# Award No. 4345
# Docket No. CL-4233

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Francis J. Robertson, Referee

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## PARTIES TO DISPUTE:

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

## THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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

(a) Carrier violated the rules of the Clerks' Agreement when on January 28, 1946, it assigned Mr. W. L. Rhodes, Assistant Head Clerk, or permitted him to perform certain routine clerical work hereinafter described,

and

(b) D. G. Schultz and R. M. McGiffert and/or other occupants of Positions Nos. 330 and 340 shall each be paid on the basis of time and one-half of their regular rate of pay for 3 hours 20 minutes per day for each work day occurring from January 28, 1946 to May 31, 1946, inclusive.

EMPLOYES' STATEMENT OF FACTS: Effective January 28, 1946 the routine clerical work of pasting corrections to interchange, which work consumed approximately six hours forty minutes time per day, was removed from Miscellaneous Clerk Position No. 330 and the scope and operation of the Clerks' Agreement by assignment to Mr. W. L. Rhodes, occupant of Assistant Head Clerk position in the Car Service Department, Topeka, Kansas, which latter position is wholly excepted under the provisions of the current Clerks' Agreement bearing effective date October 1, 1942. (See Superintendent of Car Service, Mr. Dolan's letter of September 24, 1946. Employes' Exhibit "A".)

Four days later, or on February 1, 1946, apparently as a result of the removal of the above mentioned six hours forty minutes routine clerical work from schedule Position No. 330, Carrier abolished Interchange File Clerk Position No. 341, which position had a complement of approximately eight hours work, and transferred the major portion of the duties of the abolished position to the occupant of Position No. 330, who, four days before, had lost the major portion of the duties assigned to his position by the improper assignment to the Assistant Head Clerk. Those duties from the abolished position which the occupant of Position No. 330 could not absorb went to the occupant of Position 340. (See Second paragraph of General Superintendent Mahoney's letter of March 4, 1947. Employes' Exhibit "C".) All of the routine clerical work here involved was returned to the scope and operation of the Clerks' Agreement on June 1, 1946 by assignment to schedule clerical employes in the Car Service Department at Topeka, Kansas.

Article II, Section 1, defines clerical workers and was apparently advanced by the employes as support for their contention that this rule was violated when routine clerical work was performed by the incumbent of an excepted position as set forth in Item (a) of the employes' claim. There is no dispute between the parties with respect to the application of this rule in the instant dispute and it likewise has no bearing whatever with respect to the penalties claimed in Item (b) of the employes' claim.

Article III, Section 1 (a) merely provides that seniority districts shall be as outlined in Appendix "A" which in turn stipulates that the office of Superintendent of Car Service (Car Accountant) at Topeka comprises one seniority district. Sections 3 and 4 of Article III provide that employes covered by the Clerks' Agreement shall be in line for promotion and stipulate the conditions under which they may exercise seniority. All employes involved in this dispute were assigned to the positions of their choice, hence these rules likewise have no application whatever with respect to Item (b) of the employes' claim.

Article XIII, Section 15, is the enacting clause of the current Clerks' Agreement which stipulates the effective date thereof and the manner in which it may be revised or modified. If the rule has any application whatever in the consideration of this dispute, it must necessarily require a denial of the Brotherhood's claim for the reason that the instant dispute is nothing more than an attempt to revise the overtime rules of the current agreement to provide for the payment of overtime not worked.

While the Vice General Chairman's original appeal of this dispute included reference to Article VII, Sections 1 and 2, and Article VIII of the current Clerks' Agreement, no reference was made to these rules in the subsequent appeals of this dispute by the Brotherhood representatives who apparently recognized that they offered no support whatever to their claim. The Board will, however, observe that Article VII, Sections 1 and 2 are the overtime and call rules of the Clerks' Agreement, while Article VIII relates to the payment of service performed on Sundays and the seven designated holidays. Each of these rules covers the payment that is to be allowed for work actually performed and therefore lends no support to the Brotherhood's claim for the payment of overtime not worked by the claimant employes in this dispute, which completely ignores the rights of other employes who were adversely affected by the handling complained of. In this connection, the Board's attention is also directed to the statements heretofore advanced by the Carrier under the heading "As to Question No. 2".

## CONCLUSION

In conclusion, the Carrier reasserts that the Brotherhood has failed to present any evidence whatever to show that the claimant employes in this dispute were adversely affected by the handling complained of and are thereby entitled to the penalties claimed in their behalf. The Carrier also reasserts that the Employes' claim completely ignores the rights of the other employes named in the Carrier's Statement of Facts who were adversely affected and should be reimbursed, as the Carrier has offered to do, for the monetary losses they sustained by reason of the handling complained of.

Exhibits not reproduced.

**OPINION OF BOARD:** The facts insofar as pertinent to a disposition of this claim are as follows: Prior to February 1, 1946, there were three positions in the office of Carrier's Superintendent of Car Service at Topeka, Kansas, known respectively as Position 330 Miscellaneous, Position 340 Interchange File Clerk, and Position 341 Interchange File Clerk. Among other duties assigned to all three positions was that of posting and filing interchange corrections. On January 28, 1946, the Assistant Head Miscellaneous Clerk, an excepted position, assisted the incumbent of Position 330, 340 and 341 and other schedule employes with the handling of interchange corrections in an attempt to bring that type of work up to date. Carrier says approximately six hours of said work was being performed by the Assistant Head

Miscellaneous Clerk while Employes assert that six hours and forty minutes of said work was involved. On February 1, 1946, by reason of force reduction Position 341 was abolished and the Assistant Head Miscellaneous Clerk continued to perform the same amount of covered work until May 31, 1946. Employes file claim as indicated.

Carrier refused to make payment to the employes mentioned in the notice of claim, but had indicated a willingness to reimburse any wage loss suffered by (1) the senior employe who was cut off in force reduction, and (2) those employes who suffered a reduction in rate of pay as a result of the improper abolishment of Position 341 during the period outlined above, (February 1 to May 31), with the understanding that the reimbursement of wage loss referred to should not exceed the wages of Position 341, if it had not been abolished during that period.

Thus, the first question presented for our determination is whether or not the Carrier is justified in refusing to make payment to the employes prosecuting this claim. We believe that the Carrier is in error in the premise upon which it has founded its offer to the employes. The basis of the claim herein is not the improper abolishment of Position 341, but the assignment of covered work to an excepted position. The violation of the Agreement took place prior to the time Position 341 was abolished and continued thereafter. That this is so is indicated by the following quotation from Carrier's Statement of Facts:

> "The Assistant Head Miscellaneous Clerk had, on January 28, 29, 30 and 31, assisted the incumbents of Positions 330, 340 and 341 and other schedule employes in the office with the handling of an accumulation of interchange corrections in an effort to bring that work up to date. Beginning February 1, 1946, the Assistant Head Miscellaneous Clerk continued to devote approximately six hours per day to the work of posting and filing interchange corrections which the incumbent of abolished position No. 341 had formerly performed and which could not thereafter be handled by other schedule positions in the office."

Now then, who was damaged by reason of the removal of this work from the Agreement? We turn again to the Carrier's Statement of Facts, where we find the following statement:

> "A reduction in force was accordingly accomplished with the abolishment of some twenty (20) positions in the office at the close of work on January 31, 1946, which reduction erroneously included Position No. 341, referred to above, in the expectation that its duties would be absorbed on Positions 330 and 340." (Underscoring ours)

Doesn't this point to the conclusion that if the covered work had not been performed by the occupant of the excepted position it would have been performed by the occupants of Positions 330 and 340? In our opinion, it does. The possibility that the working of overtime on such positions might be necesssary in order to keep the work current does not alter that conclusion as we view the matter. We, therefore, conclude that the penalty should be divided equally between the employes who occupied Positions 330 and 340 for each work day during the period of time that the violation continued.

With respect to whether or not that penalty should be at the rate of time and one-half or pro rata rate, we believe the weight of authority of the holdings of this Board on this question is that the pro rata rate applies. (See Awards 3504, 4244 and Awards therein cited.) We are unable to determine whether the penalty should be based on 3 hours, 20 minutes per day or 3 hours per day per position. As we stated above, Employes assert 6 hours, 40 minutes and Carrier asserts 6 hours of covered work was performed on the excepted position, but there is nothing in the record which enables us to draw any reasonable conclusion as to who is right. That phase of the claim will have to be referred back to the property for agreement. If the parties

are unable to agree they may refer the matter back to this Board, developing such facts as will enable us to determine the question, preferably by joint check.

Some comment is in order in connection with Carrier's assertions about Mr. McGiffert not being in active service of the Carrier during all of the period involved in the claim and Mr. Schultz having occupied another position. We do not view that as material for the claim is on behalf of them and other occupants of the position for each day of the period of time that the violation existed.

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 Carrier violated the Agreement.

AWARD

Claim (a) sustained, (b) sustained on pro rata rate only and subject to agreement as to whether payment be at the rate of 3 hours, or 3 hours 20 minutes per day per position, as indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1949.