

Award No. 9418

Docket No. CL-8902

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

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

**THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY**

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

(a) The Carrier violated the Rules Agreement effective Sept. 1, 1949, particularly Rules 1, 3, 4, 39-A and 64 when it failed to post for bid two new positions in the Freight Traffic Department, located at New Haven, Connecticut.

(b) The Messrs. R. S. Rosa and C. H. Finnegan be paid the difference between their present rate of pay and the rate of pay established for the two new positions illegally awarded to the Messrs. J. C. Bonney and W. C. Gardner, effective Sept. 5, 1955,—this claim to continue until this matter is adjusted.

EMPLOYEES' STATEMENT OF FACTS: In August, 1955, Mr. H. D. Hartman, Freight Traffic Manager, phoned the office of the General Chairman and advised that he was going to establish two Subordinate Official positions, both of which would not come under any of the rules of the Agreement. We requested him to arrange a meeting to discuss the matter, and he advised us to forget it.

On August 26, 1955, he advertised two Rate Clerks' Positions, Vacancy Notices #270 and #271—(EXHIBITS 1(a), 1(b)).

On August 29, 1955, we wrote to Mr. Hartman requesting pertinent information in connection with vacancy notices #270 and #271. (EXHIBIT #2).

On August 31, 1955, Mr. Hartman acknowledged our letter and advised that the two Rate Clerks vacancies were not new positions. The vacancies were caused by Mr. J. C. Bonney and Mr. W. C. Gardner being appointed to Subordinate Official positions. (EXHIBIT #3).

On Sept. 16, 1955, the General Chairman wrote to Mr. H. D. Hartman, and filed claim for two employees with seniority in his office. (EXHIBIT #4.)

plation of the parties when this Agreement was executed. Tax Accountant is much more than a clerical position and the really important part of the work goes far beyond the compiling, writing and/or calculating incident to keeping records and accounts, reports, statements or similar work which would ordinarily be regarded as clerical."

These findings could appropriately be paraphrased here. The definitions of clerk and machine operator do not contemplate the analysis of proposed rates, rules or regulations in freight tariffs, the preparation of applications and pleadings to rate committees and commissions, nor the work in committee and conference delegated to the Traffic Assistants. The positions have not been negotiated into the agreed-upon scope rule of the controlling contract.

The claim should be denied.

All of the facts and arguments used in this case have been affirmatively presented to Employees' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization contends that the two "Traffic Assistant" positions were within the Scope Rule of the Agreement and not within any exceptions to it; therefore, the filling of the positions without bulletining them in conformity with other applicable provisions were violations of the Agreement.

The Carrier contends that the positions in controversy lie wholly outside the Agreement because the Traffic Assistants are not clerks and therefore not subject to the Scope Rule, need not be specifically excepted and the positions need not be filled pursuant to bulletin procedures specified in the Agreement.

Pertinent Provisions of the Agreement

Rule 1 provides, in part:

"These rules shall govern the hours of service and conditions of employment of the clerical, station and stores employees of the New York, New Haven and Hartford Railroad Company, as described herein, subject to the exceptions noted below."

The "Exceptions" are certain laborers, all of the positions in certain executive offices (wholly removed from the Agreement except where the provisions are made specifically applicable by their own text) and other named positions which are removed from the operation of specified provisions. This latter group generally covers positions which are confidential or supervisory. Traffic assistants are nowhere mentioned.

Rule 1 (c) provides:

"Additional excepted positions in offices not entirely excepted, shall be definitely established only by mutual agreement of the duly accredited representatives of the employees and the designated representatives of the management."

Also pertinent is Rule 2 ("Definition of Clerk") (a):

“Clerical Workers—Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, rendition of bills, reports and statements, handling of correspondence and similar work.”

The scheme of the Agreement as to clericals is: If they come within the definition of Rule 2 (a) (Definition), they are covered by Rule 1 (Scope Rule), *unless specifically excepted under 1 (a) in whole or in part*. New positions within the offices completely exempted (not the case here) are automatically excepted. New positions in “offices not entirely excepted” are to be “established only by mutual agreement”—Rule 1 (c). This would apply if the positions are subject to the agreement.

The threshold question which is dispositive of the case is: “Are Traffic Assistants clerks within the meaning of Rule 2 (a)?” Before any part of the Agreement can be applied to them it must be shown that they come within that category. *Equally clearly, the burden is upon the party asserting the proposition that they are clerks*. If that proposition is proven, there is no doubt that the establishment and/or filling of the positions violated the Agreement.

Are “Traffic Assistants” Clerks? — The Facts

For the most part the facts are not in dispute, although important questions of degree are involved and the inferences to be drawn from the facts are vigorously disputed.

It is “the duties of the . . . position [which] indicate whether or not [the] position in reality [is] a Clerk’s job”. Award 7238 (Larkin).

The two positions of Traffic Assistant were established at the Carrier’s home property in the office of the Freight Traffic Manager. In September 1955, when this dispute arose by the creation of the two positions the following personnel were in that office (other than those in dispute):

Freight Traffic Manager

Assistant Freight Traffic Manager

Assistant Freight Traffic Manager

General Freight Agent

Traffic Assistant (not involved here)

(All of the foregoing are not subject to the agreement and are not excepted from it.)

Chief Clerk

*Secretary to Assistant Freight Traffic Manager
(Commerce)

Chief Traffic Clerk

*Chief Rate Clerk

*Chief Divisions Clerk

(All of these are excepted from specified provisions; those without asterisks are subject to only a few specified provisions of the Agreement; those with asterisks are subject to several additional provisions.)

Finally there are a number of clerks who are wholly subject to the Agreement, including the two Claimants. It is also pertinent that Carrier selected two clerks from this sub-department to fill the Traffic Assistant positions.

It is not contended that they did their old work in their new positions; nor is it alleged that their positions were not filled with clerks. Indeed, Carrier makes much of the fact that there was no abolition or diminution of clerks' positions or work after establishment of the two new Traffic Assistant positions.

This sub-department fulfills three tasks: (a) it sells traffic service; (b) it maintains lists of tariff already established; and (c) it originates new and special tariffs and justifications for approval by regulatory agencies and other carriers.

In connection with both (b) and (c), "divisions" are established. That is, for interlined freight the appropriate allocation of each carrier's share is made. Under (b), agreed upon rates are applied under (c), the method of allocation is devised and justified for the purpose of securing approval of other carriers and the regulatory agencies.

Generally, the Carrier contends that Rate Clerks and Division Clerks perform the ministerial tasks of (b)—i. e. apply established rates and formulae to shipments for purposes of quotation, billings and keeping tariffs up to date. The Traffic Assistants, the Carrier contends, originate new rates and divisions for new situations or revisions of existing tariffs. In connection with this work, it is alleged, the Traffic Assistants create the justification for these new rates and divisions and negotiate their acceptance with other Carriers and regulatory agencies.

This is not, the Carrier contends, writing and calculating incident to keeping records and accounts, rendition of bills, reports and statements, handling of correspondence and similar work (the definition of clerk). Rather it is responsible, creative work to which the work of the kind enumerated in the definition is incidental and subordinate. It is not contended by the Carrier that these positions are supervisory, except perhaps in the minor capacity of directing stenographers in the handling of their dictation.

On the other hand, the Organization vigorously contends that Traffic Assistants do essentially the same kind of rate and division work as that done by Rate Clerks and Division Clerks and that Rate Clerks have represented the Carrier at the very same kind of meetings and for the same purposes as have Traffic Assistants.

In support of its contention the Carrier submitted the following evidence. There are in the record brief minutes of meetings on policy questions at which the Traffic Assistants were the sole representatives of the Carrier. There are new rate proposals, ICC Fourth Section relief applications and applications to the ICC for special permission on rates, which are examples of the tasks performed by the two Traffic Assistants.

Undoubtedly each of these involve the derivation of existing rates and divisions as a preliminary to constructing new ones. Assuredly such derivation, even of existing rates and divisions, is not "incident" to records, accounts, bills, reports, statements or correspondence. At best for the Claimants' purpose, it is "similar work". It is not possible on the record before us to ascertain, even approximately, the proportion of time spent on the "similar work" (if that is what it is) and the creative, policy-connected work performed by Traffic Assistants. An indispensable feature of the definition of "clerk" is that "not less than" four hours a day are devoted to clerical work.

Claimants buttress their claim with examples of bulletins for these Rate Clerk positions which called for "rate analysis" and "rate construction" along with other tasks of a clearly routine clerical nature.

Carrier responds that the analysis and construction of rates involved were the routine application of existing rates and methods whereas the Traffic Assistants originate rates and divisions by their analysis and construction. There seems to be an element of reality in both descriptions and those parts of the evidence result in a stand-off.

The Organization also seeks support for its contention in the following comparison of pay rates (as of June 1956):

Chief Clerk	\$268.14	Semi-monthly
Chief Rate Clerk	217.72	Semi-monthly
Chief Division Clerk	236.58	Semi-monthly
Chief Tariff Clerk	240.00	Semi-monthly
Traffic Assistant	240.75	Semi-monthly

It is to be remembered that the positions whose pay is being compared with that of Traffic Assistants are "excepted" ones. We have no way of knowing whether these positions are excepted because they are generally non-clerical or because they are clerical but supervisory. The "exceptions" seem to cover both categories. Even if they fall within the latter category they provide only one inconclusive element favorable to the claims. (We pass other comparisons of duties and rates regarding supervisors represented by another Organization put forward by both sides as too far afield to be probative.) We do note that in June 1956 the Traffic Assistants were making about \$100 a month more than the Rate Clerk with the highest wage (approximately \$380 a month—Record p. 94).

One instance is attested to by one Claimant and denied by the Carrier in which the Traffic Assistant did a routine revision of a tariff formerly prepared by a clerk. As evidence, it does not take us very far toward a conclusion.

In summary, we conclude that while there are similarities between the work done by the Traffic Assistants on one hand and Rate and Division Clerks on the other, there apparently are substantial and significant differences in the nature and purpose of the Traffic Assistants work which remove them from the definition of Clerical Worker under Rule 2 (a). In any event, Claimants have not met the difficult burden of proof required by a claim of this sort to establish that the work in dispute is of a nature and daily duration which would make it subject to the Agreement.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 16th day of May, 1960.