

Award No. 18120
Docket No. CL-18355

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6611) that:

(1) Carrier violated the Clerks' rules agreement at King Street Passenger station Store Department, Seattle, Washington, when, on Saturday and Sunday, March 16 and 17, 1968, and each Saturday and Sunday thereafter, it required the Mechanical forces to enter the Store and secure material from the bins.

(2) Carrier shall now be required to compensate Thomas Baxter, and/or his successor as Store Foreman, for eight hours at the overtime rate for Saturday, March 30, 1968, and Sunday, March 31, 1968, and each Saturday and Sunday thereafter.

EMPLOYEES' STATEMENT OF FACTS: The King Street Passenger Station is a joint facility of the Great Northern and Northern Pacific Railways, and operated as a separate property with the Great Northern Labor-Relations Department handling labor contracts.

For many, many years, the Store Department at King Street Passenger Station was a 13-hour per day, 7-day operation. The purpose of this Store was to assemble, maintain and supply material to the several Mechanical Departments whose duties are to repair and maintain the facilities of the King Street Passenger Station, and the rolling stock of the Northern Pacific and Great Northern passenger and mail trains. One of the main functions of the Store is to supply material to the using departments upon demand made through a requisition form identified as Form 20. This was accomplished historically by an employe of the using department coming to a counter in the Store, presenting a requisition to the Store Attendant, who would then secure the requested material from the bins, shelves or floor area where the Store material is assembled. The material would then be passed across the counter to the employe making the requisition unless the material was too large, in which case it would be passed through a 7-foot door. The employes of the using department could not go beyond the caged-in counter and, therefore, have no access to material in the Storehouse bins, shelves or floor storage area unless the

OPINION OF BOARD: The issue in this case, as framed by the Claim, is confined to whether Carrier violated the Agreement when "it required the Mechanical forces to enter the Store and secure material from the bins." Otherwise stated, was the work involved in dispensing materials from within the Store's inventory to Mechanical Forces employees work exclusively reserved to Clerks?

Immaterial and irrelevant to the issue is the manner in which Mechanical Forces employees obtained materials from sources other than the Store.

If the work in issue be found to be exclusively reserved to Clerks by the Agreement; and, if it is found that Carrier required employees other than those covered by Clerks' Agreement to perform it, Carrier violated the Agreement and its reasons for causing violation of the Agreement are immaterial and irrelevant. The Agreement is inviolable.

In our consideration of this case we have given no weight to evidence contained in the Submissions which was not part of the record made on the property. The record was closed when Clerks letter of intention to file Ex Parte Submission to this Board, dated March 28, 1969, was received by the Board on April 1, 1969.

A. THE ISSUES

The issues confronting us are:

1. Was the work exclusively reserved to Clerks;
2. If (1) is found in the affirmative, is Claimant a proper claimant; and
3. If (1) and (2) are found in the affirmative, what is the measure of remedial compensation.

B. CARRIERS AFFIRMATIVE DEFENSE

Carrier's sole defense to the allegation of Agreement violation, as proffered by the chief operating officer of the carrier designated to handle such disputes in his denial of the Claim on July 9, 1968, and often repeated by him in substance in subsequent correspondence (see for example letter from him to the General Chairman, dated September 10, 1968), is:

"As stated in our letter of May 29, 1968, and again in conference June 4, 1968, we do not agree that a Mechanical Supervisor is precluded from securing a few isolated items of material, incidental and necessary to his duties, nor that his doing so creates any conflict with or violation of the Clerks' Agreement." (Emphasis ours.)

C. THE FACTS

The King Street Passenger Station, Seattle, Washington is a joint facility of the Great Northern and the Northern Pacific. The employees at the facility, including the Clerks, are covered by system-wide Great Northern collective bargaining Agreements with respective Organizations.

Prior to March 16, 1968, the positions in the Store were 7 day positions; but, there had been a substantial reduction in the work force before that date, over a period of time, because of a substantial decline in business at the Station. There is not evidence that when the reductions were made that work within Clerks' Agreement was assigned to employes other than Clerks.

On March 5, 1968, Carrier circulated the following bulletin:

"Effective with the close of shift Friday, March 15, 1968, hours of KSS Store Department will be 7:00 A. M. to 6:00 P. M. daily Mondays through Fridays, and will be completely closed Saturdays and Sundays unless an emergency occurs.

There will be one key to the Store House door on the west side of the building in charge of Mr. W. J. Norton, who will see that all mechanical supervisors and foremen has access to this one key. Key must be kept in a special place in Mr. Norton's office at all time. Foremen will be given instructions by Mr. Norton and Mr. Wobser in respect to leaving an accurate record of any items removed from the Store House after 6:00 P. M. week days as well as any time on Saturdays and Sundays.

Mr. Moodie will have to see that all propane tanks are fully charged as there will be no service at the Store House on Saturdays, Sundays and holidays.

* * * * *

In other words, all departments keep in mind to anticipate their needs as much as possible and obtain whatever is required from the Store Dept. prior to 6:00 P. M. each Friday as the Store will not open regularly until 7:00 A.M. the following Monday." (Emphasis ours.)

On March 7, 1968, the Baggage Agent posted a notice, effective with the close of business March 15, 1968, abolishing a Relief Position and a Store Attendant Position, and the one remaining position of Store Foreman was changed from a 7 to 5 day position. As a result of the reduction in force all the remaining work of the Store, formerly performed by the occupants of the two aforesaid abolished positions, settled in the Store Foreman, Mondays through Fridays.

During the latter part of 1958, Clerks charged that Mechanical Forces were "helping themselves to items off the shelves and out of the bins and then placing a requisition for same." As a consequence the General Car Foreman, under date of December 15, 1958, directed a letter to all Supervisors terminating the practice. It, with emphasis supplied, reads:

"ALL SUPERVISORS:

We are in receipt of a formal complaint registered by the Store Foreman that certain Coach Yard Supervisors are entering the Store and helping themselves to items off the shelves and out of bins and then placing a requisition for same. It is his contention that **this practice is an infringement of Store Department employes' work** and tends to disrupt the material in the trays, thereby hampering inventory calculations. We must agree that **this complaint is justified.**

It is not our intention to restrict Supervisors from entering the Store, as many daily emergencies arise that dictate speed in obtaining Store items which if handled under regular channels would at times delay departure of trains from the yard; but, in the future, when it is necessary for a Supervisor to search for a Store item personally he must be accompanied by a Store employe who will remove the item from the tray.

Mr. G. A. Wobser has promised complete cooperation on the part of his employes to assist the Supervisors in filling requisitions when speed is essential and if no Material Handler is available you are instructed to ask either of his office personnel to accompany you back to the shelves and they in turn will handle the material on receipt of requisition.

Please cooperate in this matter so that the Company will not be penalized with future time claims from the Store Material Handlers.

W. J. Norton"

This directive, Carrier does not deny, was honored by it until its unilateral promulgation of deviation in the March 5, 1968, bulletin, supra.

Clerks have adduced evidence that on Saturdays and Sundays following March 15, 1968, Mechanical Forces' employes, in the absence of a Clerk, entered the Store and appropriated materials from the Store's inventory. This is not refuted by Carrier. Its response is that such actions on the part of Mechanical Forces' employes was only an "incident" of their duties.

Carrier does not deny that it had made a study of the withdrawals from the Store by Mechanical Force employes on Saturdays and Sundays subsequent to March 15, 1968. It did not make it available to the employes. When Clerks requested a joint check of the records Carrier replied that the facts were not in dispute; and, reiterated its defense of "incident" — an affirmative defense which, even if it had merit, Carrier did not support by the introduction of evidence of probative value.

Clerks introduced statements of former Store employes, covering a long period of time, that the work of dispensing materials from the Store had been performed, historically, exclusively by Clerks prior to the reduction in force and change from 7 to 5 day position. Carrier's only attack upon the statements was that they came from biased individuals — an attack on credibility by uttering a self-serving declaratory presumption which has no evidentiary weight.

While Carrier says there was a decline in business which caused it to take the action relative to which Clerks complain, it has introduced no evidence that the workload of the Mechanical Forces in servicing trains was lessened. It does not necessarily follow that it would be.

Leroy Nolan was Store Foreman during the week ending March 15, 1968 and held that position until he was displaced by Thomas Baxter, Claimant herein, the week of March 25, 1968. Clerks filed Claim on behalf of Nolan for alleged violation of the Agreement by Carrier in requiring Mechanical Forces' employes to withdraw materials from the Store in the manner com-

plained of in the Instant Claim during Nolan's ownership of the position. That Claim is not before us.

The Claim before us is on behalf of "Thomas Baxter, and/or his successor as Store Foreman, for eight hours at the overtime rate for Saturday, March 30, 1968, and Sunday, March 31, 1968, and each Saturday and Sunday thereafter." The Claim as alleged is a continuing one within the contemplation of Article V of the August 21, 1954 National Agreement.

D. RESOLUTION

The Scope Rule is general in nature. Clerks have the burden of proving that the work involved at the Store was historically and exclusively performed by Clerks. We find from the facts of record that: (1) Clerks have satisfied the burden of proof; (2) Carrier violated the Agreement by requiring Mechanical Forces' employes to invade the sanctity of work exclusively reserved to Clerks; (3) Carrier's defense of "incident" is without merit — the work was not "incident" to the work of the Mechanical Forces prior to March 15, 1968 — the work was not "incident" to the work of the Mechanical Forces Mondays through Friday after March 15, 1968 — Carrier was contractually restrained from unilaterally requiring Mechanical Forces' employes incursion into the Clerks' contractually established work domain by ruse of labelling it "incident" to the work of Mechanical Forces. Cf. *Detroit & Toledo Shore Line R.R. Co. v. UTU*, 396 U.S. 142(1969). Even if the defense of "incident" had any merit Carrier failed to produce its records in support. Carrier bore the burden of proof. It did not satisfy the burden. We sustain paragraph (1) of the Claim.

Claimant and his successor(s), if any, in the position of Store Foreman is(are) a proper Claimant. Carrier had the option, Rule 29, of having a contractually qualified relief or extra Clerk perform the work of the Foreman's position on Saturdays and Sundays — this whether the position was a 7 or 5 days position. When it failed to exercise that option the right to the work vested in the Claimant as the employe regularly assigned to the position.

AWARD—18120

Job No. 8677

Galley 5

The record reveals that in some instances Carrier did in fact assign an extra employe to Saturday and/or Sunday work after March 15, 1968. On the days it did so, the Claimant nor his successor(s) have no contractual right to compensation. We, therefore, will Award that the Claimant and/or his successor(s) be compensated for 8 hours at the overtime rate for each Saturday and Sunday from and including March 30, 1968, until Carrier terminates its violation of the Agreement as alleged in paragraph (1) of the Claim; **except**, for those days when Carrier did in fact assign a contractually qualified Clerk to perform the work of the position — the excepted dates to be established by a joint check of Carrier's records. To this extent we will sustain paragraph (2) of the Claim.

In Award No. 36 of Special Board of Adjustment No. 171, involving the parties herein and the same Agreement provisions, it was held:

"The Arbitrator finds that a 7 day position, namely that of Chief Clerk, was reduced to a 5 day position, but that duties of the Chief Clerk remained to be performed on the 6th and 7th days.

* * * * *

From a careful reading of the effective agreement, the Arbitrator finds that in reducing the 7 day position to a 5 day position, and the 6 day position to a 5 day position when work remained to be performed on these positions on the 6th day and on the 7th day, the Carrier violated Rule 29 (c) of the Effective Agreement which states that 'it is understood that 6 day positions will be filled 6 days per week except as provided in Rule 33,' and 29 (d) which states that 'it is understood that 7 day positions will be filled 7 days per week.' * * * (Emphasis ours.)

This apposite Award on the property, which is founded in the essence of the Agreement, supports a finding herein that Carrier violated Rule 29 (d) when it reduced the Store Foreman position from one of 7 days to 5 day position; this since the work of the Store Foreman position "remained to be performed * * * on the 6th and on the 7th day."

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 Carrier violated the Agreement.

AWARD

Claim sustained with compensation to the extent prescribed in the Opinion, supra.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1970.