

Award No. 1404
Docket No. CL-1424

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

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

"(1) The carrier in requiring or permitting employes other than covered by the Clerks' Agreement to perform the recognized duties of clerks in the Store and Mechanical Departments at Muskogee, Oklahoma is in violation of the Clerks' Agreement, and,

"(2) That such service when required be performed by employes covered by the Clerks' Agreement, and,

"(3) That Clerk R. L. Moore be paid a call as provided for in Rule 32 on specified dates set forth in statement of fact."

There is in evidence an agreement between the parties bearing effective date of June 14, 1921.

EMPLOYES' STATEMENT OF FACTS: "On Sunday, September 4, 1938, Shop Superintendent, Mr. F. A. Edwards, came to the office, located at Shop-ton, Oklahoma, and did bill out PLE-48486, a car of scrap wheels from Shop-ton, Oklahoma to Marshall, Texas.

"R. L. Moore, Clerk, employed and holding seniority rights only in the Mechanical and Store Department was available and at home on Sunday, September 4, 1938.

"The billing of cars is part of the duty assigned to Clerk R. L. Moore.

"F. A. Edwards, Shop Superintendent, holds an excepted and appointive position and as such has no rights under the Clerks' Agreement."

POSITION OF EMPLOYES: "The employes contend that the duties here-before described in the statement of fact, are clerical duties as referred to and defined in the rules cited and contend that the carrier's action in having the Shop Superintendent, who is not covered by the Clerks' Agreement, perform these clerical duties during hours no clerks are on duty is in violation of the Clerks' Agreement.

"**AGREEMENT BEARING EFFECTIVE DATE OF June 14, 1921, contains the following rules:**

'ARTICLE 1—SCOPE

'RULE 1—EMPLOYES AFFECTED.—These rules shall govern the hours of service and working conditions of the following employes, subject to the exceptions noted below:

company material move on a revenue waybill where it moves over other roads for the purpose of participating in the joint rate, but in that case the clerk at the Mechanical and Stores Department is furnished advice by the Accounting Department as to the manner of making the waybill.

"Even if it had been the past practice to require a certain clerk to perform certain duties with regularity, it could not properly be claimed to have invested in that employee the exclusive right to perform such work. The organization has consistently contended that past practice does not amount to a modification of the agreement, and have so contended in other cases now before this Division.

"The claimant has no exclusive right to be called to perform work should work be necessary outside of regular hours.

"He was compensated in full for the duties performed on the position to which he was regularly assigned. There is no claim that he performed any service for which he was not paid in full.

"Stenographer-Clerk Moore has never been previously called to perform work of this nature outside of his regular hours.

"Award 806, Docket CL-792 of the Third Division, says in the second paragraph of the 'Opinion of Board' in part:

"* * * Moreover, it is to be remembered that Rule 4 does not encompass all clerical work performed in the service of the carrier. As this Division has previously pointed out, there are few, if any, employees of a carrier, from the president down to the laborer, who do not perform some clerical work in connection with their regularly assigned duties.'

"Principle 9 on page 23 of the agreement of June 14, 1921, shows that no such result was contemplated by the agreement.

"The claim should be dismissed as it was not presented within the agreed-upon time limit prescribed by Rule 24. Even if there were no limitation period for its presentation, the claim should be denied as the facts show no merit whatever.

"Since this is an ex parte case, this submission has been prepared without seeing the employees' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission."

OPINION OF BOARD: There is no substantial difference between the parties concerning the facts. On Sunday, September 4, 1938, F. A. Edwards, occupant of the official position of Shop Superintendent, holding an excepted position, one not covered by the Scope of the current Agreement, billed out on memorandum way-bill a car of scrap wheels from Shopton Station to Marshall, Texas. R. L. Moore is a regularly assigned clerk, a position within the Scope of the current Agreement, and one of his duties is the billing out of cars. On September 6, 1938, acting on instructions from the Shop Superintendent, Mr. Moore prepared a regular way-bill covering the car of scrap wheels billed out by the Shop Superintendent and forwarded it to Marshall, Texas.

This Board has consistently held that it is a violation of the Clerks' collective Agreement to assign work within the Scope of the Agreement to employees holding excepted positions. See Awards Nos. 521, 523, 631, 637, 751, 753, 754, 1209, 1254 and 1300. As an additional reason why the claim should not be allowed the Carrier cites Rule No. 24. In Award No. 1403, Docket CL-1423, we set forth the reasons why Rule No. 24 does not apply.

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 employe involved in this dispute are respectively carrier and employe 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 violated the current Agreement as contended by the Petitioner, and Rule No. 24 has no application in claims of this kind.

AWARD

Claims 1, 2, and 3, sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of April, 1941.

Dissent to Award No. 1404, Docket No. CL-1424

This award holds that, by reason of other awards by this Division, the preparation of a memorandum waybill by an employe other than one covered by the Clerks' Agreement constitutes a violation of that Agreement. That decision is made in face of a record which evidences the fact that the making of a waybill is not the exclusive right of Clerks, but is customarily done by Agents and others under the Telegraphers' Agreement and by other employes in circumstances similar to those of this case. A memorandum waybill is nothing but a memo authorizing the movement of a car and indicates that a regular waybill complete with weight, charges, etc. would follow. It is given to the Conductor by any employes authorized by the Carrier in order that the prompt movement of lading to which patrons are entitled will be effected. An award now declaring that its preparation in this case by an employe other than a Clerk is a violation of the Clerks' Agreement is one that revises the meaning and understanding heretofore given to the Agreement in that respect; it is a modification of the Agreement and not an interpretation of it.

Similarly, in respect to the time limitations for filing of claims specified by Rule 24, this award, holding that Rule not to be a cut-off to be applied in this case, states that decision was reached because former Award No. 1060 is followed. There was dissent to that Award which dealt wholly with that issue; reference is made thereto as expressing completely our dissent to the non-application of Rule 24 to the claim in the instant case.

(S) C. P. Dugan
(S) R. F. Ray
(S) R. H. Allison
(S) A. H. Jones
(S) C. C. Cook