Award No. 6760
Docket No. CL-6924

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that the carrier violated the Clerks' Agreement at Muskogee, Oklahoma, beginning February 16, 1952, when

(a) It removed the work of checking shop men's time from the position occupied by J. F. Toney, Clerk (Timekeeper), and assigned it to the Car Foreman, Day Roundhouse Foreman and Back Shop Foreman, and

(b) That carrier shall now be required to pay claimant J. F. Toney for 2 hours at the punitive rate of his position each week day Monday through Friday, and a call each Saturday, Sunday and holiday as long as this violation continues, and

(c) That all other employes adversely affected by reason of this violation be compensated for wage loss suffered.

EMPLOYES' STATEMENT OF FACTS: Mr. J. F. Toney is employed as Clerk (Timekeeper) at the Mechanical and Store Department, Muskogee, Oklahoma, with assigned hours 8:00 A. M. to 5:00 P. M., Monday through Friday, and is carried on the seniority roster with a seniority date of October 18, 1943.

The Car Foreman, Day Roundhouse Foreman and Back Shop Foreman have no rights under the Clerks' Agreement.

For more than 23 years the occupant of the position now occupied by J. F. Toney, Clerk (Timekeeper), has checked the time of each of the Shop Craft employes, including the Foremen, twice each day and entered their time on individual time sheets provided for the distribution of their time. These forms cover a two-week period. The time of these shop craft employes is separated between such items of work as AFE's, "A" and "B" Shop Orders, Sales Orders, Freight Car Repairs, Running Locomotive Repairs, Classified Repairs, Shop Machinery, Shop Buildings, etc.

In checking the time of these shop craft employes it has been necessary that the Timekeeper actually see each of the employes to know that he is actually on duty and record their attendance by an attendance check on

(b) That under the circumstances there is no schedule provision supporting the claim of the claimant for additional compensation. Instead the claim as made has as its basis mere allegations.

(c) That the claimant or other employes were not adversely affected by reason of this alleged violation.

(d) The organization has failed to sustain the burden of proof as to claims (a), (b) and (c).

(e) The carrier relies solely on its rights and privileges to make the change as set forth in the statement of facts.

(f) The inference is that the carrier should compensate the claimant merely because he was required to obtain the time distribution from the foremen instead of the individual employes. There can be no possible justification for making such payment, nor is there a requirement of the rules cited or any other rules in the agreement that payment be made under such circumstances.

All data submitted herewith in support of the carrier's position has been presented to the employes or their duly authorized representative and is hereby made a part of the matter in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The present claim is predicated upon the premise Carrier removed work and assigned it to the Car Foreman, Day Roundhouse Foreman and Back Shop Foreman in violation of the terms of the current Agreement.

At the outset it will simplify the issues to state that on all dates involved (1) there was an agreement in force and effect between the parties, effective July 16, 1940, which contained a scope rule controlling the disposition of work available to Clerks generally and excepting employes not covered by its terms, (2) the Foremen referred to in the claim were not covered by the scope rule and held no seniority rights under the contract, and (3) Claimant is the senior employe and entitled to work belonging to the involved position.

The facts, essential to a proper understanding of the controversy, will be stated in accord with our view of what the record warrants.

For approximately twenty years prior to the effective date of the 40-Hour Week Agreement on September 1, 1949, and except as hereafter noted, the duties of the involved Clerk (Timekeeper) position included making two daily trips, while on duty, through Carrier's shop at Muskogee, Oklahoma, for the purpose of contacting each employe as to the kind and character of service such employe performed. That was necessary since the performance of certain types of work required that the employes performing it be paid a differential while so employed with a minimum of one hour. It was also necessary because the occupant of the Clerk position was required to check each employe's daily attendance, enter his time on individual time sheets, record the number of hours he was engaged in performing particular items of work during the day, and certify such time sheet as correct.

There may have been some slight change in the foregoing procedure after September 1, 1949, but if so it is of no consequence to the issues and we are not disposed to labor it. The fact remains the record discloses that both before and after advent of the 40-Hour Week, and until February 16, 1952, the occupant of the Clerical position made his two daily trips to the shop for the purposes heretofore mentioned, except on Saturdays, Sundays and holidays As to such days the Organization admits he obtained the required information from the shop employes on their first following work day.

Effective February 16, 1952, Carrier discontinued the method of obtaining the data in question by requiring that from such date it be obtained by the Foremen and by them given and/or reported to Claimant as the occupant of the involved position.

The gist of Claimant's position is that since the involved work is within the scope rule of the Agreement Carrier was, and is, obligated to call upon employes, covered by its terms, to perform it.

The rules (1) that a scope rule such as is here involved includes all work on the Carrier's property of the kind and class which employes therein covered usually and customarily performed at the time of its execution and (2) that where work is within the scope of the Agreement the Carrier cannot let out the performance thereof to others unless it is specifically excepted under its terms or within some exception recognized by the Board as inherently existent, are well-established. For just a few of our Awards wherein they have been recognized and applied see Awards Nos. 751, 1314, 3360, 3746, 4513, 4934, 4962, 5700, 5790, 5973 and 6284. Many more Awards could be listed but those cited suffice to establish the principles in question.

Based on the foregoing rules we think the involved work was within the terms of the scope rule and that the Claim has merit unless such work comes within some of the recognized exceptions, or some other sound reason is found requiring its denial.

Turning to reasons assigned by Carrier for action of the nature just mentioned we first note a contention no work was removed from Claimant's position. Resort to the factual statement makes it apparent this Claim lacks merit and requires little attention. The same holds true of an argument to the effect the record discloses this was Foremen's work, not Clerk's. The record, disclosing the work had been assigned to involved positions for approximately 23 years, is all that is required to refute such contention.

Next it is argued this was work incidental to the regularly assigned duties of Foremen and therefore properly assigned to them. In the face of the instant record we do not think that is so. So far as its contents disclose the involved work of this position had always been performed by Clerks. See Award No. 6284. But assuming, without deciding, that the work was of such nature does not help the Carrier's position. Here the work had been assigned to the position for many years and the position itself is still in existence. Otherwise stated, the position had not been abolished. Under such circumstances it has been held the Carrier could not assign work to a position not under the Agreement, whether the work was incidental to the position to which it was assigned or not. See Award No. 3491. Noting Carrier's criticism of the last mentioned rule we pause to note the sound and plausible reason for its pronouncement springs from the fact that to hold otherwise would permit the Carrier by careful manipulation to take work from regularly established positions with impunity.

Finally Carrier relies on denial Awards Nos. 2334 and 5068, the last by the present Referee. Resort to both Awards disclose basic differences, factually and otherwise, which make them clearly distinguishable.

We find nothing in the record or in contentions advanced by Carrier disclosing that this Claim should be denied for lack of merit. However, this conclusion does not mean it can be sustained in its entirety. By Claimant's own concession he checked Saturdays, Sundays and holidays of individual shop employes on his own and their first following work day. Obviously he would not be entitled to a call for such days because if the work had never been removed he would not have been entitled to a call on these days for performing it. Neither is he entitled to the punitive rate for Mondays through Fridays. Having performed no work on such days, even though under the confronting facts and circumstances he should have been per-

mitted to do so, the proper basis for the work withheld is the pro rata rate. As to Claim (c) the record discloses nothing establishing that other employes within the scope of the agreement suffered loss as a result of the Carrier's action, hence it cannot be upheld.

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 violated the Agreement.

AWARD

Claim (a) sustained and Claim (b) sustained for Monday through Friday at the pro rata rate, in accord with the Opinion and Findings. Claim (c) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 6760
Docket No. CL-6924

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Midland Valley Railroad Company

Upon application of the Carrier involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning, as provided for in Sec. 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made;

The provisions of Section 3, First (m), **supra**, neither contemplate nor require interpretation of an award unless, appearing from the claim, opinion, findings or award, the Division of the Board to which the request for interpretation is submitted finds some ambiguity in language which renders uncertain the application of the award upon the property.

Although it indicates dissatisfaction with the result and a desire for a rehearing of the cause, we find nothing in the involved request for an interpretation which presents a dispute concerning application of the award. For that reason, such request might well be denied on that basis without further comment. However, we are not inclined to dispose of it so summarily.

When carefully reviewed and analyzed, no ambiguity is to be found in the award. On the contrary, limited strictly to the existing factual situation, it states in clear and unequivocal language that under all the facts and circumstances disclosed by the record the work in question, i.e., the work of making two daily trips through Carrier's Shops for the purpose of contacting each employe as to the kind and character of service such employe performed, was work coming within the terms of the scope rule of the current agreement and therefore wrongfully removed therefrom when it was taken away from the involved clerical (timekeeper) position, to which it had been regularly assigned for many years prior to the date of the execution of such agreement.

In view of what has been heretofore stated, the application for interpretation must be and it is hereby denied.

Referee Jay S. Parker, who sat with the Division as a member when Award No. 6760 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 22nd day of July, 1955.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 6760
Docket No. CL-6924

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 22nd day of July, 1955.