead considered as paramount the relative short "practice" which could only have dated from the time the multiple level cars were introduced. In other words, he permitted the "practice" of relative short duration to prevail over a practice which had been in existence since the clerical agreement was entered into.

Employes feel that such action is extremely improper especially since, based on all the usual "tests" related to past practice, the very "practice" which was allowed to prevail was in violation of the Clerks' Agreement when first inaugurated. In short, the Referee permitted prior violations of the Agreement to alter the terms thereof and the Carrier to profit from previous violations of the Agreement.

The Referee obviously considered the work function of unloading automobiles from flat and "Evans Loader" railway cars as sufficiently different

from the work function of unloading automobiles from multiple level cars so as to be considered "new work" not covered by the Agreement. Employes feel that determination was also in error because it ignored the fact, as stated in Award 864, and announced in subsequent Awards such as 1092, 3706, 3746, 4448, 4516, 4688, 5117, 5410, 6448, 7239, 10736, 13381 and others, that:

> "The agreement is clearly applicable to certain character of work and not merely to the method of performing it. To hold otherwise would operate to destroy collective bargaining agreements. Improved methods have no more effect upon such agreements than such agreements have upon the right of carrier to install such methods. Certainly no one would question the right of carriers to make improvements in methods of performing work and we think it is equally true that improved methods do not operate to take the work out from under contracts with employes performing same."

Evidently, the Referee strayed from the central issue and, instead of considering and properly applying the usual "tests," incorrectly considered the violative "practice" of short duration as superior to the admitted long term practice which both parties had followed under the Agreement he was called upon to interpret.

The usual test, on the basis of numerous Awards, is that the burden is upon the Carrier to show justification for diverting work to a contractor. Awards 4701, 4833, 4888, 5151, 5152, 5304, 5470, 5485, 6112, 9566, 10189, 10626, 11733, 11938, 11984 and others. This the Carrier failed to do.

To say that a violative action forever estops the Organization from proving exclusive rights is to honor the breach instead of the Agreement. It also ignores the fact that failure to prosecute a rightful claim in the past does not estop present actions, e.g., Awards 3696, 3825, 11031, and that continued violations of the Agreement does not change it, Awards 561, 1518, 4501, 5100, 5386, 6144, 6563, 6840, 7195, 7914, 9040.

Employes consider the Award erroneous and therefore dissent.

/s/ D. E. Watkins
D. E. Watkins,
Labor Member
11-22-65