

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21117
Docket Number CL-21099

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: { (Brotherhood of Railway, Airline and
Steamship Clerks, Freight Handlers,
Express and Station Employees
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7768) that:

(1) Carrier violated and continues to violate the terms of Appendix "H" - Union Shop Agreement - of the Clerks' Working Agreement, effective March 3, 1970, when it failed and refused to notify Mr. Jerome B. Larson that he was charged with noncompliance of the Union Shop Agreement.

(2) Carrier shall now be required and ordered to comply with the terms of Appendix "H" - Union Shop Agreement.

OPINION OF BOARD: This dispute involves Carrier's refusal to notify the named employee that he was in non-compliance with the Union Shop Agreement. That Agreement provides, inter alia, that an employee who disagrees with an allegation of non-compliance may request a hearing and the hearing may be followed by appeal and ultimate resolution through the arbitral process.

In this dispute, the employee involved occupies the position of Chief Clerk (office manager) to the Sales Manager at Bend, Oregon. Prior to the merger of the SP&S Railway, in 1968 the position in question had been titled Steno-Clerk. On March 18, 1968 Carrier requested that the position be reclassified to Assistant to the General Agent, an excepted position. This was agreed to by the Organization on April 9, 1968 with the stipulation that the position would remain under the provisions of the Union Shop Agreement. Elwood Smith was selected for the position effective May 1, 1968 and held the position until his death on April 24, 1973. He maintained his membership in the Organization during this period. Carrier states that the position was reclassified to Chief Clerk on March 3, 1970, the effective date of the merger of the SP&S with the Burlington Northern, on which date Carrier assigned a Sales Manager to Bend instead of a General Agent to handle the anticipated increase in activity.

At the heart of this dispute is Appendix L of the Agreement, and in particular Sections 1 (a) and 4:

"APPENDIX L

1. (a) There shall be no changes in the rules and agreements heretofore negotiated respectively by the Brotherhood of Railway and Airline Clerks and the Great Northern Railway, the Northern Pacific Railway, the Chicago, Burlington & Quincy Railroad and the Spokane, Portland and Seattle Railway providing for the exception or exemption from the application of certain rules for various employees, positions and departments, except as specifically provided herein.

* * * *

4. All positions individually listed in Rule 3(a)2 and 3 of the Great Northern clerks' Agreement, Rule 1(c) of the Northern Pacific clerks' Agreement, Rule 2(a) of the CB&Q clerks' Agreement and Rule 1(c) of the SP&S clerks' Agreement and all clerical positions in off-line and on-line Traffic or Marketing Departments and successor positions to such positions, and the employees incumbent thereto, shall be subject only to Rules 1, 3, 8, 9, 63, 64 and 71 of the Burlington Northern clerks' Agreement as provided by Section 3 of this Appendix, and, except for the positions listed below and the incumbents thereto, shall in addition be subject to the Union Shop and Dues Deduction Agreements (Appendices H and I):

Chief Clerks (Office Managers) to System Officers not listed in wholly excepted offices.

Chief Clerks (Office Managers):

Superintendents

Marketing or Sales Managers or equivalent rank or higher

General Freight Agents

Accounting Offices (1 each office)

District or Division Storekeepers (Assistant Regional Material Managers and Material Managers)

Supervisors Multigraph Department (3)

Shop Accountant (Department Head) Omaha

Traffic Department Solicitors

Tax Agents "

It is noted that 4 above specifically excludes from the Union Shop Agreement Chief Clerks to the Sales Managers. Also, relevant, to place the dispute in perspective, were two other Letter Agreements. An Agreement dated October 21, 1969 provided:

"October 21, 1969

File: 604-D

Mr. Kenneth F. Lassell, General Chairman
Brotherhood of Railway, Airline and
Steamship Clerks
738 Northeast 198th Avenue
Portland, Oregon 97230

Dear Mr. Lassell:

This letter will confirm our understanding in conference yesterday that when the Management desires to establish excepted positions under Rule 1 (c) of the current Clerks Schedule, it may do so, provided the appointees are selected from one of the clerical rosters, and with the understanding the appointees will continue to be subject to the Union Shop Agreement while filling such excepted positions.

This understanding will remain in effect until July 1, 1971 and thereafter until changed in accordance with the amended Railway Labor Act.

Very truly yours,

Chief of Personnel

AGREED TO:

General Chairman, BRAC"

That understanding was effectively terminated by the letter dated March 29, 1971.

Carrier's argument is based primarily on the clear exclusion of the position by Section 4 of Appendix L, supra. It is argued that the entire agreement must be viewed, not merely the Union Shop provisions and thus Appendix L modifies the Union Shop Agreement. Also, Carrier asserts that the cancellation of the October 21, 1969 Agreement supports its right to make the position excepted from the Union Shop provisions. By analogy, Carrier suggests that it would be just as appropriate for a notice to be served on the President of the Company as on the incumbent of the position

herein. As an additional point, the Carrier observes that the Organization was silent on the question of the Union Shop provisions applicable to the position in question from 1970 until the notice served on March 14, 1974. At the very least, Carrier observes that a fourteen month period passed after the incumbent was placed on the job until the March 1974 notice was served. Carrier argues that the doctrine of equitable estoppel should be applied.

Petitioner first observes that it was unaware of the change in the title of the position until the Carrier's letter of March 22, 1974. Further, Petitioner presented evidence to indicate that on the Seniority Rosters dated January 1, 1970 and January 1, 1971 the position was listed as Assistant to the General Agent. The Organization also challenges the assertion that the incumbent indeed performs the functions of Chief Clerk, claiming that he supervises no clerks. The Organization argues that from the time the position was reclassified to Assistant to the General Agent in 1968, it was understood that the position would remain under the provisions of the Union Shop Agreement. It also contended that since the former SP&S Agreement did not list a Chief Clerks' position at Bend, such position could not be created following the merger, except by written agreement, which does not exist. The Organization concludes that the dispute should have been resolved by the hearing and appeals procedures provided by the Union Shop Agreement.

We note that there is no evidence to indicate the Organization's knowledge of the change in title prior to the March 1974 letter. Carrier, in its argument, relating to earlier Awards on similar issues, states that those cases may be distinguished in that there was genuine doubt in those situations as to whether or not the jobs in question were covered by the union shop agreements. That is precisely where the problem exists in this dispute. The only evidence submitted by Carrier with respect to the change in job title of the position herein, was a Recommendation for Transfer dated March 3, 1970. On the other hand, the Organization has submitted seniority rosters after that date indicating the old title and also has challenged the right of Carrier to make the change unilaterally and further questions the substantive content of the new position. It is quite clear that based on the language of Appendix L the title in dispute is exempt from the Union Shop provisions. However, significant doubt has been cast on the facts surrounding the change in title which we are unable to resolve; the record simply is devoid of sufficient information to make a determination and in addition, this is not the proper forum. This Board has had similar disputes in the past and we have held consistently that Carriers could not arbitrarily refuse to give notice to individual employees, to inaugurate the special procedures specified in Union Shop Agreements, simply on the basis of Carrier's claim that the employees were not subject to that Agreement (see Awards 6744, 7085, 16590 and 18810 among others). The appropriate solution to this dispute, under the circumstances, is remand to the property for handling under the terms of the Union Shop Agreement; accordingly, the Claim must be sustained.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.