

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY

W. R. Kenan, Jr., and S. M. Loftin, Receivers.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

"The Carrier has violated and is continuing to violate the Clerks' Agreement by assigning clerical work in the Chief Train Dispatcher's Office, at New Smyrna Beach, Fla., to employes not covered by said agreement, and further failing and refusing to assign such work to employes holding seniority rights thereto under the Clerks' Agreement; that such clerical work shall be restored to the scope of the Clerks' Agreement and assigned to employes, in accordance with the rules thereof; also claim that the employes involved in or affected by said violation of rules be compensated in full for any monetary loss resulting from the Carrier's actions."

EMPLOYES' STATEMENT OF FACTS: "Prior to 1926, there were employed in the Chief Train Dispatcher's Office at New Smyrna Beach, two clerks, one on duty during the day and one on duty during the night, performing the same duties that have subsequently been removed from the scope of the Clerks' Agreement and assigned to the trick train dispatchers, except during the winter months, when it has been customary to employ a clerk or clerk-stenographer to take over the work."

"On January 3, 1938, Chief Train Dispatcher issued bulletin advertising for bid, position of Clerk-Stenographer in the Chief Train Dispatcher's Office, New Smyrna Beach, probable duration May 15, 1938. Position was assigned by bulletin, dated January 11, 1938, to Clerk J. H. Bailey, and was abolished effective with close of the day's business May 15, 1938, while part of the duties, such as checking of time tickets of all train service employes, preparation of a report styled '44 report,' etc., still remain in existence and are being performed by trick train dispatchers."

POSITION OF EMPLOYES: "There is in evidence an agreement between the parties bearing effective date of January 1, 1938, and the following rules thereof read:

RULE 1.

"These rules shall govern the hours of service and working conditions of the following employes subject to the exceptions noted below:

'Group (1) Clerks—(a) Clerical workers.
(b) Machine operators.

'Group (2) other office and station employes—such as office boys, messengers, chore boys, train announcers, gatemen, train and engine

by the Chief Train Dispatcher, or Trick Train Dispatcher, connected with performance records of train movements, checking of time slips against train sheets, making copies of train sheets, etc., in addition to the handling of special seasonal reports and correspondence. During the period of low traffic, embracing about one-half the year, the clerical work in the office of the Chief Train Dispatcher is of little consequence, and not even the services of one clerk are required. The same situation develops in other offices of the Railway, particularly in agency service, where during the summer and fall months the force in some agencies consists of the Agents only, who performs all of the work there is to be done, including telegraphing, clerical work, trucking freight, etc., and during the winter and spring months the force is increased by adding clerks and porters to take care of the seasonal increase. In the Chief Train Dispatcher's Office, as in the agencies, there is a certain basic amount of work to be done, such as train dispatching and other technical duties, assigned to the Chief Train Dispatcher and the trick train dispatchers (comparable with telegraphing and train order handling in one man agencies) and in addition they perform the small amount of so-called clerical work that is necessary.

"2. There has been no contention made heretofore by the employees that these seasonal decreases in force have violated any agreement rules, and notwithstanding the fact that similar decreases were made in a number of offices at the close of 1937-1938 season, including agency stations as above described, and also including the cutting off of the day position of clerk in the Chief Train Dispatcher's Office, in the usual manner, the Brotherhood has made a claim only in the instant case, which involves the abolition of the seasonal night position of Clerk in the Chief Train Dispatcher's Office. This position of night clerk, and the situation connected with it, does not differ in any degree from the seasonal position of day clerk in the same office, and other seasonal clerical positions which have been cut off in various agencies, leaving a force in a number of instances, of but one Agent, who performs all of the work there is to be done, clerical or otherwise.

"3. It is the position of the carrier that the rules of the agreement do not support the claim of the Brotherhood, consequently, there has been no violation of the contract. It is also the position of the carrier that the agreement does not prohibit, but on the other hand, contemplates that additional positions will be created as the amount of work to be done increases, and will be discontinued as the work disappears. The practical effect of agreeing with the contention of the Brotherhood, would be the restoration of employees to the payroll who would have absolutely no work to perform for more than six months each year.

"The Florida East Coast Railway reserves the right to introduce and examine witnesses in support of its position in connection with all issues in this case, and to cross-examine witnesses who may be introduced by petitioners, as well as to answer any further or other matters advanced by such petitioners in relation to such issues, whether oral or written. All of the matters cited and relied upon by the carrier, have been discussed with the employees."

OPINION OF BOARD: The fundamental issue presented in this dispute is whether the carrier, in violation of the rules of the Agreement between itself and the petitioner, has transferred clerical work to which clerical workers under the Clerks' Agreement are entitled, to a class of employees not covered by the Clerks' Agreement.

Rule 1 of the Agreement of January 1, 1938 between the parties states that "these rules shall govern the hours of service and working conditions" of certain employees, including (a) clerical workers and (b) machine operators. This rule imposes a definite obligation upon the carrier to assign work covered by the Agreement to the employees specified. Standing alone, it prohibits the carrier from assigning clerical work to employees not comprehended by the rule. This is established by numerous awards of this Division. Rule

66, as a matter of superabundant caution, provides that "established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules." It is clear, therefore, that the carrier cannot directly or indirectly transfer work covered by the Clerks' Agreement to employees not included in its scope.

Rule 2 of the Agreement describes the clerical work covered by the Agreement. Paragraph (a) of this rule describes clerical workers as "employees who regularly devote not less than four hours per day to the writing and calculating incident to keeping records and accounts, rendition of bills, reports and statements, handling of correspondence, and similar work."

While this is a definitive test for determining what is clerical work to which employees specified in Rule 1 of the Agreement are entitled, it requires interpretation in its application to individual situations. It is clear, of course, that unless there is, in a given office, work of the character described in Rule 2 (a) amounting to at least four hours per day, the carrier is not obligated by the rule to engage a clerk for such clerical work as has to be performed. The contention on behalf of the petitioner that Rule 3 (e) guarantees to clerical employees the seniority right to perform all clerical work described in Rule 2 (a) is not tenable. Rule 3 (e) is, of course, subject to the four-hour limitation of Rule 2 (a).

It is equally important to note that there is always a greater or less amount of clerical work as defined by Rule 2 (a) incident to other classes of work which employees in such classes may rightfully perform without impinging upon the seniority rights of clerical employees under the Clerks' Agreement. The division of work between the various railway labor organizations cannot be made with mathematical precision. There is always some overlapping between various classes of work, and in the nature of things this must be so. It follows, of course, that it is extremely difficult in some situations to draw a dividing line between clerical work as described by Rule 2 (a) to which clerical workers under the Clerks' Agreement are entitled and clerical work which is peculiarly incident to other classes of work and which may rightfully be performed by employees in such other classes.

In the present dispute, the Division is of the opinion that the clerical work involved in the preparation of the "8:00 A. M. report" and the "44 report" is both logically and historically incident to the work of dispatchers and may properly be required of them by the carrier. In passing, however, it may be noted that the carrier may assign a part of this clerical work—how much, it cannot be stated abstractly—to clerical workers under the Clerks' Agreement without violating the scope rule of an agreement which the carrier may have with this class of employees, unless such agreement specifically includes such incidental clerical work.

The evidence of record, however, abundantly indicates that in the office in question a greater or less amount of routine clerical work is regularly required and performed. The petitioner states in its submission—and this statement is not denied by the carrier—that on three days a week a trick relief dispatcher devotes his time exclusively to routine clerical work. The clerical work in this office consists of checking time tickets of train service, agency and telegraph employees; posting records of perishables and icing reports; filing loading reports; checking and requisitioning stationery and supplies; opening mail for the chief dispatcher; and handling correspondence. For some years the carrier has regularly employed one or more clerk-stenographers during its busy season to assist in performing the clerical work arising out of the increased volume of business.

These various activities clearly fall within the description of clerical work as described in Rule 2 (a) of the current Agreement. Moreover, they cannot properly be regarded as a mere incident of the work of dispatchers. The petitioner, in support of its contention that the carrier recognized this work

as belonging to clerks under the Clerks' Agreement, states that prior to 1926 the carrier had regularly employed two or more clerks to perform the work in question; and that since that date the carrier has required the trick dispatchers to perform it. While the record is somewhat vague and inconclusive on this issue, the Division is of the opinion that during a part of the period prior to 1926 clerical workers did perform some of the routine clerical work described above and now performed by dispatchers. It must be admitted, however, that the record indicates that some types of clerical work required prior to 1926 have disappeared entirely and that the total amount of clerical work has substantially decreased with the carrier's declining volume of business since 1926. It must also be admitted that the record indicates that the trick dispatchers prior to 1926 performed some of the clerical work now in dispute. The evidence of record, however, does indicate that the carrier in the period prior to 1926 recognized the work now in dispute as belonging to clerks. Further evidence of the carrier's attitude on this issue is found in the fact that in the busy seasons it has called clerks, and not dispatchers, to care for the increase in clerical work incident to the seasonal increase in its volume of business.

The carrier insists, however, that on December 20, 1937, when the current Agreement between the parties was entered into, the petitioner was aware that there were no clerical positions in the office in question, and that trick dispatchers were performing the clerical work now in dispute; and that the petitioner, having signed the agreement with an awareness of these facts, cannot now contend that the work in dispute belongs under the current Agreement. The Division is of the opinion that this contention is not tenable.

The Division accordingly concludes that the carrier is requiring trick dispatchers to perform work which under Rule 2 (a) is clerical in character and which is not a necessary incident of the work of dispatchers. This, however, is not a violation of the agreement unless work of this character amounting to at least four hours each day is being performed by employees not included in the Clerks' Agreement. It is now appropriate to consider the question of how much clerical work the carrier is improperly assigning to dispatchers.

On this question the record, unfortunately, is most inconclusive. The petitioner in its claim does not state with precision the amount of clerical work which in its opinion the carrier is improperly assigning. It states generally that the carrier has violated and is continuing to violate the Agreement by improper assignments of clerical work, and in equally general terms asks for a restoration of the work and for the monetary loss suffered. In its statement of the facts of the dispute, the petitioner asserts that "prior to 1926, there were employed in the Chief Train Dispatcher's office at New Smyrna Beach, two clerks, one on duty during the day and one on duty during the night, performing the same duties that have subsequently been removed from the scope of the Clerks' Agreement and assigned to the trick train dispatchers, except during the winter months, when it has been customary to employ a clerk or clerk-stenographer to take over the work."

Even assuming that this is an accurate statement of the situation, it does not follow that, in view of the changes which have occurred since 1926, two clerks are now necessary to perform the clerical work to which the clerks are entitled under the Clerks' Agreement. It is not denied that during the busy season, one or more clerks are necessary. The carrier admits that during the slack seasons "the Chief Train Dispatcher and the Assistant Chief Train Dispatcher, assisted more or less by the Relief Trick Train Dispatcher, carry on all of the routine details of the office, the amount of work involved representing but a small fraction of the detailed clerical work that is required during the heavy traffic season, when the seasonal clerks are employed." The carrier does not estimate the amount of time which these employees spend in the performance of routine clerical duties. The record, however, indicates that during the slack seasons the relief trick dispatcher devotes his

time exclusively to the performance of routine clerical duties on three days of each week. In the absence of a showing on the part of the carrier that clerical work is allowed to accumulate on the days on which the relief dispatcher is not assigned to clerical duties, it is a fair inference that on such days the dispatchers on duty perform at least four hours of routine clerical work. The Division so finds.

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 the carrier, in violation of the current Agreement between the parties, has assigned to employees not covered by the Clerks' Agreement, clerical work, amounting to a full-time clerical position.

AWARD

It is the award of this Division that the carrier establish in the office involved in this dispute a clerical position in accordance with the Division's Opinion; and that it reimburse the clerk or clerks who in terms of seniority were entitled to the position for the wage loss sustained since May 15, 1938.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Ill., this 7th day of March, 1939.