Award No. 17007
Docket No. CL-16278

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

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

NEW YORK CENTRAL RAILROAD
(Southern District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5990) that:

(1) Carrier violated the Clerks' Agreement when on August 27, 1964, they contracted the work of auto driver and related work to the Midwest Service Company of St. Louis, Missouri and refused to assign the work to employes covered by the current Rules Agreement.

(2) The Carrier shall now compensate Mr. J. P. Brennan, Mr. Richard E. Loheide, Mr. Larry T. Bruin and Mr. Lester N. Huffman, Cincinnati, Ohio, for eight (8) hours' pay at rate of $18.758 per day, for September 24, 1964 and for each subsequent day thereafter until the work of auto driver and other related work in connection with unloading bi-level and tri-level automobile cars at Cincinnati (Sharon Yards), Ohio is assigned to employes covered by the current Rules Agreement.

EMPLOYES' STATEMENT OF FACTS: On August 7, 1964, Carrier issued Bulletin Notice No. 40-64 addressed to all concerned advising Positions Nos. 151 through 156 inclusive — Auto Driver — was open for bids. Claimants Brennan, Loheide, Bruin and Huffman bid for the bulletined positions. (See Employes' Exhibit C.)

Under date of August 10, 1964, Carrier issued Bulletin Notice No. 41-64, advising employes of the fact that previous Bulletin Notice No. 40 was hereby canceled. (See Employes' Exhibit D.)

Investigation by the employes and the Organization's representatives endeavoring to learn why the bulletin advertising the positions was canceled when the work was there to be performed, we were informed that the Carrier had on or about August 27, 1964, contracted out the work of auto driver and the related work of unblocking, untying and driving the automobiles off the cars.

Under date of November 17, 1964, time claim was filed by Local Chairman Bradford with Terminal Manager Garrison in behalf of Claimants Brennan, Loheide, Bruin and Huffman. (See Employes' Exhibit H.)

Under date of November 25, 1964, File No. 37, Agent Garrison declined the time claims in behalf of Claimants. (See Employes' Exhibit I.)

Appeal from decision of Agent Garrison was then taken by Vice General Chairman B. T. Moore, to Mr. T. J. Brown, Terminal Superintendent. (See Employes' Exhibit J.)

Under date of February 3, 1965, Terminal Superintendent Brown declined the appeal of Vice General Chairman Moore. (See Employes' Exhibit K.)

Under date of March 31, 1965, the decision of Mr. T. J. Brown, Terminal Superintendent, was appealed by General Chairman T. C. Burch to Mr. E. Gibson, Assistant General Manager–Employe Relations. (See Employes' Exhibit L.)

Under date of May 3, 1965, Mr. E. Gibson, Assistant General Manager–Employe Relations, in a letter to General Chairman Burch declined the claims and conference with the Carrier on the property in an effort to compose the issue was not successful. (See Employes' Exhibit M.)

(The time limits were extended by agreement between the parties and letter of confirmation dated December 30, 1965 is attached hereto under Employes' Exhibit N).

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: There is in full force and effect an Agreement between the parties hereto, effective July 22, 1922, (revised to January 5, 1951), copies of which are on file in the offices of the Third Division, and which is hereby made a part of this submission.

During the fall of 1964, Carrier established facilities at Sharonville Yard, Cincinnati, Ohio, to accommodate the unloading of automobiles arriving from Detroit, Michigan, on the special bi-level and tri-level equipment for distribution by motor carriers to the various automobile dealers within the Cincinnati area.

Carrier assessed the possibility of manning this facility with employes from the Clerks' Organization; but a careful analysis of the various aspects of the service necessary in this work indicated that this plan would not be feasible. This work was, therefore, contracted to the Midwest Service Company, resulting in the claims progressed here.

OPINION OF BOARD: Petitioner contends that Carrier violated the Clerks' Agreement when it contracted out the work of auto driver and related work to a private independent contractor rather than assign the work to Claimants.

The grounds of Petitioner's assertion may be summarized as follows: (1) The work in question belonged to Claimants under the terms of the Agree-

ment, (2) Evidence of such preliminary negotiations between Carrier and Petitioner representatives followed by a Bulletin Notice (which was canceled 3 days later), (3) Application by Carrier for new tariff authority, and (4) Carrier recognized that the work came within the purview of the Clerks' Agreement when local letter agreements were negotiated between the parties for identical work at other installations such as Selkirk, New York.

Carrier contends that it had the right to employ independent contractors to do the work because: (1) The Scope Rule is general in nature and does not describe the work, (2) As such, the Petitioner has the burden of proving that past practice, custom, or tradition exclusively reserved the work to the Petitioner — and this burden has not been met by the Petitioner (3) Carrier has shown that such work has been contracted out as early as 1924, and (4) The Petitioner also recognizes that it does not have the exclusive right by its Section 6 Notice requesting that the Agreement be amended to include such work.

The Scope Rule does not indicate that the work of loading and unloading cars is work that is reserved to the clerks. In Award 14751, the Board held:

> "The Scope Rule in the Agreement is general in character. It does not expressly assign to the Brotherhood the work here involved. The rules relied upon were effective May 1, 1952. There is no evidence in the record to sustain a finding that the existing agreement contemplated that the work claimed was to be covered by the Agreement. The Agreement between the parties is system-wide. It is not confined soley to York, Pennsylvania. It includes all of the Carrier's Divisions. If the work complained of is not specifically set out in the Agreement, the Brotherhood must then show that the work belongs to the Claimants exclusively by past practice, tradition and custom, system-wide. The burden of proof through competent evidence is upon the Brotherhood. The Brotherhood has failed to prove a sufficient system-wide practice to show the exclusive right of these Claimants to this work. Therefore, we are constrained to deny this claim."

The record further shows that the Petitioner has failed to meet its burden of showing that the clerks in the past performed the work on this property. In Award 13923, the Board denied the claim in a dispute involving the contracting out of loading and unloading of automobiles, and held:

> "It has been long and firmly established by decisional rule of this Board that an organization laying claim to specific work — where the Scope Rule of the collective bargaining agreement is general in nature — has the burden of proving that the employes covered by the agreement have, historically and customarily, exclusively performed the work on the property. In the instant case Clerks failed to satisfy the burden. We, therefore, will deny the Claim."

The fact that Carrier and Petitioner representatives held preliminary conferences to consider such work, and the further fact that such conferences resulted in the issuance of bulletin notices, with nothing more, are not evidence of an admission on Carrier's part of a past practice. Nor is the application for a tariff, standing alone, evidence of the absence of past practice.

Contrary to the Petitioner's assertion, the negotiation of local letter agreements between the parties for the performance of identical work (such as Selkirk, New York) is further evidence of the absence of any exclusive system-wide past practice.

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 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 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 25th day of March 1969.

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