

Award No. 7048

Docket No. CL-7079

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: This is a claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the rules of the Clerks' Agreement when it abolished the positions of Steno-Clerk, working around the clock, seven days each week, in the Chief Dispatcher's Office at Sacramento, California, effective with the completion of work on June 15, 1946, for the first shift; June 16 for the 2nd shift; and June 17 for the 3rd shift and the relief position, and established in lieu thereof three positions of Steno-Clerk, working around the clock daily except Sundays and holidays, and thereafter (except for the period from on or about September 24, to December 18, 1948, inclusive) required or permitted employees outside the Clerks' Agreement to perform on Sundays and holidays the work formerly performed by the occupants of positions of Steno-Clerk on such days.

(b) The occupants of the three six-day positions created in the Chief Dispatcher's Office at Sacramento, beginning June 16, 1946, and/or their successors, (except for the period from on or about September 24 to December 18, 1948, inclusive) be compensated for a day's pay, as time lost, at the overtime rate, for each Sunday and holiday that the Chief Dispatcher, Night Chief Dispatcher, or other employees outside the Agreement performed the work normally attached to the clerical positions.

NOTE: Effective September 1, 1949, this claim is extended to cover "rest days and holidays" instead of "Sundays and holidays."

(c) The Carrier be required to restore to clerical workers the around the clock seven days per week work in the Chief Dispatcher's Office at Sacramento, California.

(d) All employees adversely affected by reason of action of the carrier in reducing the number of Steno-Clerk positions in the Chief Dispatcher's Office at Sacramento, working daily except Sundays and holidays, be compensated for all wage loss sustained.

NOTE 1. Effective September 1, 1949, this claim is extended to cover "rest days and holidays" instead of "Sundays and holidays."

NOTE 2. Actual monetary consideration involved in this claim to be determined from a joint check of the Carrier's payrolls, records, etc.

EMPLOYEES' STATEMENT OF FACTS: The use of one or more Stenographers in the Chief Dispatcher's Office at Sacramento, California, had been the practice for several years prior to June 13, 1944. On that date Clerks' Circular No. 77-44 (Employees' Exhibit "A") was issued advertising for a "Relief Stenographer—Chief Dispatcher's Office, Sacramento" to perform relief Sunday, Tuesday and Thursday in that office and to work Monday, Friday and Saturday in the Superintendent's Office, with Wednesday as the relief or rest day. Thereafter the rest days of the three Stenographer-Clerks in the Chief Dispatcher's Office were changed to conform to those established by the inauguration of the Relief Stenographer assignment (Employees' Exhibit "A") and the positions as changed were advertised in Clerks' Circular No. 84-44 (Employees' Exhibit "B") as seven-day assignments.

The three positions of Stenographer-Clerk in the Chief Dispatcher's Office having been established as seven-day positions, as shown in Employees' Exhibit "B", a question arose as to whether the position of Relief Stenographer advertised in Clerks' Circular No. 77-44 (Employees' Exhibit "A"), established to relieve each of the Stenographer-Clerks one day each week, and to work three days each week in the Superintendent's Office, could be considered as one necessary to the continuous operation of the railroad. On June 25, 1944, the Division Chairman wrote the Superintendent with respect to this matter as follows:

"4026 Ventura Avenue
Sacramento 17, Calif.
June 25, 1944"

Mr. G. W. Curtis, Superintendent
1904 Jay Street
Sacramento, California

Dear Sir:

With reference to that portion of Clerks' Circular No. 77-44 dated June 13, 1944, in which the position of Relief Stenographer, Chief Dispatcher's Office is advertised, it is noted that one of the days of assignment in the Chief Dispatcher's Office is for Sunday with hours 8:00 A.M. to 4:00 P.M. and that the relief day for this newly created position is Wednesday.

The exception to Rule 22 which permits working certain employees at straight time rate on Sunday requires that these employees be necessary to the continuous operation of the Carrier and that they be regularly assigned to such service.

The schedule of this newly created position of Relief Stenographer indicated that the position will work three shifts in the Chief Dispatcher's Office and three shifts in the Superintendent's Office. It, therefore, cannot be said that this position is regularly assigned to service necessary to the continuous operation of the Railroad.

May I suggest that you change the relief day of this newly created position from Wednesday to Sunday. In this manner the regular occupants of positions of stenographer in the Chief Dis-

- (2) Claims "(c)" and "(d)" were not conferenced on the property and appeared for the first time in this dispute when it was submitted ex parte by the Employees to the Third Division; such procedure violates the Railway Labor Act and deprives your Board of jurisdiction to hear the dispute on the merits;
- (3) The Employees made no protest against the abolishment of the third stenographer-clerk position until they presented the claim ex parte to the Board, seven years after the position was abolished; such failure to act amounts to a waiver of whatever rights they might have had as a result of said abolishment;
- (4) Under the "ebb and flow" doctrine as set forth in Award 1314 Carrier was not in violation of the Clerks' Agreement either when it abolished the relief stenographer-clerk position or when it abolished the regular third stenographer-clerk position; and
- (5) The sustaining of this claim would place an unreasonable burden upon Carrier in requiring the maintenance of two positions to perform work now performed by one position within an eight hour period; in other words, require the establishment of wholly unnecessary clerical positions.

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.

This claim presents essentially the same questions as those presented in Award 7047.

For a 20 year period prior to World War II the Chief Dispatcher's Office had little or no clerical help: out of a total of 252 months a Steno-Clerk was employed only 15% of the time or for only 39 months or parts thereof. Thus, there was no clerical help provided, the Chief Dispatcher necessarily performed the clerical duties required as an integral portion of the duties of his position.

The Scope Rule was amended effective December 16, 1943 to read as quoted in Award 7047.

The increase in business attendant upon World War II resulted in the augmentation of regular clerical forces in the Chief Dispatcher's Office.

From 1944 to 1946 the Carrier maintained in that office three 7-day Stenographer-Clerk positions and a relief Stenographer.

In June 1946 the Carrier unilaterally abolished all of these positions and established two new 6-day Stenographer-Clerk positions without rest day relief. From 1946 to 1949 there never was any Relief Stenographer position except from September to December 1948; and during this period there were always one, two or three Stenographer-Clerk positions in existence at various intervals but all on the basis of 6-day assignments with dispatchers performing the clerical work on Sundays and holidays.

Ever since March 5, 1949 there have constantly been two Stenographer-Clerk positions in existence with dispatchers performing the clerical work on rest days and Sundays.

First. Regardless of how the disputed work had been performed before, the need for around-the-clock clerical positions was recognized by the Carrier when they were established and maintained from 1944 to 1946. And the adoption of this particular Scope Rule in 1943 protected the positions so established to the Clerks (Awards 3563, 5785, 5790, and 6141).

When the Carrier abolished the Relief position, it does not appear that the Sunday, holiday and rest day work had ceased: it was given to the dispatchers. 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 and 6216).

When the Carrier reduced the number of Stenographer-Clerk positions, the reductions were proper, if the work of the abolished positions had ceased; but under the 1943 Scope Rule the work of the abolished positions could not properly "ebb back" to the dispatchers without action taken under Rule 64. This is to say that the Claimants are entitled to compensation for the clerical work, if any, which the dispatchers have actually performed since June 16, 1948 and which immediately prior thereto was being performed by the occupants of the abolished Stenographer-Clerk positions.

Second. The claim was filed January 24, 1948 one year and seven months eight days after the initial violation is alleged to have occurred. It embraced paragraphs (a), (b) and (d), but not (c) which was added for the first time in the Organization's Ex Parte Submission filed here March 1, 1954. The claim was finally denied by the Carrier on appeal on February 28, 1949. On September 22, 1950 (one year six months 25 days later) the Organization submitted to the Carrier a proposed joint statement of facts which the Carrier did not finally reject until November 14, 1952 (two years one month 22 days later).

Thus, five years have elapsed from final denial of the claim on the property to the filing of the ex parte submission here.

The Railway Labor Act contains no time limitation on claims; and neither does this Agreement, although many do. There is no basis for denial of this claim by reason of the initial delay of one year seven months eight days in filing the claim on the property. Such a delay is shorter than most statutory periods of limitation; and, notwithstanding the delay, the Carrier entertained the claim and dealt with it on the merits (compare Award 6656).

However, decisions of this Board have gone so far to deny claims for unreasonable delay in bringing the claim to the Board, even though the particular agreement contained no cut-off or limitation period (Awards 4941 (3 years), 5190 (3 years), 5949 (4 years) and 6229 (2 years)).

The record presents no excuse for the delay of five years in bringing the claim to the Board except the abortive attempt to reach a joint statements of facts. But this accounts for only two years of the five year delay.

Moreover, the Organization was not diligent about pressing the joint statement to a conclusion. And finally the Organization always was at liberty to file an ex parte submission.

No useful purpose will be served by denying the claim on the authority of the above cited awards and leaving the essential dispute on the merits unresolved.

In view of the foregoing considerations, items (b) and (d) of the claim should, therefore, be denied for the period commencing March 1, 1949 and ending February 28, 1954. These items of the claim should be otherwise sustained at the pro rata rate except for holidays which shall be at time and one-half rate.

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 Employees involved in this dispute are respectively Carrier and Employees 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 as found in the foregoing Opinion.

AWARD

Item (a) of the claim sustained;

Item (c) of the claim denied;

Items (b) and (d) of the claim sustained to the extent specified in the foregoing Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. I. Tummon
Secretary

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

DISSENT TO AWARD 7048, DOCKET CL-7079

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