Award No. 6758

Docket No. CL-6869

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) That Carrier violated rules of the Clerks' Agreement effective July 1, 1942, and the Forty Hour Week Rules effective September 1, 1949, in assignment of work and providing for relief service on position of Stenographer-Clerk, Office of Assistant Master Mechanic at Sheridan, Wyoming.

(2) That the involved employe, E. M. McCarthy, be compensated for wage loss sustained, namely four hours' pay at the time and one-half rate for Sunday, December 16, 1951, and all subsequent Sundays to date Rule violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Sheridan, Wyoming, is the Division Headquarters for the Sheridan Division of the Carrier.

Prior to application of the Forty Hour Week Rules on September 1, 1949, the Carrier maintained three clerical positions in the Mechanical Department at Sheridan, i.e.

Name of Employe	Position	Hours of Service
E. M. McCarthy	Stenographer-Clerk	7 A. M. to 4 P. M.
E. A. Dunning	Roundhouse Clerk	8 A. M. to 4 P. M.
H. M. Johnson	Roundhouse Clerk	12 Midnight to 8 A. M.

All positions were designated seven days per week jobs.

With application of the Forty Hour Week Rules on September 1, 1949 certain changes in the hours of service attached to the position were made

clearly distinguishable. In Awards 4977 and 4812 **the specific work involved had been recognized by the Carrier and the issue was whether it could then be taken away from the employes who had theretofore performed it.** (Emphasis added.)

Claimant Steno-Clerk McCarthy cannot possibly contend the work of calling engine crews and marking the board was taken away from him. He is still working all of his regularly assigned forty hours per week, and in addition four hours overtime every Saturday morning. Calling crews on Sunday morning was never part of his job, so it could not have been taken away from it. The mere fact that he is paid overtime to do this work on Saturday mornings, along with other items of work, cannot justify a requirement for a similar overtime call on Sunday mornings.

In conclusion the Carrier avers:

1. The past practice at Sheridan, as well as other points on this railroad, is for the roundhouse foreman to call engine crews and mark the board when no clerk is on duty.

2. The agreement between the Carrier and the Clerks' Organization has been revised several times and no steps have been taken to alter, eliminate or amend this practice. It has therefore become part of the controlling agreement between the parties.

3. A host of Third Division Awards on other properties have recognized the propriety of requiring or permitting other than clerical employes to call crews or mark crew boards.

4. The awards relied upon by the Employes are clearly distinguishable from the facts in the instant claim. As a matter of fact, they have been distinguished or modified by later Third Division Awards cited herein.

In view of the above, the Carrier respectfully requests this claim be denied in its entirety.

* * *

The Carrier affirmatively states that all data herein and herewith submitted has been previously submitted to the employes.

* * *

(Exhibits Not Reproduced.)

OPINION OF BOARD: The instant claim, as expressly stated in the Organization's ex parte submission, relates solely to alleged erroneous assignment of work belonging to Claimant's position for a four hour period, 8 A. M. to 12 noon, on Sundays at Sheridan, Wyoming.

Preliminary to all that is to follow it can be said that on the dates here involved the record reveals (1) a Collective Bargaining Agreement, effective July 1, 1942, with a scope rule, controlling the disposition of work available to Clerks generally and excepting employes not covered by its terms; (2) a subsequent agreement, effective June 1, 1953, which, unless the inclusion of provisions of the 40-Hour Week Agreement, effective September 1, 1949, are to be so construed, make no material change in applicable and governing rules so far as the involved issues are concerned; and (3) discloses that Roundhouse Foremen were not covered by the terms of either Agreement. Many of the material facts are not in dispute. Others are in conflict. For that reason our statement of the governing facts will be based on what we believe to be a fair analysis of the record, without reference to versions of the contending parties.

Sheridan, Wyoming, is the headquarters for the Carrier's Sheridan Division. Two sets of pool and unassigned freight crews operate out of the point who are subject to call and depart at any hour of the night.

For reasons not here complained of, probably due to lack of sufficient work, full time Train and Engine Crew Callers have never been employed at the location. Instead for a period of approximately twenty years the work presently involved, consisting of calling crews, marking the crew board and answering calls from enginemen, has been performed by Roundhouse Clerks when on duty and, when no such Clerks were on duty, by Roundhouse Foremen.

For some time, just how long the record fails to disclose, prior to inauguration of changes made necessary by the 40-Hour Week there were two Roundhouse Clerks assigned in Carrier's Mechanical Department at Sheridan, one assignment working 8 A. M. to 4 P. M. and the other midnight to 8 A. M. During this period and while they were on duty these Roundhouse Clerks performed work of the character now in question along with their other clerical duties. While off duty it was performed by the Roundhouse Foremen who were on duty. During the same period Claimant was regularly assigned as a Stenographer-Clerk at the same location six days a week, hours 7 A. M. to 4 P. M., with Sunday as a rest day, but he was not required to perform crew calling work as a part of his assigned duties during his assignment.

With the advent of the 40-Hour Week Carrier employed three Roundhouse Clerks at Sheridan. The assignments were set up with one trick working 8 A. M. to 4 P. M. and the other midnight to 8 A. M. The third man employed was a relief Clerk, who worked the two rest days of each of the two positions first above mentioned and on his fifth day relieved a Yard Clerk. When on duty these employes performed the necessary work of the type in question. When they were off duty Roundhouse Foremen continued to perform it. No change was made in the assigned duties or hours of Claimant's regularly assigned position. However, although the record on the point is not clear, it appears the work thereof was not such Carrier was required to provide it with relief or work Claimant at the overtime rate on Saturdays on the date it commenced to operate under provisions of the 40-Hour Week Agreement.

Effective March 30, 1951, for reasons of no consequence to the issues, Carrier made a change in existing assignments at Sheridan by requiring the first trick Roundhouse Clerk to work from 12 noon to 9 P. M. instead of 8 A. M. to 4 P. M., as he had been doing previously, and by changing the hours of Claimant's assignment from 8 A. M. to 5 P. M. Concurrent with the last mentioned change, and for the first time, Carrier assigned Claimant the work of calling Crews and marking the board from 8 A. M. to noon, Monday through Friday, along with his other duties. In addition it commenced to call him for four hours, from 8 A. M. to 12 noon, on Saturdays at the overtime rate and used him solely for the purpose of marking the board and calling the Engine Crews until the first trick Roundhouse Clerk came on duty that day, Roundhouse Foreman continuing to do the same work during all portions of the week Clerks were not on duty, i.e., 7 A. M. to 8 A. M., 9 P. M. to 11 P. M. every day and 7 A. M. to 12 noon on Sundays.

Shortly after action by the Carrier as last mentioned Claimant progressed the instant claim through proper channels to this Division where he claims the involved Sunday work belongs to his position and is now being assigned to Roundhouse Foremen on Sundays in violation of the current Agreement.

Primarily the basic contention on which this claim is based is that the involved work belongs to the Clerks exclusively under and by virtue of the scope rule of the current Agreement.

Heretofore the Referee now sitting with this Division of the Board has had occasion to give long and considered attention to this same contention in Award No. 5404. After reviewing the opinion in that case and giving

careful consideration to the many other Awards cited and relied on by the parties he is convinced no erroneous conclusion was reached with respect to this same subject when in such Award it was said:

> "Thus it appears we are called upon to determine whether under the confronting facts and circumstances the Scope Rule of the instant Agreement, which does not purport to describe the work encompassed within it but merely sets forth the classes of positions covered, in and of itself gives train and engine callers the exclusive right to performance of all crew calling work on the Carrier's property. The question presented is one fraught with difficulty. It is also one on which there is no unanimity among our decisions. Early in the history of the Division of the Board in Award 615, frequently cited with approval in subsequent Awards, we said it is a mistaken concept that the source of the right to exclusive performance of the work covered by an agreement is to be found in its scope rule. However, the Opinion of that Award does recognize that subject to certain exceptions the right to exclusive performance under collective bargaining agreements does exist from the application of an elementary principle of law. In other Awards, see 3696, 3890 and 4664, heavily relied on by the Petitioner, it appears we have gone so far as to hold the mere fact an agreement has a scope rule and does nothing more than to list the classes of employes covered is enough to insure such employes the exclusive performance of all work which can be regarded as ordinarily performed by members of the craft to which they belong. In between the two extremes to which we have referred, however, is a line of decisions basically founded upon the fundamental and universally recognized legal principle (see Awards 3727, 2436, 1435, 1397, 1257 and 507) that where a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself. In substance these decisions, to which we adhere, deal with all types of collective bargaining agreements, see e.g., Awards 4464, 2326, 1435 (Clerks) 4922, 4791, 2090 (Telegraphers) and 3727 (Pullman Conductors) and hold that where the work to be performed by the particular craft in question is not described or spelled out in the scope rule or elsewhere in the agreement specifically reserved, and the question for decision is whether the work involved was ever within the purview of the contract, there is such ambiguity in its terms that intention of the parties, to be determined by recourse to custom, tradition, practice and other indicia of their understanding, is the decisive factor in determining whether the scope rule covers all work ordinarily performed by the classes of employes listed therein or was intended to leave to other employes that which they had been performing prior to the negotiation of the agreement."

The record presented makes it clear that for as much as twenty years, long prior to execution of any of the involved existing agreements, all parties in question have been fully cognizant of, and knowingly recognized, the established practice at Sheridan of using Roundhouse Foremen to perform the involved work when Clerks were not on duty. Actually, it discloses that under such circumstances such work, except the four hours in question, is now being performed by Roundhouse Foremen without protest or complaint on the part of Claimant or his Organization. In such a situation we think this is a case calling for application of the Rule adhered to in Award 5404 and the decisions there cited; we believe the facts of record clearly establish a custom and practice definitely indicating an understanding and intention on the part of all parties that work of the type in question could be assigned to Roundhouse Foremen when Clerks are not on duty; and when the record is surveyed in its entirety we are convinced beyond all peradventure of doubt that it is asking too much of us to say no such practice exists under the confronting facts and circumstances. It necessarily follows the involved work could be assigned to Roundhouse Foremen with impunity under the agreement unless there are other sound reasons which preclude that conclusion. This, we may add, is true notwithstanding Claimant's contention to

the effect there are several Awards of the Division holding that Crew Calling work when specified in the Scope Rule may not be removed from the Agreement unilaterally and assigned to employes not covered by its terms. Much could be said on this subject but we are not inclined to labor its intricacies or the Awards dealing therewith. It suffices to say that Referee Boyd reflects the view of the present Referee when in Award No. 4977, on which Claimant relies, he clearly and definitely indicates there may be outside conditions which deprive employes of the exclusive right to all clerical work, even under such a Scope Rule. Here, as we have indicated, the outside reason was implied agreement between the parties under a well and long establishd practice.

Finally Claimant contends he is entitled to the involved work by virtue of provisions of the 40-Hour Week Agreement. In the face of the controlling facts of record in this case the short but nevertheless all decisive answer to such contention is that the giving of such work to Roundhouse Foreman was permissible and proper, that it was not unassigned work to be regarded as belonging to Claimant's position, within the meaning of that term as used in our decisions, and that hence subsections (e) and (k) of Rule 30 of the 1953 Agreement (dealing with the 40-Hour Week) have no application and do not control its disposition.

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 record fails to establish any sound basis for a conclusion the Agreement was violated under the confronting facts and circumstances.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 10th day of September, 1954.