

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: "(a) Claim that the Carrier violated the Clerks' Agreement at Bisbee, Arizona, on May 1st, 1936, and subsequent dates, by assigning clerical and other station work to an employee not covered by said agreement, and failing and refusing to assign such clerical and other station work to employees holding seniority rights thereto, under the Clerks' Agreement.

"(b) Claim of the Employees that a clerical position should be established at Bisbee, Arizona, with a rate of not less than \$6.17 per day, bulletined and assigned to senior applicant, and that such applicant and other employees affected be compensated for all wage loss retroactive to May 1st, 1936."

EMPLOYEES' STATEMENT OF FACTS: "On or about May 1st, 1936, Carrier established position performing clerical duties at Bisbee, Arizona, and assigned the position to an employee who held no seniority under the Clerks' Agreement.

"The incumbent of the position was required to perform the following duties:

Billing Ore	
Abstracting Waybills	
Handling Cash Book	7 hours 55 minutes per day
Telephoning	5 minutes per day

"Upon the filing of this grievance, the duties of the incumbent were changed as follows:

Billing Ore	
Abstracting Waybills	
Handling Cash Book	7 hours 50 minutes per day
Telephoning	5 minutes per day
Telegraphing	5 minutes per day

"In 1927, an Arbitration Agreement (U. S. Mediation C-21) as to rates of pay for all clerical employees on the Southern Pacific was entered into by the parties to this docket.

"Under the Award granted under this agreement, rates of pay were fixed for positions which then existed at Bisbee, Arizona, as follows:

"At many stations the Carrier maintains positions of agent and/or agent-telegrapher. The majority of such positions as agent come within the scope of the Telegraphers' Agreement, all positions of agent-telegrapher are within the scope of said Agreement; all positions of each classification are assigned and the incumbent is required to perform clerical work without complaint and/or the right of complaint by the representatives of the Clerks' Organization.

"Yardmasters, other supervising employes and officers, also many other employes, including conductors, none of whom are within the purview and scope of the Clerks' Agreement do, and must of necessity perform certain clerical work, and have been doing so since the first Agreement with the Clerks' Organization, namely, the National Agreement effective Jan. 1, 1920, and prior thereto, which is not different than the situation at Bisbee concerning which the Petitioner is now complaining.

"The Carrier's practice is the same as that in effect on all railroads of the country, a practice which is understood by all practical railroad men, that is, when telegraphing is required a telegrapher is assigned and the incumbent permitted to perform clerical work, when not engaged in telegraphing, and that where only clerical work is required, except in cases where agents and/or agent-telegraphers are assigned, and/or if the position is specifically exempted from the Clerks' agreement, an employe under the Clerks' Agreement is assigned. This claim of the Petitioner evidently has for its purpose a repudiation of past practice and agreement interpretations—and the Petitioner seeks to change an accepted practice of more than fifty years standing.

"We have shown that Morse telegraphing and telephoning, the latter involving train operations, is involved and required of the Telegrapher-Clerk at Bisbee; we have also shown that the assignment of telegrapher-clerk under the Telegraphers' Agreement is in accordance with Agreement provisions and past practice; that such practice has been known to, accepted and condoned by the employes under the Clerks' Agreement and by representatives of the Clerks' Organization, all of whom have worked under these conditions for many years; therefore, we say that the Petitioner does not come before this Board with clean hands, that he is not entitled to the relief sought and we respectfully request that the claim be denied.

"We request the Board to dismiss the claim for the following reasons:

"(a) Lack of jurisdiction of the subject matter.

"(b) Because it is a jurisdictional dispute between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Order of Railroad Telegraphers.

"(c) Because there is a defect in the joinder of parties in interest.

"(d) Because the claim before the Board is not the same claim handled by the Petitioner with the Carrier.

"(e) Because a change in rules and working conditions is requested.

If, however, the Board does assume jurisdiction, we request that the claim be denied on the grounds that the assignment of Telegrapher-Clerk at Bisbee does not in any way violate the provisions of the Clerks' current Agreement."

OPINION OF BOARD: At the outset the Carrier questioned jurisdiction of the Board on the following grounds: (a) That the Claim here is not the same as that handled with the Carrier; (b) That a necessary party to the controversy, the Order of Railroad Telegraphers, has not been joined; (c) and (d) That the controversy is in reality a jurisdictional dispute of which this Board has no cognizance under the Act.

As to the objection (a), the claim is the same in substance except that that here seeks reparation while that below did not. This would not deprive the Board of jurisdiction but simply limit it in the application of remedy.

As to objections (b), (c) and (d), in view of the conclusions reached herein, they are not sustainable.

The Petitioners present a long line of cases by this and other Divisions of this and other Boards holding as a principle that employes represented by an agreement are entitled to the exclusive right to perform the work covered by such agreement in the absence of any definite limitation.

They go to the scope rule as indicating the character of work covered by that agreement and say that at least in any case where there are four or more hours of clerical work involved, the position indubitably belongs under the agreement. They further say that once work has become subject to their agreement, under the principles of the seniority rules it cannot be taken away so long as it exists.

The Carrier argues that there is nothing whatever in the schedule giving the Clerks an exclusive right to the performance of clerical duties; that for decades before the Clerks' Organization was recognized nationally, telegraphers had always been permitted and required to handle clerical work under certain circumstances and that it was in contemplation of this situation that the Clerks' contract was made; that the four-hour provision of Section 2 of the Clerks' rule is simply a distinction as between "clerical workers" and the other classes covered by the agreement.

The Board does not intend in this case in the slightest to impinge upon or limit the principles asserted by the Clerks but it is a mistaken concept that the source of the right to exclusive performance of the work covered by the agreement is to be found in either the scope or seniority rules; they may be searched in vain for a line even implying that they purport to accord to the employes represented the exclusive right to the performance of the work covered by the agreement. The Scope rules describe the class of work; they do not undertake to specify directly the inclusion of all of such classes of work; the Seniority rules merely control the disposition of the work that is available under the agreement.

The right to exclusive performance in the absence of exception arises from the application of an elementary principle of law. The "schedules" are not and do not purport to be the agreement of employment. The agreement of employment is almost universally unwritten. The "schedules" are merely the subordinate rules and conditions of such employment. The actual contract of employment itself is implied. Since by the patent facts such a contract must exist, as an elemental principle of law it must have a determinable subject matter; stated differently, there can be in law no such thing as a contract but that its subject matter is susceptible of definite determination. It follows from this that in the absence of some definite exclusion, the contract must be deemed to embrace all of the field involved to be a valid contract at all. If it were purely optional with the Carrier to say how much or what of a definite kind of work was the subject matter of the contract, it could say none and the consequence would be in the absence of a subject matter that there would be no contract. Whatever if any exceptions exists will fall into one or the other of two classes—(a) those directly expressed in the exceptions to the scope rule of the schedule and (b) those which may be definitely demonstrable extraneously. The latter class might be shown by definite evidence such as clearly provable agreement of the parties or by implication arising from the conditions surrounding the making of the agreement; in the last class of cases, however, the Board should be extremely slow to find the existence of such exceptions and only upon unmistakable proof. Practice alone would be insufficient grounds because of the inequality of the relative status of the parties to make such practice. There must be definite evidence of actual acquiescence.

Applying these principles, therefore, to the present situation, we find that it is overwhelmingly established by an abundance of evidence that there was and is a limitation on the extent of the right of the Clerks under their agree-

ment to the exclusive performance of that work consisting in that which has been and still is recognized as permissible and requirable to be performed by the telegraphers. It not only is proved but is a matter of common knowledge that for many years even before the Clerks' Organization had national recognition and perhaps from the inception of the industry—certainly since the beginning of the Telegraphers' agreements, telegraphers have been required and have had the right to perform clerical duties. So definitely was this situation recognized that, in promulgating the rules which gave the Clerks' Organization national recognition, the Railroad Administration in the scope rule promulgated by it parenthetically expected such work performed by employees subject to the telegraphers' agreement; while this exception no longer appears in the scope rule, the conditions in this respect have not changed since the first Clerks' agreements. The best illustration of the fact, that there is a well recognized limitation on their agreement for performance of clerical work so far as telegraphers are concerned, is that at one-man non-telegraph stations the agent is expressly incorporated in the telegraphers' agreement, is not excepted in the Clerks' Scope rule, and up to this date it has not been and is not now questioned that that limitation subsists. It has always been the rule that telegraphers may be assigned clerical work without limit except their capacity to fill out their time when not occupied with telegraphy. For obvious reasons in diminution of force, a clerk cannot undertake or be accorded telegrapher's duties but the converse is not true; on the contrary, where two positions are involved, one, that of a clerk, and the other, that of a telegrapher, and one is to be abolished, the telegrapher—if any telegraph duties remain—has the absolute right to the position including the assumption of the remaining clerical duties. As previously stated, this condition subsisted at the time, long before, and ever since clerks' agreements were executed and they were made in the light of these conditions which are a clear limitation or exception to the exclusive right of clerks to the performance of clerical duties.

So far as the four-hour provision of Rule 2 of the Clerks' Agreement is concerned, if the construction put upon it by the Clerks in this case is correct, whatever its force may be as applied to the inclusion of positions in the Clerks' Agreements as against other agreements other than the Telegraphers' Agreements, it could have no application as opposed to the Telegraphers' Agreement. To attempt to accord it such extra-territoriality would be to permit the stream to rise higher than its source. Manifestly, if the agreement of which this provision is a condition has certain limitations, the condition cannot operate to extend the agreement beyond its limitations. Considerable point is made in this case of the fact that over seven and one-half hours of the incumbent's time are devoted to clerical duties and only one-half hour to telegraphic duties; stated thus it might be inferred that the one-half hour of telegraphic duties is confined to that much elapsed time. There is no warrant however for that inference and the probabilities are that the telegraphic duties are scattered throughout the shift. It is this necessity which dictates the assignment of the position to a telegrapher.

Obviously the qualifications of a clerk do not include ability to handle Morse Code and even if they did, he could not be permitted to do so without flagrant invasion of the Telegraphers' Agreement.

As to the contention that, once clerical duties which at a given point have been performed by the clerks, by reason of the principle of the seniority rules they cannot be taken from them; while this doubtless is true as applied to other agreements, it is not so in a case of a telegrapher for the simple reason that there is the same limitation on the seniority rules that there is on the agreement itself; to the extent that the agreement is limited by the telegrapher's rights, the seniority involved is necessarily likewise limited; nor is it productive of such havoc as seems to be asserted; when a change of the kind here involved occurs no employee loses his seniority. What happens is that one position is withdrawn from one seniority and made available to another seniority; that is, the loss to one is a gain to another; there is no net

loss of individual seniority. It is a matter of everyday experience that positions are abolished and completely withdrawn from seniority opportunity but this does not violate seniority rules; in fact, they all expressly contemplate such happenings.

It follows from what has been said that likewise on the complete disappearance of telegraphic work, a position till then occupied by a telegrapher-clerk must be thrown open to bidding to the clerks instead. It automatically becomes a clerks' position on the disappearance of the telegraphic duties.

What has been said does not, of course, permit arbitrarily switching of a position from one agreement to the other merely to evade the rules of the one because of its higher wage rate. Awards Nos. 423 and 456 cited by the Clerks were based on a finding of a violation involving evasion of rules; Awards 423, 452, 456 and 531 rest on the assumption that there is a conflict and overlapping between the two agreements; they fail to accord consideration to the limitations on the Clerks' Agreement so far as permissible performance of clerical duties by telegraphers is concerned as hereinabove found and accordingly to the extent they are in conflict with the this decision, they must be deemed to be over-ruled; they themselves are counter to a well-established line of decisions by the Railroad Labor Board and the Railroad Administration. The mistake arises from looking to the Scope Rule as conclusive without regard to the well-understood limitations.

From what has been said it is the conclusion of the Board that there is no conflict between the two agreements; that consequently it is not a jurisdictional dispute in a technical sense and accordingly it is one of which this Board has jurisdiction; that the Carrier was within its right in establishing a position under the Telegraphers' Agreement in the instant case and assigning to such position clerical work previously performed by employees under and subject to the Clerks' Agreement. If joint conferences between the carrier and the two organizations involved are held when such changes are contemplated, they should operate to reduce the number of disputes of this character.

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 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 no violation of the rules has been shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of April, 1938.