

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

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

GULF, COLORADO AND SANTA FE RAILWAY CO.

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

(a) Carrier violated the provisions of the Clerk's Agreement at Fort Worth, Texas, by assigning or permitting Warehouse Foreman C. E. Wright, an excepted employee, to perform routine clerical work; and,

(b) A sum equal to eight (8) hours per day at time and one-half the daily rate of \$8.67 (now \$12.45), account these rules violations, shall be paid to and equally divided between Receiving, Delivery and Check Clerks A. E. Havins, A. P. Bates, J. D. Colbert, R. A. Harrington, R. E. Walker and/or any other employees occupying these Receiving, Delivery and Check Clerk positions from January 1, 1946, to November 1, 1947, on which latter date violation was corrected.

EMPLOYEES' STATEMENT OF FACTS: Mr. C. E. Wright, Warehouse Foreman at Fort Worth, Texas, who occupies a position which is wholly excepted from the provisions of the Clerks' Agreement bearing effective date October 1, 1942, was permitted by the Carrier to take over the performance of routine clerical work and, as of January 1, 1946, as result of Employees' check into the matter, it was found that he was then working from 8:00 A. M. to 6:00 P. M. or 7:00 P. M., daily, and that his entire time was occupied in the blocking of all bills for inbound merchandise, signing bills of lading, receiving freight from city trucks, blocking all outbound bills of lading, stamping bills from connecting lines and blocks same, assisting in delivering freight from warehouse, relieving the Delivery Clerk during his lunch period, 12:00 noon to 1:00 P. M., each day, rendering 44 report, listing freight from city trucks and various other schedule clerical work, all of which work is covered by the scope of the agreement. While Foreman Wright performed the duties of Receiving Clerk, shown above, he, as supervisor in charge, used Mr. A. E. Havins, who is regularly assigned to position of Receiving Clerk, to perform the duties of a Check Clerk.

During the course of handling this claim on the property several changes occurred which affected Foreman Wright's assignment of schedule clerical work and the total amount of time he spent in performing such work. For example, on June 9, 1947, Check Clerk Position No. 148 was abolished and Foreman Wright then took over, in addition to the routine

CONCLUSION

In conclusion, the Carrier submits that:

- (1) The duties complained of were performed by the warehouse foreman incident to and as a consequence of his excepted position, which is clearly in accord with the parties' agreed to memorandum of interpretation of Articles I and II of the Clerks' Agreement;
- (2) These duties had been performed by the incumbent of that position for over twenty years prior to the effective date of the current Clerks' Agreement and for more than three years thereafter, prior to the instant claim;
- (3) There is no rule in the Agreement and the employees have cited none which prohibits the performance of the duties complained of by the excepted positions;
- (4) The rules of Agreement cited by the Employees do not support the claim; and
- (5) The Employees' claim should be denied.

(Exhibit not reproduced).

OPINION OF BOARD: This claim arises out of the contention of the System Committee of the Brotherhood that Carrier violated the Clerks' Agreement between Jan. 1, 1946 and Nov. 1, 1947 by having the Warehouse Foreman at Fort Worth perform certain clerical work. It asks eight hours of pay at time and one-half for each day the violation occurred.

There is no question but what the Warehouse Foreman, a position excepted from the Clerks' Agreement, performed the work upon which this claim is based. The question is, did Carrier have a right to have the Warehouse Foreman perform it or was such performance in violation of the scope of the Clerks' Agreement?

Carrier relies upon the parties' agreed to Interpretation of Articles I and II of the parties' Agreement effective Oct. 1, 1942. This provides, as far as here material, as follows:

"... it is understood and agreed that the work of Class 1, 2 and 3 employes . . . when performed by officials and others not covered by the Agreement, incident to or as a consequence of their officials or other positions, is not subject to the provisions of said Agreement."

We held in Award 3191 of this Division that by this language the intent is to limit the work which officials and others not covered by the contract can perform to that which is incident to or arises out of their work, that is, if it is incidental to or arises as a consequence thereof.

This agreed to interpretation of the parties has the effect of applying to the work of Class 1, 2 and 3 employes under Articles I and II of their Agreement, effective Oct. 1, 1942, the ebb and flow principle when such work is incident to or arises out of an official position, or a position not under the Clerks' Agreement, and has flowed out therefrom. The principle of ebb and flow of clerical work incident to or arising out of an official position, or a position not under the Clerks' Agreement, is not a catch-all doctrine permitting Carrier to have such officials or other positions not under the Clerk's Agreement perform any and all clerical work regardless of its nature. It applies when the clerical work which is incident thereto and arises therefrom is ebbing back to the position from which it had previously flowed out.

To take advantage of the interpretation agreed to Carrier must show that the work was incident to and arose from the Warehouse Foreman's work and that either he has always performed it or, if now being returned to the position, that it had previously flowed out therefrom.

The position of Warehouse Foreman at Fort Worth was established Feb. 1, 1922, and has always been excepted from the Clerks' Agreement. Shortly after it was established a joint check of the duties thereof was made to determine if it should come under the then Clerks' Agreement. That was made on Jan. 30, 1923. This check shows that duties of the same kind or nature as those now complained of were then being performed by the Warehouse Foreman. How long he continued to perform part or all of them is not shown, although apparently he did so for a considerable time. With one exception, which will hereinafter be more fully discussed, these duties were incident to or arose out of the position of Warehouse Foreman. Such being true the Carrier, under the agreed to interpretation, had a right to have the Warehouse Foreman perform them.

The exception already referred to is the preparation of the "44 Report". Admittedly this work is not within the foregoing exception. The preparation thereof continued until March 16, 1946. The length of time to prepare this report is stated by the Carrier to be ten minutes. The doing of this work by the Carrier constituted a violation of the scope of the Clerks' Agreement. In view of the time required to perform it Carrier should pay for each day the Foreman prepared it on a Call basis under Article VII, Section 2, of the parties' Agreement.

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, 1944;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claim sustained to the extent as set forth in the Opinion, that is, for a Call on each day between Jan. 1, 1946, and Mar. 16, 1946, when the "44 Report" was prepared by the Warehouse Foreman, but otherwise denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of January, 1950.