

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

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

(1) That the carrier violated, and continues to violate, the Clerks' Agreement when it failed to bulletin clerical position titled "Mechanical Inspector", in accordance with the rules, and assigned an employee with no seniority rights to the position.

(2) That clerical position titled "Mechanical Inspector", shall now be bulletined and the senior employee, or employees who have suffered monetary loss, shall be compensated the difference between what they have earned and what they would have earned if they had been able to bid on the position.

EMPLOYEES' STATEMENT OF FACTS: Some time prior to September 1, 1946 position titled "Mechanical Inspector", Chief Mechanical Officer's Office, became vacant. This vacancy was not bulletined, and Mr. Wallace Ford was assigned to the position.

The organization protested, claiming that the position was of a purely clerical nature and should be bulletined under the provisions of the schedule rules. The carrier refused the request of the employees, also refused joint submission of the dispute to Third Division, National Railroad Adjustment Board; therefore, this case is being submitted ex parte.

POSITION OF EMPLOYEES: The employees' position is based on Rule 1 (Scope Rule) paragraphs (a) and (b) and Rules 2 (a), 3 (a), 4 and 5.

Rule 1 provides, in part:

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

Group 1. CLERKS.

(a) Clerical workers.

(c) The following positions are within the scope of the Agreement and all rules apply, except Rules 4, 10, 12, 17, 19 (c) and (d), 36, 37, 41, 43 and 49 (a). Positions within this group when vacant

21, 22 and 23 can only be checked at shop points, that is, Burnham, Utah Junction, Phippsburg, Pueblo, Alamosa, Salida and Grand Junction, Colorado shops; and Helper, Salt Lake City and Ogden, Utah, shops. Employees' Exhibit "B" lists some of the duties performed by the Mechanical Inspector, and coincides, so far as it goes, with some of the items shown in Carrier's Exhibit "A". The Carrier, however, wishes to call attention to the fact that numbered items 2, 3, 4, 5, 6, and 10 of Employees' Exhibit "B" require road trips. Item 1 of Employees' Exhibit "B" can be handled either in Denver or on the road. Items 7, 8 and 9 can be handled in Denver.

Attached, as Carrier's Exhibit "B", is tabulation of road trips made by Mechanical Inspector from October 1946 to and including June 1948. While the Burnham Shops and the Utah Junction Shops (former Denver & Salt Lake Railway Shops) are within the city limits of Denver, Colorado, trips to those points are just as much a road trip as to any other shop point in Colorado and Utah. As a matter of fact, the Burnham plant is the Carrier's main shop point, is the largest and most important shop on the System and frequent trips to and checks at that point are required. Likewise, Utah Junction was and is the largest shop point on the former Denver and Salt Lake Railway, now a part of the Denver and Rio Grande Western Railroad System.

It is the Carrier's position that the position is excepted from all rules of the Clerks' Agreement for the reason special training and fitness is necessary to properly perform the duties of the position; also for the reason that road service is a necessity; and further has been so recognized by the Organization since creation of the position Jan. 1, 1925. In view of the foregoing the rules cited by the Organization have no application.

(Exhibits not reproduced.)

OPINION OF BOARD: In September, 1946, the position of Mechanical Inspector in the office of the Chief Mechanical Officer became vacant and was filled by appointment. Claimants contend that the position was of clerical nature and should have been bulletined. The position was first established in 1925, and each of the several times that it thereafter became vacant it was filled by appointment; such was the case in December, 1925, November, 1937, and, as has been seen, in September, 1946.

During the period from January 1, 1925, to September, 1946, three new agreements were negotiated between the parties, and at no time was the contention made that the position was one which should come within the scope of the Agreement.

The Carrier contends that the position is one wholly outside the scope of the Agreement, and further contends that even if it were a position within the scope of the Agreement it would be excepted from all rules of the Agreement by the part of Rule 1, Article 1 of the current Agreement, which excepts certain positions and "also employees assigned to road service where special training, experience and fitness are necessary." Each party has submitted to the Board a detailed description of the duties of the position of Mechanical Inspector; the Board finds that the supervisory duties of the position are dominant. Without question, special training, experience and fitness are necessary qualifications for the occupant of the position. The parties are in disagreement as to whether or not road service is an important feature of the position; a determination of that question is not necessary, however, in that the Board finds that the position has never been brought within the scope of the Clerks' Agreement.

Although the fact of failure to prosecute a claim in the past does not estop the bringing of an action, the conduct of the parties in treating this position as an appointive position outside the scope of the Clerks' Agreement for over 21 years is strong evidence that neither party considered the position to be within the scope of the Agreement. Also, there are many official positions that are not shown as exceptions to the Clerks' Agreement simply because they are completely outside the scope of the Agreement.

That this Board cannot include within the scope of the Agreement a position not covered by the Agreement was well brought out by this Board in Award 389, where the Board made the following statement:

"* * * the request of the employes cannot be granted without alteration by this Board of the scope of the agreement between the parties, which is beyond the bounds of its authority. The positions here involved were in existence prior to the negotiation of the prevailing agreement, and might well have been covered by that agreement, but in point of fact they were not included within its terms. The Telegraphers' Agreement operative on this property contains not only the scope rule, but a list of the positions and their rates of pay as fixed by the parties. Since the actual scope of an agreement can be made as broad or as narrow as the parties may stipulate, the positions thus listed must be taken as the concrete expression of the carrier and its employes with respect to the effective scope of the agreement. It is not within the authority of this Board to alter the terms of an agreement either by including positions not covered thereby or by excluding positions embraced therein. The end here sought by the employes can properly be achieved only through the processes of negotiation. * * *"

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 did not violate the Agreement.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of March, 1949.