

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

THE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: 1. Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' Agreement on June 1, 1939, when it discontinued positions of Second and Third Trick Telephone-Switchboard Operators at Susquehanna, Pa. assigning the work to employees not covered by said agreement, and fail and refuse to assign such work to employees holding seniority rights thereto, under the Clerks' Agreement.

2. Claim of the employees that positions of Second and Third Trick Telephone-Switchboard Operator be re-established at Susquehanna, Pa., with rates of not less than \$90.00 per month for Second Trick Operator, six (6) days per week of eight (8) hours per day and \$85.00 per month for Third Trick Operator (6) days per week of eight (8) hours per day, bulletined and assigned to senior applicants and that such applicants and other employees affected be compensated for all wage loss retroactive to June 1, 1939.

EMPLOYEES' STATEMENT OF FACTS: This is in fact a resubmission of dispute covered by Award 1569, Docket CL-1482 which was remanded to the parties on September 18, 1941, the Board there holding "The case, therefore, turns on whether effective June 1, 1939, the operation of the Telephone Switchboard has been performed in whole or in part, by the telegraph operators, employees without the current Agreement, as contended by the petitioner, or whether such work has since been performed by the crew callers as contended by the carrier. If the former is found to be true, under the terms of the current Agreement (here deleted the words, 'as will later be shown'), the Board must hold that the Carrier has violated the current Agreement between the parties. If on the other hand, it is shown that the operation of the telephone switchboard has since June 1, 1939 been performed by crew callers, employees within the scope of the current Agreement, the Board must find that there has been no violation of the Agreement."

"Because of the sharp disagreement between the parties on the record and in the briefs, this Referee after more than the usual study and consideration of a record, briefs and cited awards is unable to determine the actual facts with satisfactory accuracy, and additional evidence is required. The facts can only be determined after a joint check."

The Employees, in accordance with the Award, have endeavored to develop factual information through joint check and conference with the Carrier. At conference with the carrier on October 31, 1941, the carrier stated ver-

Rule 1. There is nothing in the Agreement limiting its application to only portions of clerical work. Nor, can it reasonably be contended that the Carrier has the right to merely say that certain work is not covered by the Agreement. Your petitioner contends that the Carrier has no right to remove clerical work from the scope of the Clerks' Agreement and assign it to other employees who hold no rights.

Rule 1 (Scope) of the Telegraphers' Agreement reads as follows:

"(a) The following rates of pay, rules for overtime and working conditions will govern positions held by the Telegraphers and telephone operators (EXCEPT SWITCH-BOARD OPERATORS), agents included in the wage scale, agent telegraphers, agent telephoners, towermen, levermen, tower and train directors, block operators and others whose positions are included in the wage scale.

"(b) Where existing payroll classifications does not conform to Rule 1 (a), employees performing service in the classes specified therein shall be classified in accordance therewith."

The attention of the Board is specifically called to the fact that telephone switchboard operators were specifically mentioned in the scope rule of the Telegrapher's Agreement as being not covered thereby. The Carrier cannot reasonably contend that this is work belonging to that class of employee, as both the Carrier and the Telegrapher's Organization by the signed Agreement have agreed that telephone switchboard operators are not covered by that agreement. The Clerks' Agreement, on the contrary, specifically mentions that telephone switchboard operators are clerical positions and come within the scope of the Clerks' Agreement.

As evidence of the fact that clerical work here involved was removed from the scope and application of the Clerks' Agreement and assigned to employees not covered thereby, and by reason of Carrier's reluctance to make a joint check, we submit as Exhibits "D" to "M," inclusive, copies of affidavits obtained from a telegrapher, chief callers, relief caller and clerks employed at Susquehanna, who are familiar with the situation and the change made.

The Carrier cannot, either piece-meal or wholesale, in whole or in part, remove clerical duties as established and rated, out of the Clerks' Agreement without due notice, process and agreement.

POSITION OF CARRIER: Award 1569, Docket CL-1482 by the Third Division, concerns this same claim.

Since Award 1569 several conferences with the employees have failed to reach a mutual settlement.

The re-submission of this claim to the Third Division at this time is an attempt by the Brotherhood to have the Third Division order the Railroad to establish additional positions at Susquehanna, Pa. which are not needed.

The Third Division is without jurisdiction to order new positions established, and accordingly claim should be dismissed.

OPINION OF BOARD: This is, in effect, a re-presentation of Docket CL-1482, on which Award No. 1569 was made on September 18, 1941. This Division there held:

"Telephone switchboard work remains at Susquehanna between the hours of 4:00 P. M. and 8:00 A. M. notwithstanding the change in the telephonic equipment and its removal to the telegrapher's office, to which room the callers were also moved.

Switchboard operators are embraced in the Clerks' Agreement and are specifically excluded from the Telegraphers' Agreement.

It has been repeatedly held by this Board that work embraced within the scope of an Agreement may not properly be removed from such Agreement and assigned to employees not subject to its terms. Award 1122.

It is said in Award 1314 quoting from Award 385: 'It is well established under collective Agreements of that character here involved that while the carrier is free to abolish positions, such work as remains in connection with these positions must be performed by the class of employees to which the Agreement applies.'

This Referee is in complete accord with a statement in an opinion proposed by the employees which he adopts as his own with a minor deletion.

"This case, therefore, turns on whether effective June 1, 1939, the operation of the telephone Switchboard has been performed in whole or in part, by the telegraph operators, employees without the current Agreement, as contended by the petitioner, or whether such work has since been performed by the crew callers as contended by the carrier. If the former is found to be true, under the terms of the current Agreement, *(here deleted the words, "as will later be shown,")* the Board must hold that the carrier has violated the current Agreement between the parties. If on the other hand, it is shown that the operation of the telephone switchboard has since June 1, 1939 been performed by crew callers, employees within the scope of the current Agreement, the Board must find that there has been no violation of the Agreement.'

Because of the sharp disagreement between the parties on the record and in the briefs, this Referee after more than the usual study and consideration of a record, briefs and cited awards is unable to determine the actual facts with satisfactory accuracy, and additional evidence is required. The facts can only be determined after a joint check.

The matter must be remanded for a joint check as to the work actually performed and by whom, at the Susquehanna office between the hours of 4:00 P. M. and 8:00 A. M. There should also be further negotiations between the parties. If not thus disposed of, the claim in its original or amended form at the option of petitioner may be re-submitted to this Board."

The showing made on the present docket justifies the holding that the situation dealt with in Award No. 1569 continued until on or about December 1, 1941. We do not think there is any sufficient showing that it continued after that date. Therefore, this Award must be understood as limited to the period between June 1, 1939, and December 1, 1941.

The only question left open by Award No. 1569 was whether telephone switchboard work was performed by telegraph operators or by crew callers. Telephone switchboard operators were covered by the Clerks' Agreement, and were excluded from the Telegraphers' Agreement. Therefore, neither was entitled to perform the work of the other. On the other hand, crew callers were within the Clerks' Agreement, and the Carrier had the right to call upon them to perform telephone switchboard work. There being a disagreement on the record then presented, as to who actually did this work, the Board was of the opinion that the dispute should be resolved by a joint check, and remanded the case to permit such a check to be made, with the provision that if a settlement of the dispute be not affected through such check, or by further negotiations between the parties, the claim in its original or amended form, might, at the option of the petitioner, be re-submitted to this Board.

The dispute went back to the property. The Carrier has at all times contended that the joint check required by this Board was impossible, and that such check would not furnish the information desired. Aside from showing a disposition to compromise the claim, the Carrier has done nothing to facilitate a settlement of the dispute. It has offered no alternative to the proposed joint check. The petitioner, while not insisting that a joint check of the work for the full period of the dispute was necessary, contends that, had the Carrier been willing to cooperate, a check of the work over selected normal working periods would have served the purpose the Board had in mind. No check being made, the petitioner then secured and filed with the docket the affidavits of ten employes, who from their statements appear to be familiar with the work in question, which affidavits show that from June 1, 1939 to November 23, 1941, or December 1, 1941, telegraphers in the regular course of their duty did telephone switchboard work at Susquehanna, Pennsylvania. On whether crew callers did some of such work, the affidavits are silent, but the Carrier contends that they did, without offering any proof in support of its contention. In view of the Carrier's failure to cooperate in a joint check, as required by the Board, or to join in the check over short periods proposed by the petitioner; and its failure to furnish any data or information on which this Board might act, even at the hearing held on March 10, 1943, after the affidavits aforesaid had been filed, or to make any alternative proposal through which the situation might be worked out, we do not think we would be warranted in sustaining Carrier's request to again remand the case and permit further inquiry on the question left unsettled by Award No. 1569. In the circumstances, we are of the opinion that the affidavits should be considered, and that they show that between June 1, 1939, and December 1, 1941, the Carrier, in violation of the Clerks' Agreement, took from telephone switchboard operators work they were entitled to perform, under said agreement, and required telegraph operators, not entitled to do such work, to perform the same in whole or in part; and that the claim should be sustained to the extent that it be held that the rule was violated, and that the parties affected thereby are entitled to be compensated for wage loss suffered thereby, between June 1, 1939, and December 1, 1941.

But we do not believe the record is sufficient to warrant us in holding that the monetary claim of compensation in the sum of \$6,143.50, outlined in the letter of the General Chairman to the Carrier, dated January 21, 1942, should be paid without further investigation. We are not influenced by the offers of compromise made by both the petitioner and the Carrier. As we held in Award No. 2283, "It is fundamental that a rejected offer of compromise, is, after its rejection, no longer binding on the party who makes it," and such offers should not be considered for or against either party. Furthermore, compromises are favored in law, and should be encouraged by this Board. No serious harm will result from a remand of the case for the sole purpose of determining with exactness the amount of compensation due to each party entitled thereto. It is not clear to the Board that all the persons named in the General Chairman's letter of January 21, 1942, were prejudicially affected by the violation of the rule. Some of them undoubtedly were, and, as to them, further delay in settlement may do an injustice, which, in the circumstances, and considering the interest of all parties, cannot safely be avoided. Under the ordinary process of negotiation, pursued in good faith by both parties, there should be no difficulty in determining to whom and in what amount compensation should be paid; but if there is still another failure to agree, the case may be re-submitted to the Board for the sole purpose of fixing the amount of compensation to be paid, and to whom it should be paid.

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 (a) violated the current agreement in depriving telephone switchboard operators of work to which they were entitled, between June 1, 1939 and December 1, 1941, and permitting telegraph operators to do such work in whole or in part; (b) should compensate employees affected by such violation for all wage loss suffered between said dates; and (c) that the case be remanded to the property to ascertain, through negotiation or otherwise, to whom such compensation should be paid and the amount thereof.

AWARD

Sustained to extent stated in above finding.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of August, 1943.