Award No. 8793
Docket No. CL-8093

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the provisions of the Clerks' Agreement:

(a) When effective October 21, 1954, it nominally abolished the clerical positions of Accountant and Second Yard Clerk at Chickasha, Oklahoma, and removed the clerical work comprised of the regular assigned duties of the positions from under the scope and operation of the Clerks' Agreement and utilized the Telegraphers, employes of another class and craft, subject to the Agreement of another craft, to perform said work in violation of the Clerks' Agreement; and

(b) The clerical work performed by the Telegraphers, employes of another class and craft, be returned to the clerical forces.

(c) That the Carrier be directed by appropriate Board order to reimburse claimants, J. B. Bellah, Accountant; Joe B. Carter, Yard Clerk; Arthur Spearing, Chief Yard Clerk; J. H. Lawson, Yard Clerk, and other clerks affected by this violation for monetary loss sustained in accordance with claims filed, until the violation of the Agreement has been removed.

EMPLOYES' STATEMENT OF FACTS: October 15, 1954, Superintendent H. G. Dennis addressed a letter to Agent S. C. Hill, Chickasha, Oklahoma, as follows:

"El Reno—October 15, 1954

File—2255-2

"Mr. S. C. Hill:

"Please arrange, effective with the close of work October 21, to abolish following positions:

Carrier may abolish the position and return the remaining work to the position from whence it came and to which it is incident. That is, clerical work incident to a position outside of a Clerks' Agreement may flow from such position to positions under the Clerks' Agreement and then, if it decreases, back to the position to which it is incident. See Awards 806, 1405, 1418, 2138, 2334, 3211, 3735, and 3989 of this Division."

Award 4893, Opinion of Board:

"Based upon all of the facts and circumstances of this particular case the Board is not disposed to disturb the action of the Carrier."

Award 4998, Opinion of Board:

"In the instant claim, third trick telegraphers have performed this work from the year 1919 to the war year 1943. Then when his duties became so great, the work was given to clerks. When the work slackened, it was again given back to the third trick telegrapher. When it increased, it was given to a clerk on December 1, 1947, and when it again decreased in July, 1948, it was returned to the telegrapher. It was work incidental to and in proximity with his duties. This we believe the Carrier has a right to do. A denial of this claim is in order. Awards 523, 615, 638, 1566, 2334, 3003 and 4492."

Award 5489, Opinion of Board:

"In the interests of stability in labor relations, we feel compelled to conform to past decisions of this Board interpreting the same or identical clauses of the Agreement unless our past ruling be clearly erroneous. For a concise recital of the ebb and flow doctrine see Award 4477."

As previously cited in Award 615, your Board held that seniority rules merely control the distribution of the work that is available under the agreement. As we have shown, there was no necessity for maintaining the positions of Accountant and Second Yard Clerk at Chickasha and for your Board to order their restoration would burden the Carrier with the added expense of maintaining positions, the duties of which can be assigned to the remaining clerical and telegraph employes at Chickasha without violation of any rule of the agreement.

In view of the long history of this issue before your Board and the determination of it under the applicable agreement in previously cited Awards on this property and others, the Carrier has rejected the Organization's claim and we respectfully request your Board to do likewise.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 15, 1954, Carrier served notice that, effective with the close of work on October 21, 1954, the positions of Accountant and Second Yard Clerk at Chickasha, Oklahoma, would be abolished. Carrier at that time furnished statements showing disposition of the work of the two positions.

According to said statements, the time involved in the performance of the duties of the Accountant position as of the days preceding its abolishment was estimated to have totaled 340 minutes per day. Of these, 250 minutes of work were apportioned to the Chief Clerk and Warehouse Foreman positions and 90 minutes to the First and Second Telegrapher positions. The work of the Second Yard Clerk position was estimated to have amounted to 300 minutes per day; and of this total, 140 minutes of work were given to the Chief Yard Clerk position, 30 minutes to the Second and Third Telegraphers positions, and 130 minutes to the Chief Clerk or the Third Telegrapher position, depending on which incumbent was on duty.

A conference on Carrier's notice was held on October 21, 1954. Thereafter, a claim was presented, declined, progressed, and finally, on March 22, 1955, denied by Carrier's Manager of Personnel, highest official designated for final decision on such matters. On November 28, 1955, this Division received from the Employes notice of intention to file an ex parte submission on the claims, and same was received here on December 30, 1955.

It appears from the record that (1) before the date when the two abolishments became effective the freight clerical work, including that of said two positions, had been handled in the freight office at Chickasha, where there were no telegrapher positions; and (2) after said date the freight clerical work was transferred to the passenger station, where there were three telegrapher positions (one for each trick) and to which the remaining clerical positions were moved.

The Employes do not allege that in carrying out the above-mentioned abolishments Carrier failed to conform to the procedural requirements of Rules 25 and 69. They do contend that Carrier violated Section 2(k) of the Scope Rule, Interpretation (1) of Rule 2, Interpretation 2 of Rule 69, and the Scope Rule in general (as interpreted in certain awards of this Division).

Carrier defends by arguing that (1) paragraph (k) of Section 2 of the Scope Rule applies only to the various excepted positions under Section 2 and not to the positions (including those here involved) set forth in Section 1 of said rule; (2) Interpretation (1) of Rule 2 is also inapplicable, having to do only with the distinction between clerical and non-clerical work subject to the Agreement; (3) Interpretation 2 of Rule 69 does not reqiure that the work of an abolished position be returned to the "clerical" positions from which it originated; and (4) the general interpretation of the Scope Rule in numerous awards of this Division—embracing the ebb-and-flow doctrine and others—support Carrier's action here.

In determining cases of the sort here involved, the Board is obligated first to interpret particular relevant rules and, if possible, to decide the issue(s) on that basis. If the Board finds that one or more of such particular rules have been violated or otherwise furnish sufficient grounds for a decision, there is no need to look or go further. However, if the Board finds that such rules have not been violated or that they are not enough for deciding the case, the Board must proceed to an interpretation of the more general scope rule, using previous awards of the Board where applicable. For example, the Clerks' agreements with certain railroads specifically prohibit a carrier from removing positions or work previously covered by the agreement from such coverage except by agreement with the Organization. Then, unless such an agreement has been worked out, the contract has been violated, and there is no need to consider the matter further. On the other hand, a Clerks' agree-

ment may contain no such specific prohibition. It is then necessary to consider the general scope rule and its implications.

In accordance with the above, the Board here first deals with three particular rules of possible relevance. Paragraph (k) of Section 2 of the Parties' Scope Rule is first to be considered. The Board finds that there is no need to interpret this Rule in order to decide the instant case because (1) this Rule is contained in Section 2, which is labeled **Exceptions** (to the application of the Agreement's rules); (2) the abolished positions here at issue are under Section 1, headed **Scope**; and (3) paragraph (k) may therefore not be held to apply to the positions listed in Section 1. It is apparent that, if the Parties had intended to make the provisions of paragraph (k) applicable to the positions enumerated in Section 1 as well as to those in Section 2, they would have labeled said paragraph as Section 3 or used some other appropriate device. But they did not. And this Board lacks authority to do so. Section 2(k) must be found to be inapplicable here and therefore not violated by Carrier.

Rule 2 and its Interpretation (1) have next to be considered. The Board finds that the provisions of this Classification Rule have no application to the instant case. The four-hours dividing line is made to separate clerks from non-clerks, both subject to the Agreement. Said dividing line is not useful for or applicable to making a distinction between employes subject to the Agreement and employes, e.g., telegraphers, not so subject. This Rule was not violated by Carrier.

The third particular rule of possible specific application and relevancy is Rule 69 and its two Interpretations. The Board will deal here with only the substantive portions, for, as previously stated, the procedural provisions are not involved.

Rule 69 is headed **Adjustment of Rates.** From this fact and from a study of the language of the first two paragraphs of the Rule, it is evident that the chief original concern of the Parties was with (1) protecting the wage rates of positions when the duties thereof were increased or decreased or changed, and (2) preventing the Carrier from reducing a position's rate of pay under the guise of abolishing the position and setting up a new one under a different title.

The Employes contend that the last phrase of the first paragraph—"or evading the application of these rules"—is broad enough to apply to cases of the sort involved here. That is, for the instant case the first paragraph of Rule 69 would be said to read, "Established positions will not be discontinued for the purpose of evading the application of these rules." Here two positions were discontinued, and some of their work was given to telegraphers, not subject to the rules of the Clerks' Agreement. Carrier's action resulted in an evasion of the application of the Clerks' rules, say the Employes.

The Board finds two difficulties with this contention. In the first place, the Employes have failed to establish that Carrier's abolishment of the positions was for the **purpose** of evading the application of the Clerks' rules. Second, Carrier's action, however, may be said to have had the **effect** of taking certain work out from the coverage of the Clerks' rules. Is this prohibited by the first paragraph of Rule 69, whether or not "purpose" has been established? The Board finds not. The context of the Rule is as originally written leads to the conclusion that the Parties set down those first two paragraphs for the employes covered by the Agreement and not for or in respect to those

not so covered. It is to be noted that said first paragraph uses an "and" rather than an "or" between "established positions will not be discontinued" and "new ones created under different titles . . .". This fact persuades that the Parties were dealing with both situations—old job abolishment and new job creation—together in respect to protecting the application of Clerks' pay rates and Clerks' rules to clerical employes, all under the Agreement. In the instant case two positions were discontinued, but there was no "and"; no new clerical jobs were created.

In view of all the above the Board finds that Carrier did not violate any provision in the first two paragraphs of Rule 69.

Interpretation 1 is next to be dealt with. Carrier relies on the first clause as establishing its right to abolish a position. The Board, however, is unable to conclude that this right is unequivocal or absolute. Its exercise is subject to (1) other provisions of Rule 69 and its Interpretations; and (2) other rules of the Agreement, including the general Scope Rule. In itself Interpretation 1 is inconclusive and of little help to a determination of the instant case.

Looking next at Interpretation 2 of Rule 69, the Board finds that the important substantive provision has to do with what is to happen to the "remaining work" of an abolished position. The language says that "the remaining work will, so far as possible, be returned to the position or positions in the station, yard, or office from which it originated." In respect to this language the following observations must be made: (1) In the Interpretation, the words, "remaining work", are used three times. This fact, plus the fact that in the next paragraph the procedures of Rule 25-b (on Reducing or Increasing Force) are invoked, leads to the conclusion that here is a specific (as opposed to the general) flow-and-ebb principle or rule. That is, Interpretation 2 to Rule 69 says, in effect, that when there is an ebb or reduction in clerical work at a given location, so that one (or more) monthly rated positions is discontinued, then the remaining duties will, if possible, be placed in the remaining position at the location where the work first came from. The word "remaining" can only mean that some of the work of the abolished position(s) must have ebbed or disappeared. And the three-time use of "remaining" in the Interpretation convinces that the Parties were not talking about or "legalizing" the abolishment of a full-time position, i.e., one whose content had not fallen off but had retained a full eight hours of work. (2) The Interpretation's flow-and-ebb principle is only relatively specific. It is not so specific as to set forth various reasons for ebb of work, including some reasons, and, possibly, excluding others. This degree of generality means that all causes are included, e.g., fall-off in railroad business at the location, introduction of labor-saving equipment, and better methods of management. (3) The next point has to do with whether the words "position or positions" are broad enough to include positions, e.g., telegraphers', not subject to the Clerks' Agreement. The Board finds that, in the general context of Rule 69, these words do not hold such breadth. As with the first paragraph of Rule 69, so here: It is not reasonable to suppose that the Parties wrote Interpretation 2 to cover or benefit employes not subject to the Clerks' Agreement. They must have meant that the remaining work of an abolished position should, if possible, be returned to the remaining Clerks' position(s) at the location. (4) Finally, the words, "so far as possible", have real significance. The Board finds that they often soften the requirement that "remaining work" must be returned to remaining clerical positions at the location. Said requirement is not an absolute one. Carrier must in good faith try to make such a transfer or return. But there might be many reasons why it would be impossible to do so. Clearly the possibility or impossibility of returning the remaining

work of an abolished clerical position to the remaining clerical positions at a location must be determined on a case-by-case basis from positive evidence of record.

As to the instant case, there is no such evidence. The Board is unable to develop any finding as to whether the work of one or the other or both of the two abolished clerical positions could have been returned to other clerical positions or had, in part, to be given to telegrapher positions. It follows, then, that the Board is unable to rule whether or not Interpretation 2 was violated by Carrier.

In summary, the Board finds that the particular Rules above considered, in conjunction with the facts of record, provide insufficient grounds for determining the instant claims. Accordingly, the Board is compelled to fall back upon an interpretation of the general Scope Rule (Rule 1, Section 1).

This Board has frequently held that (1) a scope rule of the sort here involved covers and names positions rather than specific work and operations; (2) in terms of the latter, therefore, such a scope rule is general and in a sense vague and ambiguous; and (3) therefore its proper coverage is to be determined from the facts regarding custom, usage, and practice on the property.

Custom and practice governing the application and coverage of the Clerks' Scope Rule, particularly in relation to the work of Telegraphers, may be considered in general or specific terms. One question that has arisen is this: Is it enough to decide a case on the basis of general information as to cutom on the property as a whole? Or should the Parties be required to present positive evidence as to specific custom at the particular location on the property? On this question the Board is of the opinion that (1) evidence on both is desirable; (2) or the two kinds of evidence—general and specific—the latter is the more persuasive; and (3) a case will not be decided on the basis of general information for the property as a whole unless there is positive evidence that the general custom has applied to the particular location involved in the particular case.

It is possible, if not probable, that under the above approach different customs and practices might be found at different locations on the same property—depending in part on whether the management of a carrier on such matters is centralized or decentralized. If so, this situation might appear to lead to inconsistent or contradictory decisions for a given carrier. So a second question arises: Are there not general principles that can be applied to various customs and practices, so that decisions on particular cases which might seem to be conflicting are brought into harmony and consistency?

The answer is definitely in the affirmative. This Board has handed down numerous awards establishing such principles as (1) clerical work is not an exclusive right of Clerks, and members of other organizations, as well as of management, may properly perform clerical work that is incidental to and in proximity to their regular work; (2) a Telegrapher may in general be given clerical work suited to his capabilities to the extent necessary to fill out the work-hours of his assignment, e.g., five hours of telegraphic and/or agency work plus three hours of clerical work; and (3) if telegraphic and/or clerical work increases for whatever reason at a given location, clerical work may flow out from one or more Telegrapher positions to one or more Clerk positions and, by the same token, may ebb back from Clerks to Telegraphers as clerical and/or telegraphic work for any reason diminishes there.

There is a temptation to employ one or more of these general principles in a particular case without inquiring closely as to (1) what their proper meanings and implications are; (2) whether they are truly applicable; or (3) whether the case record contains enough positive evidence to warrant their use for making a decision. For example, Award 615 sets forth the general notion that historically the work of Telegraphers at stations antedated the work now or later done by Clerks. This may well be true in general and may well furnish the proper basis for the general doctrine of flow-and-ebb. But as to said doctrine three matters should be noted: (1) This "Adam's rib" situation may not have existed at every location of every carrier. It is not inconceivable that at some locations one or more Clerks may have been employed before a Telegrapher was. (2) In a particular case a Clerk's position may not have been abolished, but nevertheless work previously done by a Clerk may have been given to a Telegrapher. Then the flow-ebb doctrine may be found inapplicable. (3) What does "flow" and "ebb" mean? (a) In respect to "flow," it is desirable to start with the conditions producing the flow of clerical work from Telegraphers to Clerks. These may be an increase in freight and/or passegner business at a particular location, the consolidation of facilities, the relocation of a facility, or other circumstances. Then comes the "flow." Assume a single Telegrapher at a station. Suppose he has eight hours of telegraphic-plus-clerical work. Then, if one or the other or both of two things happen—he gets more regular clerical work or more regular telegraphic work or both, and the carrier does not decide that he can economically do by overtime the work in excess of his regular eight hours—said excess must go in the form of clerical work to a newly created Clerk's position. The cause is an increase in business at the location; the effect is a flow of clerical work to a Clerk's position. It will be observed that this conception of "flow"—in effect, long used by this Division, presumes no significant idle time during a Telegrapher's work-day. By definition the Telegrapher has had more telegraphic plus clerical work than he could reasonably manage in eight hours; otherwise there would have been no flow of clerical work to a newly established clerical position. (b) In respect to "ebb," the cause is a decrease in railroad business at the location, or the introduction of labor-saving equipment, or the use of better management methods, or any other condition having the effect of reducing the amount of clerical and/or telegraphic work at the location. Assume a station where one Telegrapher doing eight hours of telegraphic and clerical work and one Clerk doing eight hours of only clerical work are employed. Then if business decreases so that only eight hours of telegraphic plus clerical work remains at the station, the Clerk's position is the one to be abolished. Assume next a location where one Telegrapher doing eight hours of telegraphic and/or agency work and three Clerks each doing eight hours of clerical work are employed; at the location there are 32 hours of work. Then, if business falls off so that the telegraphic and/or agency work diminishes along with the clerical work and a total of only 24 hours of work remains, a Clerk's position is the one to be abolished; the Telegrapher's remains. (c) In respect to flow-and-ebb, considered together, the question arises as to whether "ebb" is possible without a preceding "flow." The answer would seem to be in the negative if a long enough period of time is considered—unless of course one concedes the possibility that occasionally a station or location might spring into full existence with both Telegrapher and Clerk positions from the beginning and with no subsequent expansion of positions and, for a period of time before the "ebb," no contraction.

There is a third question: Should the previously stated general principles, e.g., that of flow-ebb, be used to decide a particular case if the record in the case lacks positive, specific evidence bearing on said principles? The Board

is of the opinion that, if a carrier is relying on, say, the flow-ebb principle, the carrier has the burden of establishing by such evidence (1) the causal conditions producing the "ebb" (those on "flow" would also be helpful, if available); and (2) the facts in respect to the effect(s), i.e., the data on the diminution of clerical and/or telegraphic work at the location. In the absence of such evidence the Board may not be disposed to apply the principle in a decisive manner.

There is a fourth question of importance: Three principles (which in respect to the work of Telegraphers in relation to that of Clerks may be labeled "incidental—proximate," "idle Telegrapher time," and "flow-ebb") were set forth above as having been developed out of this Division's previous awards. Are these principles to be applied separately or jointly? The answer is that, in the main, they are to be applied jointly. It is true, of course, that in some cases separate application is appropriate. For example, the principle that a Telegrapher may not be given clerical work (formerly under the Clerks' Scope Rule) when such work is not incidental to or in proximity to the Telegrapher's regular work may be applied, as in Award No. 636, to deny a claim even though an actual ebb of clerical work may have been established. By and large, however, the three principles are closely interrelated and should be applied together. The basic concept behind all three is really flow-and-ebb. If the clerical and/or telegraphic work load at a location has diminished, then a carrier, in the absence of specific prohibitions in the agreement, may abolish one or more Clerks' positions and give their remaining work to Telegraphers if the latter have idle time and if said work is incidental and proximate to the Telegraphers' regular work. But if ebb of clerical work has not been shown to exist, Clerks' positions may not be abolished even if the Telegraphers have idle time and the clerical work would be incidental-proximate to the telegraphic work. Awards of this Division have held that full-time Clerks' positions may not be abolished and their work apportioned to Telegraphers.

All of the above dealing with the application and interpretation of scope rules like the one here before the Board has now to be related to the facts of the instant claims.

The record shows that Carrier moved the clerical work formerly done at the Chickasha freight station to the Chickasha passenger station. The Board rules that the Carrier had the right to execute said consolidation unless the purpose thereof or the effect thereof was to violate the Scope Rule. There is no evidence of such purpose. As to such effect, the facts of record must be further scrutinized in the light of the three general principles previously set forth.

First, as to the principle that clerical work which is incidental to and in proximity to regular telegraphic work may properly be performed by Telegraphers: Obviously the clerical work that was previously done at the freight station was not then incidental to or in proximity to the work previously performed by the Telegraphers at the passenger station. There is no compelling evidence that it ever was. But this principle does not imply such a requirement. The real question is, **after the move** was that part of the clerical work of the two abolished clerical positions which was given to the Telegraphers incidental to and in proximity to their work at the passenger station?

The record shows that the clerical work of the abolished Accountant's position that was given to the Telegraphers had to do with making up, signing and/or filing bills and similar papers. The clerical work of the abol-

ished Second Yard Clerk position going to the Telegraphers was mail sorting, head-end train duties, and baggage reporting. It is true that positive evidence is not to be found in the record as to whether, after the consolidation, this work was incidental to or in proximity to the Telegraphers' regular duties. However, in many awards of this Division it has been ruled that the above-mentioned duties may properly be performed by Telegraphers. And the Board is not now persuaded to the contrary. The Board rules that Carrier conformed to the first of the above-stated general principles.

Second, as to the principle that a Telegrapher may be given clerical work suited to his capacities to the extent necessary to fill out a normal work-day of eight hours: The record contains no evidence as to the idle time of the Telegraphers here involved before the consolidation of stations took place. Therefore the Board is unable to rule on whether Carrier conformed to this second principle. It is not enough to infer that, because the Telegraphers actually did the aforementioned clerical work after the consolidation, they had equivalent idle time prior thereto. Such an inference would come close to a pure assumption.

Third, *the basic flow-ebb principle: The record shows that the estimated* time of the work of the abolished Accountant's position before the consolidation of the stations amounted to a total of 340 minutes, or 140 minutes less than a full-time day of 480 minutes. The estimated total time of the work of the abolished Second Yard Clerk's position was 30 minutes, or 180 minutes less than full time. The record does not show whether or not allowance was made for personal needs or other proper time-outs. In any case, the above-repeated data may be said to be evidence of the ebb-of-work **effect** of a possible decline in business, etc., at Chickasha. But Carrier failed to place anything in the record that is positive or specific about such **cause(s)** of this ebb. The Board holds that the above-stated data on work-ebb are not enough to establish beyond reasonable doubt the existence of actual ebb. It finds a lack of positive, specific factual information that would justify application of the flow-ebb principle in support of Carrier's position.

All of this does not mean that the instant Claims must or can be sustained. In order to achieve a sustaining of the Claims the Employes would have had to produce substantial evidence that Carrier violated one or more specific rules or that Carrier failed to conform to the general-scope-rule *principles set forth above. These were the Employes' obligations, and the* Board finds that they have failed to support same adequately.

On the other hand, in cases of this sort a carrier must also fulfill certain obligations of substantial proof, as set forth above. The Board has found that in the instant case Carrier has in some particulars failed to meet such obligation. As in several other cases in this series, Carrier has in the main contented itself with general allegations and has produced insufficent specific evidence. It follows that the record contains inadequate grounds for a complete and final denial of the Claims.

In view of the deficiencies in Petitioner's presentation, the Board rules that the Claims herein must be denied—but, because of the deficiencies in Carrier's presentation, not with surgical finality. The Claims allege a continuing violation, which if established by substantial evidence would afford redress to the named Claimants. Therefore this denial award is not to be *considered* ***res adjudicata*** *in respect to the issues involved herein. It is* **res adjudicata** only in respect to the money claims in Claim (c) up to the date of this award. This means that, for dates subsequent to the date of this award,

Petitioner may, if it wishes, take further action and, if necessary, obtain hearing from this Board on the facts and merits.

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 Petitioner failed to establish the Claims.

AWARD

Claims denied in accordance with Opinion and Findings above set forth.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 16th day of April, 1959.