

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

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

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
OF TEXAS**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) violated the agreement extant between the respective parties when

1. The carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) failed and refused on June 12, 1944, to call the Reconsigning Clerk, in the office of the Superintendent of Transportation at Denison, Texas, to handle the incidental clerical work in connection with the diversion of Missouri Pacific Car No. 86039 and four others; and,
2. The carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) violated the agreement when it permitted the Chief Clerk in the Office of the Superintendent of Transportation at Denison, Texas (a position excluded from agreement coverage) to handle the incidental clerical work in connection with the diversions; and,
3. That the Reconsigning Clerk is entitled to be paid for a call for the reason of the violation; and,
4. That the carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) shall now be required by an appropriate award and order of the Board to pay to the Reconsigning Clerk two hours' time at penalty rates to compensate for time lost due to the agreement violation committed by the carrier.

EMPLOYEES' STATEMENT OF FACTS: The Office of the Superintendent of Transportation of the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas is located at Denison, Texas.

All diversion of cars and traffic on the railroad are handled through the Office of the Superintendent of Transportation.

In the said office is maintained a position identified as No. 3713, titled "Reconsigning Clerk," rate \$9.39 for eight hours of service. The said position was created and maintained to handle reconsigning of traffic, diversions of traffic and similar related duties.

Prior to January 5, 1944, the position was carried on a flat monthly rate. On January 5, 1944, the rate was reduced to a daily one.

If the Chief Clerk had not instructed Fort Worth yard to make the diversion, this would have eventually been done by night passenger train supervisor; and subsequent handling of the work in connection with the diversion would have been handled just as it was.

The only thing the Chief Clerk did which only by some academic definition might be called "clerical work" was the making of notation on Western Union telegram which ordered the diversion; this being turned over to Reconsigning Clerk who, next day, confirmed diversion, indexed it, and handled message file in connection with it; he handled the "incidental clerical work in connection with the diversion." The pencil memorandum is not clerical work required to be done under the agreement.

The use of the telephone is not clerical work; and, in any event, the carrier has not contracted with this petitioner for the exclusive performance by employees under the agreement, or by this Reconsigning Clerk, the carrying on of all telephonic conversations, the giving of instructions by telephone, whether or not such telephonic conversations or instructions are the primary, the cause, of resulting and only subsequently necessary clerical work, required to be done under the agreement by clerks, as they are defined in Rule 1 (1) of the agreement. **When** this clerical work is done by Reconsigning Clerk is for decision and direction by the management.

There have been many decisions of this Board recognizing that most everyone on a railroad legitimately, and not in violation of Clerical Agreements, does work, which in a sense could be called "clerical work," in one degree or another; the use of the telephone is similarly universal; and not exclusively by, nor required to be by, any one employee or class of employees.

The claim is based on the alleged failure and refusal of the carrier to call, on June 12, 1944, the Reconsigning Clerk to handle the incidental clerical work in connection with the diversion of MOP 86039 and others. The carrier has shown that there was not, under the agreement, clerical work in connection with this diversion necessary or performed, in office of Superintendent of Transportation, on June 12, 1944. The clerical work generated by the diversion of these cars, was performed on June 13, 1944, and by this Reconsigning Clerk.

There must be obvious the chaos that would result from approval of this claim, prohibiting as it would the functioning of officers or of other employees of the railroad in getting done those things which the inherent nature of conducting transportation requires to be done promptly, often instantly; or, as an alternative, the assessment of arbitrary, unjustifiable and absurd penalties against the carrier.

The carrier submits that the mere reading of the facts as to what the Chief Clerk did in this case, in the light of common-sense and universal practice, and particularly in view of the consideration given and decisions rendered by this Board, shows the illegitimate nature of this claim; and condemns it for its actual triviality.

Except as herein expressly admitted, the carrier denies the allegations of the employees and respectfully requests that the petitioner be placed on strict proof of his allegations.

The carrier respectfully requests that the Board deny the claim.

OPINION OF BOARD: With all irrelevant discussion eliminated this claim resolves itself into two narrow questions, namely (1) did Chief Clerk perform services in connection with the diversion of Missouri Pacific Car No. 86039 and four others and (2) if so, were there special circumstances justifying him in performing these services? In the submission, reconsignment of these cars is referred to. The record indicates that the cars were diverted and not reconsigned, but there seems to be no question but that diversion, as well as reconsignment, are a part of the duties of the Reconsigning Clerk, the position held by Claimant.

The claim is based principally upon a violation of the Scope Rule. It cannot successfully be denied that the usual and ordinary duties of the Chief Clerk do not include the work of diverting or reassigning cars. It is not necessary to discuss the numerous awards of this Division having to do with the Scope Rule as the Carrier in this case is not in a position to deny that the Chief Clerk, whose position is outside the scope of the Clerks' Agreement, violated the Scope Rule if he performed duties pertaining to the position of Reassigning Clerk. In negotiations between Organization and Carrier in 1938, Organization agreed that Night Passenger Car Distributor while on duty, might perform services in connection with reassignment and work of a similar rush character. Under date of March 30, 1938, in a letter from representative of Carrier to representative of Organization, the following statement was made:

"In connection with the night passenger car distributor, we have eliminated from this position routine agreement clerical work; and this position will be confined to the work originally attaching to the position of this title, including the making of the usual morning reports as now; and also such duties as arise during the time this party is on duty which require immediate attention in the way of reassignments, and work of a similar rush character."

In specifically surrendering to Carrier the right to have work of Reassigning Clerk performed by Night Passenger Car Distributor, the presumption is that it was intended that all employees other than such Night Passenger Car Distributor and Reassigning Clerk would be excluded from the performance of those duties. Such is the plain implication of that letter. The Carrier is bound by this construction which the parties themselves have placed upon the Agreement.

The Carrier asserts, however, (1) that the record does not show a performance of Reassigning Clerk's duties; that at most the Chief Clerk had mere telephone conversations in connection with the matter and that the actual clerical work of diversion of these cars was performed by the Reassigning Clerk the next morning, and (2) that special circumstances existed in this case by virtue of the Chief Clerk having received information concerning these cars during the day, which justified him in disposing of the matter in the evening.

We are not impressed with the contention that no work was performed by the Chief Clerk in connection with the actual diversion of these cars. It is true that the telephone conversations had by the Chief Clerk concerning these cars during the day had to do merely with the quick delivery of the shipments and not with the diversion thereof, but it seems equally clear that the work done in the evening was in connection with the actual diversion of the cars and falls squarely within the contemplated duties of the Reassigning Clerk. We believe the Carrier's instructions as to the handling of reassignments and diversions justify this conclusion.

Nor are we persuaded by the claim of special circumstances. It is not overlooked that the Chief Clerk was familiar with the matter by reason of having received information concerning these cars during the day and that it was important to effectuate a diversion without delay on account of the important shipments involved. Such argument would have weight if Claimant had been called at his home and Chief Clerk was unable to contact him. It is significant that prior to the time that Claimant was put on a daily rate he performed the work of diversion and reassignment at his home and in the office in the evenings. It does not appear that any appreciable delay would have resulted if Claimant had been contacted at his home as he lived closer to the office than did the Chief Clerk. If we were to justify a violation of the rule on the ground of special circumstances as shown by the record in the instant case, it would open the door to further violations which ought not to be encouraged.

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 employes 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 Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of March, 1945.