

Award No. 7047

Docket No. CL-7078

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

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

(a) The carrier violated and continues to violate the rules of the Clerks' Agreement at Gerlach, Nevada by requiring employes outside the Clerks' Agreement to perform the work of calling engine crews as well as selling tickets, loading and unloading baggage and mail from passenger trains outside of clerks' regular hours and on clerks' rest days subsequent to March 20, 1949.

(b) The senior available clerical employe regularly assigned to the class of work of calling engine crews and selling tickets, loading and unloading baggage and mail at Gerlach, Nevada be paid a call in each instance when employes outside the scope of the Clerks' Agreement were used to call crews, sell tickets, and load and unload baggage at that point, outside the regularly assigned hours of clerks and on clerks' rest days and on holidays, subsequent to March 20, 1949.

NOTE: Actual monetary consideration involved in this claim, Item (b) hereof, to be determined by joint check of Carrier's pay-rolls, time book records, etc.

EMPLOYEES' STATEMENT OF FACTS: On November 1, 1931, the jurisdiction of the Gerlach, Nevada station was transferred from the Western Division to the Eastern Division of the Carrier. At that time the station force consisted of a station agent assisted by three telegraphers assigned around-the-clock, and a warehouseman. This force remained constant except for abolishment of the warehouseman's position on March 12, 1932, its reestablishment on January 2, 1935, and subsequent abolishment on April 10, 1935.

On June 30, 1939, a joint check of Gerlach Station was made by former Trainmaster Brady and former General Chairman McCarthy, to determine station duties performed, and their findings were reported to the Superintendent in the following joint letter:

"Mr. G. W. Curtis:

Your letter file 013-C June 22nd, regard to joint check Gerlach Station.

their rest days to perform these and other duties which were a part of their positions the balance of the week. This information was obtained from overtime slips for rest day service submitted by the employees involved in the instant claim.

In summary, Carrier has shown:

- (1) that the duties enumerated in Employees' Statement of Claim have never been considered the exclusive property of the Clerks as is evidenced by the joint check of 1939;
- (2) that the Employees' position is contrary to the interpretation they themselves placed on their Scope Rule since 1923;
- (3) that the Employees are **legally** estopped from asserting instant claim; and
- (4) that prior to the establishment of a relief position in January, 1951, the assigned clerks were regularly called in to perform the clerical duties accruing to their positions on their rest days.

For the above reasons, Carrier asserts the instant claim is wholly without merit and urges your Honorable Board to deny it.

All of the above has been presented to the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: At the threshold we are met with a motion lodged in the docket which reads:

"A study of the ex parte submissions in each of Dockets CL-7078 and CL-7079 reveal that other party or parties are involved.

In line with our statutory duty, I move, therefore, that a hearing date be set on Dockets CL-7078 and CL-7079 and that other party or other parties involved in each of these disputes be notified of such hearing."

In view of a number of awards of this Board and the decision of the United States Supreme Court in the case of **WHITEHOUSE v. ILLINOIS CENTRAL RAILROAD COMPANY** (No. 131 October Term 1954), notwithstanding pendency of the motion, the Board now has jurisdiction over the only necessary parties to this proceeding and over the subject matter. Awards 5627 and 5644 were ill advised. Therefore we proceed to consideration of the merits.

The disputed work at Gerlach Station is calling engine crews, selling tickets and loading and unloading mail and baggage from passenger trains. Except for short periods in 1932 and 1935, all of this work was performed by an Agent and three Telegraphers until March 16, 1942.

June 30, 1939 a joint check of Gerlach Station was made by a former Trainmaster and a former General Chairman of the Clerks to determine station duties performed. At that time the only crew calling necessary was for the outbound engine crew on one train which took 15 minutes. The joint check did not mention passenger business at all and indicated that the three telegraphers were performing an hour and a half or less of clerical work per shift.

Between March 16, 1942 and September 28, 1944 two clerical positions were established: Warehouseman (reclassified to General Clerk) and

Clerk-Warehoueman. Until March 20, 1949 all of the disputed work was performed by these two clerical positions.

About March 20, 1949 an additional passenger train each way was added. As a consequence, outside the regular assigned hours of the two clerks, the disputed work was performed by a telegrapher; and effective September 1, 1949 telegraphers were instructed to perform the disputed work on the clerks' rest days.

The claim was filed October 19, 1949; and it was confined to train and engine crew calling. The additional claim, involving selling tickets and loading and unloading mail, was filed August 7, 1952.

The performance of the disputed work by telegraphers outside the assigned hours and on the two rest days of the clerks continued until the establishment of a Relief Clerk position on September 4, 1950 after which clerks have performed the disputed work on rest days. The performance of the disputed work by telegraphers outside the clerks' assigned hours continued until the establishment of CTC and the abolishment of two telegrapher positions on January 11, 1951, after which clerks have performed all of the disputed work.

Rule 1 (effective December 16, 1943) provides:

"... Positions within the scope of this agreement belong to the employes covered thereby and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 64."

Rule 64 reads:

"This agreement shall be effective as of December 16, 1943, and shall continue in effect until it is changed as provided herein or under the provisions of the amended Railway Labor Act.

Should either party to this agreement desire to revise or modify these rules, 30 days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately upon the expiration of said notice unless another date is mutually agreed upon."

Regardless of how the disputed work had been performed before, the need for clerical positions was recognized by the Carrier when it established them in 1942, 1944 and 1950. And the adoption of this particular Scope Rule in 1943 protected the positions so established to the Clerks (Awards 1314, 3506, 3563, 5785, 5790 and 6141).

The positions so established were never thereafter abolished; but when additional passenger service was established in 1949, work of the positions outside regular assigned hours and during rest days was taken from the occupants of the clerical positions and given to others. This was a violation of Rule 20 as it stood both before September 1, 1949 (Award 4497), and after (Rule 20 (f) and (h); Awards 5240, 5623, 6216).

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties to this dispute waived oral hearing thereon;

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

The Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 8th day of July, 1955.

DISSENT TO AWARD 7047, DOCKET CL-7078

The majority opinion erroneously rejects the necessity for Notice to other parties involved in this dispute, and for the reasons outlined in our dissents to Awards 5702, 5785, 5790 and to other awards of like tenor, we likewise dissent here.

/s/ J. E. Kemp
/s/ W. H. Castle
/s/ R. M. Butler
/s/ E. T. Horsley
/s/ C. P. Dugan