

Award No. 9440

Docket No. CL-8734

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**

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

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

(a) Carrier violated and continues to violate the controlling Agreement between the parties at Malvern, Arkansas, when effective August 4, 1954, they removed clerical work, consisting of checking of the Yard and making train and switch lists, which work had theretofore been performed by the Clerks, from under the Scope and operation of the clerical Agreement and unitilized a Telegrapher, an employe covered by an Agreement of another craft and class.

(b) That clerical work of checking the Yard and making train and switch lists performed by the Telegrapher, an employe of another craft, be returned to the clerical position.

(c) That the Carrier be directed by appropriate order to pay Clerk Frank E. Davis a "call" (2 hours punitive) for each day (six days per week, Sunday through Friday), effective August 4, 1954, at the rate of the Clerk's position, \$310.45 per month, August 4, 1954 to November 30, 1954, inclusive, and rate of \$335.68 per month, December 1, 1954 until the violation has been discontinued.

EMPLOYES' STATEMENT OF FACTS: The following instructions were issued by Assistant Superintendent J. C. Cartland on August 5, 1954:

"Little Rock—August 5, 1954
File 5

"C. E. Pegors:

"Referring to your letter of July 29th reference additional clerk at Malvern:

"We will arrange to make Yard check Malvern by using the 2nd trick operator to do this work. You should make this a part of

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 recently as December, 1955, your Board, in ruling on this property which involved an interpretation of the current Clerks' Agreement and which was identified as Docket CL-6993, Award 7198, upheld the right of the Carrier to abolish clerical positions and assign clerical work to telegraphers. Your Board further took cognizance of the principles you have applied to previous cases and in your Opinion in Award 7198 referred to Award 615, stating that the findings in that previous case properly applied to that recent claim namely:

" . . . It has always been the rule that telegraphers may be assigned clerical work without limit except their capacity to fill out their time when not occupied with telegraphy."

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 respectfully requests your Board to do likewise.

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

OPINION OF BOARD: The question in this case is whether the yard check duties formerly performed by a Clerk may be assigned to a Second Trick Operator (Telegrapher) when such duties require trips of one-quarter and one-half a mile, plus the length of the trains, from the station at which the Operator's main duties are performed. The Clerk also had made the trips in question to perform the same tasks. The contract in this case does not contain a provision preventing the application of the ebb and flow principle if it is otherwise applicable.

The case arises under well known principles governing the application of the Scope Rule of Clerks' agreements. A very brief review of the major cases is required to ascertain into which category this one falls.

The first pertinent case on the relative spheres of Clerks' and Telegraphers' jurisdiction was Award 615 (Swacker). There it was stated that a scope rule defines the work to which employes covered by an agreement are entitled. Judge Swacker called this the "subject matter" of the agreement. However, he traced the long history of performance by Telegraphers of agency work which consisted in large measure of clerical duties. Thus, it was held, that Telegraphers properly could be assigned clerical work "without limit

except their capacity to fill out their time when not occupied with telegraphy" as an exception to the right of clerks to perform it.

It was only a matter of a few weeks when this generalization suffered the fate of all: it was modified. (Award 636, also decided with Referee Swacker sitting.) Referring to Award 615, it was said:

"Broad language was there used to the effect that the only limit was the telegraphers capacity. But it should be understood that the opinion was dealing with the situation there involved, and there is not the remotest inference drawable from what was there said that would sanction any such practice as that indulged here under the guises of the principles recognized by that award.

"The practice there referred to as being abundantly proven and a matter of common knowledge was the assignment of clerical work, existing or arising at or immediately adjacent to the post of the telegrapher, to him." (Emphasis ours.)

"There was no shadow of proof nor of thought in that case that a telegrapher may be detached from his post and sent a mile away to an entirely unrelated location to take over a half a day of straight clerical work to facilitate the abolition of a clerical position. The reason for the existence of the practice recognized as legitimate is the fact that frequently a telegrapher, altho required to be available at his post all day, may be occupied only intermittently at telegraphing and otherwise have idle time. To suppose such a principle might be applied to permit him to shut down and desert his instrument, when four hours of his assignment had elapsed, and go elsewhere to perform other work would not only be in direct contradiction of the reason of the rule, but would also amount to the establishment of short hour assignments in both crafts.

"It is significant that in this case (unlike their attitude in Award No. 615) the Telegraphers make no claim of a right to perform clerical work under such circumstances as those here involved.

"In the instant case there is no evidence worthy of that description to the effect that the practice here involved is a part of the nationwide general practice upon which the limitation was founded by Award No. 615. It cannot be over-emphasized, as stated there, that only upon the most conclusive of proof should the Board find such a limitation."

These then are the basic general guides. There has been some variations in the descriptive terms employed to set the bounds beyond which a Telegrapher could not be sent to assume the duties formerly performed by a Clerk. So, for example, Award 7622 (Smith) held a transfer was not permissible where "the telegrapher left the proximity of his post and went a substantial distance into the yard to perform a part of the reassigned duties . . .". This assuredly is at least a verbal extension of the "immediately adjacent" test of Award 636.

The principle has been embroidered further. Special Board of Adjustment No. 169 in its Award No. 7 (Douglass) found that such duties "cannot be said to be beyond a reasonable proximity of the operator's office". Despite the more elastic statement of the principle, the distance involved in

Award No. 7 seems to have been shorter (head end and baggage room work) than that in Award 7622 (going into the yard from a station office).

Although the terms employed are not precise, the distance test seems reasonably clear. However, Special Board of Adjustment No. 194 in its Award No. 11 (Wyckoff), on the basis of Awards 636 and SBA Award No. 7, deduced that "these standards or tests . . . mean that the telegrapher may leave his desk to perform outside work provided his telegraphic duties are not interfered with in so doing" (citing Award 7186 (Smith)).

Award 7186, however, stated that because of its large "volume" the clerical work "could not properly be considered as incidental to the duties of the telegrapher".

The rationale of the cases is not too clear. We believe that the distance and volume tests are related to the "incidental" test as implied in Award 7186. The line of cases expressing the proposition that clerical work cannot be brought to a telegrapher are harmonious with such a test.

Both lines of awards imply that Telegraphers' duties historically performed clerical work in and around (immediately adjacent or in proximity to) stations. They imply that clerical work brought to them or to which they must travel any substantial distance (a few hundred yards or more as in Award 5024 (Parker)* are not "incidental" because the transfer or the distance belies the historical connection.

It would be an ingenious rationale which covered all the quirks of all the cases.

It is sufficient here to apply an "adjacent" or "proximate" distance test. The yard checks here involved required going into the yard sometimes a quarter and sometimes a half mile plus the length of the train. The cited cases sustaining similar claims involved two miles, Award 3998 3988, (Fox); one mile, Award 636; yard checks of twenty minutes and fifteen minutes, indicating relatively brief distances, Award 7197, (Smith); and the remainder employ the adjacent and proximate terminology. As already indicated, Award 5024 disallowed a transfer involving a Telegrapher working at two stations requiring walks of 600 and 900 feet. Award 4893, cited in support of Carrier's position, involved a distance of only thirty-eight feet.

Certainly, points removed one-quarter and one-half mile, plus the distance of the trains checked, are not "adjacent", not "proximate", nor even "reasonably proximate". It would follow that the transfer of work was improper and that the claim should be sustained.

It is argued that Award 8851 (Bakke) between the same parties involves a construction of the same agreement which allegedly leads to a contrary conclusion and is binding here. **There it was observed:**

"On August 21, 1954 the National Agreement, to which this Carrier, the Clerks' Organization and the Telegraphers' Organization are parties and in which, in Article VIII thereof it was agreed—

"ARTICLE VIII—CARRIER'S PROPOSAL NO. 24

"Establish a rule or amend existing rules to recognize the Carriers' right to assign clerical duties to telegraph service employees and to assign communication duties to clerical employees.

*This case involved performing substantial duties at both of two stations a few hundred yards apart.

“‘This proposal is disposed of with the understanding that present rules and practices are undisturbed.’

“‘The present rules and practices, on this Carrier were at that time, ‘that telegraphers may be assigned clerical work without limit except their capacity to fill out their time when not occupied with telegraphy.’ Award 7198. This quotation from Award 7198 stems, as we all know, from Awards 615 and 638.”

Award 7198, in applying Award 615, specifically said that it was “subject to the limitations as to the locale of the work performance in Award 636.” The effect of Award 8851 is to do no more than say that it adopted the prior awards, already discussed here, by reference. As there is no question of overruling any of them directly or indirectly the doctrine of Award 8851 is not significant despite the fact that the parties and agreement are the same, although the location is different.

The Carrier points out that Award 8851 stated that all of the Organization's attempts to limit the assignment of clerical work to Telegraphers on the Rock Island had failed, except for Award 638, which no one claims is applicable here.

As the brief on behalf of the Carrier observes, “The crux of this dispute does not concern the validity of the above principles, which, it can be seen, both parties accept from their citation of those early awards among others. It is plain to see from reading the record that the issue we have before is a factual one. The gist of the Clerk's case is that the Second Trick Operator was required to leave his post to go out into the yard to make the yard check”.

The other Awards cited, e.g. Awards 8672, 8761, 8764, 8793, 8794, 8795 and 9008 (all Daugherty) are not in conflict with the foregoing analysis of the awards of the Board. In the comprehensive discussion of the precedents, it was recognized that while “ebb and flow”, “idle time” and “incidental-proximate” tests were to be applied together, the latter test could be dispositive of a case even if the Carrier's action met the other tests.

Thus we return to the main point already discussed, the applicability of Award 636 and the line of cases flowing from it. We hold that the transfer of yard check clerical work to the Telegrapher (Second Trick Operator) does not fall within the exception to the general jurisdiction of the Clerk's Scope Rule established by Award 615 because the Telegrapher was required to travel substantial distances (one-quarter mile and one-half mile plus the length of the trains checked) from his regular post.

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 Employee involved in this dispute are respectively Carrier and Employee 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 Contract was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1960.