

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21022
Docket Number CL-20787

Louis Norris, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees

PARTIES TO DISPUTE: (
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the Burlington Northern System Board of
Adjustment (GL-7587) that:

1. Carrier is violating the terms of the current Clerks' Agreement at Lewistown, Montana, Freight Warehouse, by permitting outside Truck Drivers to handle freight from various locations on the freight house floor to their motor vehicles, using the two-wheel trucks and other railroad freight handlers equipment in the performance of such work.

2. Carrier now be required to refrain from allowing such outside people to perform the freight handling work here involved.

3. Carrier now be required to compensate Mr. Edwin M. VanderVen, Clerk-Warehouseman, Lewistown, Montana, at the time and one-half rate on the dates and in the amount of hours as set out below, and each and every day thereafter that outsiders perform this work. Such payments in addition to compensation already received on those dates:

<u>Date</u>	<u>Time Claimed</u>	<u>Date</u>	<u>Time Claimed</u>
March 16, 1973	2 hours	March 19, 1973	2 hours
March 20, 1973	2 hours	March 23, 1973	2 hours
March 26, 1973	2 hours	March 27, 1973	2 hours
March 28, 1973	2 hours	March 29, 1973	2 hours
April 26, 1973	2 hours	April 27, 1973	2 hours
May 1, 1973	2 hours	May 2, 1973	2 hours
May 3, 1973	2 hours	May 4, 1973	2 hours
May 7, 1973	2 hours	May 8, 1973	2 hours
May 9, 1973	2 hours	May 10, 1973	2 hours
May 11, 1973	2 hours	May 14, 1973	2 hours
May 15, 1973	2 hours	May 17, 1973	2 hours
May 18, 1973	2 hours	May 21, 1973	1 hour
May 22, 1973	2 hours	May 23, 1973	2 hours
May 24, 1973	2 hours	May 25, 1973	2 hours
May 28, 1973	2 hours	May 29, 1973	2 hours
May 31, 1973	2 hours	June 5, 1973	2 hours
June 6, 1973	2 hours	June 7, 1973	1 hour
June 8, 1973	1 hour	June 12, 1973	2 hours
June 14, 1973	2 hours		

OPINION OF BOARD: The Statement of Claim adequately sets forth the aspects in which Petitioner contends Carrier has violated and allegedly continues to violate the controlling Agreement; in essence, that "outsiders" are being permitted to perform work covered by the Clerks' Agreement. Relief is demanded as set forth in the Claim, plus "compensation" to Claimant.

The basic situation which gives rise to this dispute revolves around the work procedures at Carrier station located at Lewistown, Montana, where one of the functions is to handle inbound and outbound freight. Rigs are backed to the dock and it is the duty of the Clerk-Warehousemen, Claimant being one, to unload, check, sort and place the freight in assigned locations on the warehouse floor. The freight is then picked up for delivery by private trucking companies. Due to clerical work load, Claimant was instructed to remain in the office, which meant that only one Clerk was available to handle the above described duties.

Thus, Petitioner asserts, outside drivers were instructed by their superiors, in order to avoid delay, to load their own freight from the warehouse - "i.e., the tail gate delivery principle would no longer be observed". Petitioner contends that such practice violated the Clerks' Agreement since the disputed work was covered thereby.

Carrier responds that in accordance with the practice followed at this location for at least the past six years, and in compliance with the Agreement, warehousemen were in fact doing all the necessary checking and sorting of freight; and that "all the drayman was doing was loading his own truck".

Initially, Carrier contends that the instant claim is jurisdictionally defective and should be dismissed for vagueness and failure to allege specifics on claimed rule violations. Although we are persuaded that such contention has merit on procedural grounds, we are of the opinion that the claims as filed (overtime slips) contain sufficient detail to apprise Carrier of the nature of the dispute. In any event, the issue having been joined, we deem it proper to resolve this dispute on its merits.

Carrier raises the further objection that the "tail gate delivery principle" asserted by Petitioner constitutes "new matter" not previously raised on the property and, accordingly, not properly before the Board at this stage of the appellate process. We concur and sustain such objection, for this Board has consistently adhered to the principle of rejecting issues not raised on the property.

See Awards 19101, 20064, 20121, 20255 and 20468, among many others.

Arguendo, assuming the "tail gate delivery principle" does apply, the burden would still be on Petitioner to establish probatively that the disputed work was theirs to perform, exclusively, either under a specific work reservation rule or under the specific language of the Scope Rule of the controlling Agreement. In neither case has Petitioner offered concrete facts sufficient to sustain its burden of proof. Such "principle", therefore, is not deemed pertinent to the merits of this dispute.

The Scope Rule here involved is a general rule governing hours of service and working conditions of the employees in specific positions which are listed in the Agreement. There is no language in the Agreement, however, either under the Scope Rule or work reservation rule (of which there is none), which exclusively reserves or assigns the disputed work to any craft or class of employees covered by the Agreement.

In similar circumstances, we have held in innumerable prior Awards that where the Scope Rule is general in nature, as is the case here, the Organization claiming the right to specific work has the burden of proving by a preponderance of evidence that such work has been customarily, historically and traditionally performed exclusively by members of Petitioner's Organization system-wide. No such proof is contained in the record before us.

See Awards 12109 (Seff), 12381 (O'Gallagher), 16780 (Ritter), 18465 (O'Brien) and 19969 (Roadley) among a host of others to the same effect.

Petitioner contends nevertheless that these claims for the disputed work were conceded by Assistant Superintendent Miller in his instructions to the Agent at Lewistown to handle the matter "locally" and to have "the situation corrected". However, Mr. Miller's letter of June 29, 1973 is precisely to the contrary. He states specifically that the Agent is "to eliminate the presentation of such timeslips" and that these should "be declined by proper authority". This contention of Petitioner is therefore not sustained factually.

Petitioner further asserts that similar claims have in fact been paid by Carrier in the past. Such assertions, however, are without specific factual proof and, consequently, are of no evidentiary value. Additionally, even if true, this Board has consistently rejected contentions that such settlements have any precedential value and are not controlling upon specific disputes.

See Awards 16053 (Kenan), 16544 (Devine) and cases cited therein, among others.

Accordingly, in view of the foregoing, and particularly in view of our findings in connection with the Scope Rule, the past practice at this location for at least the past six years becomes of paramount importance and is controlling upon this dispute.

See Awards 15503 (House), 16819 (Brown), and 19702 (Blackwell) among others.

In short, the disputed work not being exclusively reserved to the employees covered by the Agreement, no violation of the Agreement has been probatively established. Accordingly, we find no basis in this record upon which to sustain the Claim.

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 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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1976.