

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

James M. Douglas, 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:

(1) The carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) violated and continues to violate its several agreements with the organization, when on October 4, 1943, after due notice, it failed and refused to assign to positions covered by the said agreements, incidental clerical work then and now performed at Junction City, Kansas, Chanute, Kansas, Lockhart, Texas, and Stamford, Texas, by employees working outside the scope of the clerical agreement; and,

(2) That the carrier (Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas) refused and continues to refuse to classify and restore the work to the scope and operation of the clerical agreement; and,

(3) 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 create and maintain appropriate positions under the clerical agreement and assign to said positions and restore to the scope and operation of all the agreements and rules extant between the respective parties, all of the incidental clerical work, as set forth in the Statement of Fact, thereto remain until removed therefrom by the proper processes set forth in the agreement (Rule 78) and the Railway Labor Act—1934—amended; and

(4) That the said positions shall be advertised and assigned under the appropriate rules of the agreement as of October 4, 1943, and that any and all employees adversely affected by the illegal and unlawful act of the carrier in assigning the said work and duties to the positions and/or persons not covered by the clerical agreement, shall be reimbursed for all their money losses:

EMPLOYEES' STATEMENT OF FACTS: On January 1, 1929, under Addendum No. 4 to the current agreement dated August 1, 1925, there existed at Junction City, the following positions under the clerical agreement:

matter which has already been concluded by a final and binding award, not again be opened, but, if reopened, that an award for the carrier denying the claim be made.

The Clerks lost nothing by Award 2597, as they sought a right they never had, and which had time and again been expressly denied them. The Agents and telegrapher-clerks gained nothing as they retained only what they had always possessed and enjoyed.

The carrier by reference incorporates herein and makes a part hereof its exhibit "D", the original submission in Award 2651 covering this identical case, together with all its exhibits, defenses, and arguments therein contained.

The carrier hereby incorporates in and makes a part hereof Award 2597 (exhibit "E") and pertinent parts of Award 2596 (exhibit "H") and all defenses which may grow out of or arise from said awards.

Except as expressly admitted herein, the Carrier denies each and every, all and singular the allegations contained in all of the organization's and the employees' submissions of any kind or character submitted, or to be submitted in Docket CL-2752, Award 2651, or in this action, and respectfully requests that the Petitioner be placed on strict proof of any and all allegations contained in said submissions.

(Exhibits not reproduced.)

OPINION OF BOARD: This is one of three companion claims between the same parties and involving the same question namely, whether Carrier has improperly assigned work comprehended by the Clerks' Agreement to employes covered by the Telegraphers' Agreement. The same general contentions both in support of and against the claim, which seeks to restore such work to the Clerks, are discussed and decided in Award No. 3932, which award governs this claim and is by this reference incorporated herein as deciding such contentions, and as ruling this claim.

The procedural history of this claim differs slightly from the one decided in Award No. 3932. This one was originally filed with the Board on May 29, 1944, and remained pending without action until after the companion case was disposed of by Award 2597 on June 1, 1944. Thereafter, this claim was withdrawn from the Board by the Petitioner under an order entered of record as follows: "That no hearing thereon has been held, and under date of July 31, 1944, the complainant party addressed a formal communication to the Secretary of the Third Division requesting withdrawal of this case, which request is hereby granted."

Pursuant thereto an award of "Case Dismissed" was entered August 2, 1944, under Award No. 2651. Then on March 19, 1947, the same claim was refiled with the Board.

Since the previous dismissal of this claim was not a dismissal "on the merits" or "with prejudice" such order of dismissal in no way affects or bars Petitioner's right to refile the same claim. The claim was withdrawn without any hearing on the merits so the order of dismissal may not be construed to be an adjudication of the merits. The general rule of law is stated: Where the dismissal of an action is in the nature of a nonsuit (such as a voluntary withdrawal as here) without any hearing or examination into the merits, it does not bar a second suit on the same cause of action. See 50 Corpus Juris Secundum, page 60.

Thus no valid objection may be raised against the refiling of this claim because of its previous dismissal. Section 3 (g) of the Railway Labor Act which prescribed a two-year limitation on the filing of "all actions at law based upon the provisions of this section" is not applicable because a claim filed with the Board is not "an action at law" within the purview of the Act.

In this claim Petitioner seeks the establishment of two clerical positions at Junction City, Kansas, three positions at Chanute, Kansas, two positions at Lockhart, Texas, and two positions at Stamford, Texas. The daily hours of clerical work now existing at these stations which Petitioner shows as a basis for establishing these various positions appear not to be in dispute. Previous Addenda to the Agreement between the parties listing and rating the Clerks' positions at these stations show the clerical work was performed by members of the Clerks' organization until such time as the positions were abolished.

However Carrier makes much of the fact the General Chairman executed Addendum No. 5 which omitted the positions in question. It charges: "Petitioner's General Chairman (struck) from Addendum No. 5 the very positions which Petitioner here seeks to have created and assigned to clerical employes, at a time when he knew that agents, telegraphers, and telegrapher-clerks were performing the work complained of." Petitioner infers that positions were omitted because abolished by Carrier on the representation that the work performed by those positions was no longer in existence. But regardless of the fact these positions were omitted from Addendum No. 5 when it became effective on August 1, 1937, if the clerical work was then present or later came into existence at these stations it was Carrier's obligation under the specific agreement contained in such Addendum "to create additional or other positions not specifically provided for in the attachments." Under the circumstances the omission of the positions in question from Addendum No. 5 does not authorize Carrier to assign such clerical work which was comprehended by the Clerks' Agreement to Telegraphers. It appears to us that Awards No. 1551 and No. 1766 which deal with Addendum No. 5 support this view.

Thus, it follows and for the reasons stated in Award No. 3932 items 1, 2, and 3 of the claim must be sustained. However, for the same reason stated in that Award we are not disposed to sustain Item 4 of the claim for penalties retroactive to October 4, 1943. As we said in that Award Carrier's opposition to this claim was excusable under Award 615 as such award had been previously construed. Furthermore, Carrier may not be charged with the delay caused by Petitioner's previous withdrawal of this claim from the Board resulting in the order of dismissal under Award 2651. Accordingly, item 4 of the claim will be denied.

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 Employes 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 has violated the agreement.

AWARD

Claim 1, 2 and 3 sustained.

Claim 4 denied as to compensation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of June, 1948.

**DISSENT TO AWARD 3932, DOCKET CL-3714, AWARD 3933,
CL-3715, AWARD 3934, CL-3716.**

This opinion and award disregard the clear intent and purpose of the Agreements in effect, and the practices and customs of long standing under said Agreements. Practical consideration of the record in that respect will point out the error of this award. As reliance is placed on Award 2071, attention is directed to dissent to that award and by reference thereto is made a part of this dissent.

/s/ **A. H. Jones**
/s/ **C. C. Cook**
/s/ **R. F. Ray**
/s/ **R. H. Allison**
/s/ **C. P. Dugan**