

Award No. 5290

Docket No. CL-5327

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Angus Munro, Referee

PARTIES TO DISPUTE:

NORTHERN PACIFIC RAILWAY COMPANY

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

STATEMENT OF CLAIM: Claim as presented by the System Committee of the Brotherhood in behalf of the occupant of the position of ticket clerk at Jamestown, North Dakota, for payment of eight hours at time and one-half rate on Saturday, September 24, 1949, and on Sunday, September 25, 1949, and subsequent Saturdays and Sundays.

CARRIER'S STATEMENT OF FACTS: There are maintained in Jamestown Passenger Station the following positions which were assigned to work as indicated below prior to September 1, 1949:

One ticket clerk—11 A. M. to 8 P. M., with one hour for meals, Monday through Saturday
One manager-telegrapher—8 A. M. to 4 P. M., Sunday through Saturday
One telegrapher—4 P. M. to 12 Midnight, Sunday through Saturday
One telegrapher—12 Midnight to 8 A. M., Sunday through Saturday

Effective September 1, 1949, the position of ticket clerk was assigned to work from Monday through Friday and the positions of manager-telegrapher and telegraphers continued to be assigned to work seven days per week.

Prior to September 1, 1949, occupants of positions of manager-telegrapher and telegrapher assisted the ticket clerk during the assigned hours of that position in the sale of tickets and handled the sale of tickets outside the assigned hours of the position of ticket clerk from Monday through Saturday and also handled the sale of tickets on Sundays. Commencing with September 1, 1949, occupants of positions of telegrapher continued to assist the ticket clerk during the assigned hours of that position in the sale of tickets and handled the sale of tickets outside the hours of the occupant of the position of ticket clerk Monday through Friday and also handled the sale of tickets on Saturdays and Sundays.

Claim has been presented in behalf of the occupant of the position of ticket clerk for payment of eight hours at time and one-half rate on Saturday, September 24, 1949, and for payment of eight hours at time and one-half rate on Sunday, September 25, 1949, and subsequent Saturdays and Sundays, which claim has been declined.

POSITION OF CARRIER: Jamestown, North Dakota, is located on the main line of the Northern Pacific Railway. Several branch lines diverge from

employment not expressed in nor contemplated by the Agreement of July 7, 1944, in that it specifically contemplated that Telegraph Operators would only sell tickets and perform work incidental thereto during times outside the hours of assignment of the Ticket Clerk seven days per week. The Agreement never contemplated that the Ticket Clerk job would be blanked on Saturdays, Sundays or any other day of the week and the work normally attached thereto within his assignment be performed by employees outside the scope of the Agreement.

4. This case is not unlike several that have been before your Honorable Board, among them being Award 4059 involving a dispute between our Brotherhood and the Great Northern Railroad. There, as here, a clerical employee whose normal assignment includes work connected with that of selling tickets to passengers on six days of the week had that portion of the work relating to the ticket selling assigned to an employee without the scope of our Agreement on Sundays and Holidays. Employees charged Carrier with having violated the rules of our Agreement by transferring work normally attached to a clerical position on six days of the week to an employee without the scope of the Agreement for performance by him on Sundays and Holidays. Your Honorable Board found in that case:

"Admittedly the selling of tickets at this station is a seven day job necessary to the continuous operation of the railroad. The record shows that on six days of the week the cashier was required to perform ticket selling work. This Board has repeatedly held that work performed six days a week by a clerk is within the scope of the Clerks' Agreement on Sunday as well. Awards 3425, 3858, 3900. Under these holdings the Carrier cannot properly assign the Sunday work to one not under the Clerks' Agreement. In addition thereto, it being a seven day position, the work must be performed by clerks the full seven days of the week. If a regular relief man is not assigned or an extra clerk not available, the occupant of the positions is entitled to it on the overtime basis. Awards 3979, 3054, 2052."

The Employees feel that their claim is supported by the rules of our Agreement with the Carrier and that our claim should be sustained.

(Exhibits not reproduced.)

OPINION OF BOARD: This case comes before the Board at the instance of Carrier by reason of the fact the Brotherhood on the property alleged Carrier had violated Rule 1 of the Schedule in that it had without notice to and consent of said Brotherhood blanked a seven (7) day position two (2) days of each week and required employees other than referred to in said rule to perform the duties of such position. In particular the Brotherhood claimed that on or about September 1, 1949, Carrier transferred the functions and duties of the job classification of Ticket Clerk at Jamestown, North Dakota, on Saturdays and Sundays to another class or craft, to-wit: Telegraphers.

Reference is here made to said Rule in order to determine whether the work in the job classification of Ticket Clerk belongs exclusively to the Brotherhood. At the outset it will be noted that "Ticket Clerk" as such is not referred to in the rule and that the rule itself very plainly sets out that the job classifications mentioned "is for the purpose only of showing the classes of clerical, * * * employees who are covered by this Agreement." Reference is also made to Rule 2 in connection herewith. In fact, a long line of decisions or awards, particular reference to which we are forced to omit by reason of time and space limitations, clearly and firmly establish that the type of work in the case before us falls within the meaning to be given to the terms and provisions of the Schedule. If such be the case (and we here hold it to be) we next inquire on what basis does the Brotherhood assert the work here to be exclusively theirs? Referee Swacker in Award 615 very ably discusses this whole matter and points out, in the absence of a

direct provision or necessary implication, schedules as a whole are silent with reference to granting the exclusive right to perform the work described in the Schedule to the class or craft covered by such Schedule. The Schedule in the instant case is silent. But this is not to say that by reason of silence in the Schedule the work in the job at hand does not belong exclusively to the Brotherhood. Referee Swacker goes on to point out in the above mentioned Award the test of whether a given class of work is or is not exclusive to a given craft is determined by an examination of the contract of employment, not of the Schedule in that it sets out only the rules and conditions of employment. The Referee then goes on to say as such contracts are as a rule not written, it is to be presumed that in the absence of evidence to the contrary the subject matter of the contract belongs exclusively to the respective parties thereto else a schedule would be meaningless. We have no quarrel with such line of reasoning.

Whether the exceptions to the general rule found in the above mentioned award exists in this case or not is not determinative of it for reasons hereinafter set out.

It is our considered opinion that certain letter bearing date of July 7, 1944, is highly significant, in fact, to such an extent we deem it necessary and proper to include it in this opinion in its entirety, as follows, to-wit:

"Northern Pacific Railway Company
St. Paul, Minnesota
July 7, 1944

Mr. E. R. Stapleton, Acting General Chairman
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express & Station Employees
307 Anchor Building
St. Paul, Minnesota

Dear Sir:

Please refer to my letter of January 23, 1943, to General Chairman Thrower about claim that Ticket Clerk's position should be established at Jamestown at the rate of \$6.78 per day.

This matter was discussed with General Chairman Thrower and the Clerk's System Committee on June 20th. In order to dispose of this case a ticket clerk's position at a rate of \$7.50 per day will be established at Jamestown Passenger Station as soon as arrangements can be made to bulletin and make an assignment of the position, and providing there is a qualified ticket clerk holding seniority on the Fargo Division who makes application for the position. It is understood and agreed that the establishment of the ticket clerk's position will not be construed as preventing telegraphers at Jamestown Passenger Station from selling tickets and performing work incidental thereto during or outside of the hours of assignment of the Ticket Clerk. It is also understood and agreed that the ticket Clerk's position will be maintained only so long as there is sufficient work to justify continuing the position. It is further understood and agreed that disposition of this case as herein provided for entirely disposes of the claim that a ticket clerk's position should be established at Jamestown.

Yours truly,

(s) M. J. Byrnes
Chief of Personnel

Agreed to:

(s) E. R. Stapleton,
Acting Chairman
Freight Handlers, Express & Station Employees."
Brotherhood of Railway & Steamship Clerks,

Pursuant thereto Carrier did on July 13, 1944, bulletin the position in question and did on July 19, 1944, award same to its employe one Spotts. At this point the respective parties hereto are in sharp conflict over the question of whether said bulletin created a seven (7) day job, i.e., one necessary to the continuous operation of Carrier's business. Carrier flatly avers no member of the Brotherhood ever did sell tickets on Sunday. The Brotherhood makes reply by showing Carrier has in its possession the appropriate records and that it has failed to produce same; further, that by reason of the extraordinary travel burden imposed on Carrier during the late conflict, it is a fair inference Carrier did on Saturdays or Sundays or on both such days subsequent to the time of the aforesaid bulletin employ ticket clerks.

We think reference to said bulletin and the letter in the submission identified as Employees' Exhibit No. 4, same being composed by employe Spotts who has continuously occupied the position in question since the time it was bulletined, disposes of the matter. Nowhere in said letter does the writer assert he was ever employed on a Sunday; on the contrary he specifically states on Saturdays no clerk is on duty and by inference that a similar situation prevails on Sundays. The bulletin is silent with reference to relief days.

The letter agreement heretofore set out in toto was not affected by subsequent Schedules. It will be noted employes other than members of the Brotherhood are permitted to sell tickets at any time. The fact that on and subsequent to September, 1949, the incumbent of the position of ticket clerk had two (2) rest days instead of one (1) does not alter matters. Carrier had the burden of determining whether or not to continue the position and no showing has been made that it acted in an arbitrary, unreasonable or capricious manner. Nothing has been changed in that the position of ticket clerk was continued in accordance with the bulletin with Carrier possessing authority to direct members of another craft to perform the duties on rest days.

This decision is based on the factual situation here presented and is intended only to apply thereto.

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 Employee involved in this dispute are respectively Carrier and Employee 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 by reason of the above quoted letter an affirmative finding may not be returned.

AWARD

Claim denied in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of March, 1951,