

Award No. 9441

Docket No. CL-8766

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 WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

(a) The Carrier violated and continues to violate the rules of the Clerks' Agreement through its unilateral action in permitting and/or requiring employees, outside the Agreement, to perform routine clerical work in connection with the operation of its station at Hayward, California.

(b) Mr. D. L. Naylor and/or his successor or relief on the position of Bill Clerk, Hayward, California, is entitled to and shall now be compensated for a minimum call, but not less than the actual time consumed by the Agent at Hayward in performing routine clerical work, for each day of the violation, beginning December 8, 1954, and continuing until the violation is corrected and the work properly assigned to employees covered by the Clerks' Agreement.

EMPLOYEES' STATEMENT OF FACTS: On November 13, 1945, a position of Warehouseman-Clerk at Hayward was advertised for bid on Clerks' Circular No. 199-45. (Employees' Exhibit "A") This position was assigned to Mr. E. M. McCasey on November 23, 1945. The position was abolished effective upon completion of shift, February 23, 1946, (Employees' Exhibit A-1) and the work thereof was subsequently performed by the Agent, an employee outside the scope of the Clerks' Agreement. Claim with respect to this violation was filed and progressed up to and including the Assistant to General Manager, the highest officer of the Carrier to whom claims are appealed, and he denied this claim, (his Case No. 3285) after conference, under date of February 28, 1949.

The occupant of the position of Warehouseman-Clerk at Hayward was required to perform various duties, among which were the following:

1. Handle all LCL merchandise through the warehouse.
2. Check yard and industry tracks.

Insofar as the instant claim constitutes an attempt to acquire for clerical employes the exclusive right to perform all clerical work at Hayward to the exclusion of the Agent, it must be denied in line with the firmly established principle prevailing throughout the railroad industry which recognizes the historic right of employes of the telegrapher's craft to perform clerical work incidental to their telegraphic duties. As stated in Third Division Award 615:

"It . . . is a matter of common knowledge that for many years even before the Clerks' Organization had national recognition and perhaps from the inception of the industry—certainly since the beginning of the Telegraphers' agreements, telegraphers have been required and have had the right to perform clerical duties. So definitely was this situation recognized that, in promulgating the rules which gave the Clerks' Organization national recognition, the Railroad Administration in the scope rule promulgated by it parenthetically excepted such work performed by employes subject to the telegrapher's agreement; while this exception no longer appears in the scope rule, the conditions in this respect have not changed since the first Clerks' agreements."

On this property, the history of telegraphers performing clerical duties has conformed to the national pattern which your Board took cognizance of in Award 615. The first telegraphers' agreement was effective on this property in 1914 and telegraphers have been performing clerical duties, not only since that time, but actually since operations began in 1910. Carrier cannot dispense with the Agent-Telegrapher at Hayward as long as there remains a necessity for telegrapher's work. This necessity still remains even though the installation of Traffic Control System has severely reduced the amount of this work. There is nothing in the Clerks' Agreement nor in the decision of the Third Division which requires Carrier to remove work to which telegraphers have established rights of performance from a position within the scope of the Telegraphers' Agreement and assign such work to clerical employes who have never performed these duties and, thus, have not established exclusive rights thereto.

To summarize, the position of Bill Clerk at Hayward was reestablished under the terms of the letter agreement of July 2, 1954 and work was assigned to that position as required by the letter agreement. The Organization now seeks, by means of the instant claim, to force Carrier to assign additional duties to the clerical position, thereby removing said duties from the Agent-Telegrapher position. This it cannot do for two reasons: first, because the Organization, having invoked its rights under the letter agreement of July 2, 1954, cannot now escape its obligations under that agreement and second, because the work subject of this dispute is work which clerical employes have never performed and to which they have never acquired rights of performance. For the reasons stated, Carrier urges that the instant claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This controversy has a long history, but we hope its future will be brief.

At the outset it is useful to state the extent of the claim as presented in the original submissions of the parties. Although the "Statement of Claim" is broad and general, the actual controversy involved the alleged impropriety of not assigning yard checks ("demurrage checks" in the Carrier's version)

at Decoto and Carpenter, locations serviced by the Carrier's Hayward, California agency. That is what the parties talked about and wrote about on the property and that is the extent of the controversy we will decide. The allegations as to the performance of routine clerical work at Hayward came belatedly in the "Employees' Reply to Carrier's Statement" some six months after the filing of the Submission. We do not believe the issues raised at that time are properly before us nor was there supporting evidence.

The Contractual Provisions

The Carrier and the Organization had several outstanding disagreements as to the proper sphere of work covered by their Agreement. Apparently they treated Award 5790 as a pilot case. They entered into a letter agreement dated July 2, 1954 to dispose of the accumulated claims in the light of the Award. The agreement provided in part:

"It is understood other existing disputes involving the same issue as Award No. 5790 . . . will be disposed of by making a joint check to determine whether or not three (3) hours or more are consumed in performing duties previously performed by the clerical position or positions abolished in such cases. If such check develops that three (3) hours or more are consumed in the performance of such duties, the abolished position will be reestablished. No monetary payment shall be made for period prior to joint check and reasonable period thereafter to provide for bulletining and assignment. If such check develops that less than three (3) hours are consumed in the performance of such duties, claim shall be withdrawn and situation handled for the future under Rule 40(f). If the checks develop that a duty or duties have been performed by both a clerk and a supervisory employee, such items will be disposed of in the light of facts in the individual instance." (Emphasis ours.)

The parties also added Rule 40(f) to their agreement covering the abolishment of positions. It provided in part:

- "3. When the work of an abolished position is transferred to another seniority roster or to a supervisory employee, as provided in (2) hereof, the General Chairman, if he thinks such work has increased to three (3) hours or more per day, may request a joint check of the work of the abolished position and such check will be made. In the event the check shows that the work previously transferred has increased to three (3) hours or more per day, the position will be reestablished as it was constituted immediately prior to its abolishment, bulletined and assigned in accordance with the rules of this Agreement." (Emphasis ours.)

Employees also contend the Scope Rule is involved. It provides in part:

"Rule 1. These rules shall govern the hours of service and working conditions of all of the following class of employees, subject to the exceptions noted below:

"(1) Clerks.

"Positions within the scope of this agreement belong to the employees 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."

The Basic Facts and Contentions

A joint check was made of the Hayward Agency (which includes Decoto and Carpenter) which showed that the Agent was performing about nine and a half hours of clerical work. Accordingly a position of "Bill Clerk" was "reestablished" at Hayward in accordance with the letter agreement. Its hours were 11:00 A. M. to 8:00 P. M.

However, there was disagreement about the Carrier's desire to have the Agent continue certain work prior to those hours.

The correspondence between the parties indicates that the work in controversy concerned "making check of cars at Carpenter and Decoto each morning." Carrier's Submission also characterizes the disputed work as "demurrage check".

Prior to 1954, the Hayward Station had been a one man agency except for brief periods. For three months ending in early 1946 there had been a Warehouseman-Clerk position. For four months toward the end of 1948 there had been a Bill Clerk position. These were the only Clerk positions existing at Hayward before the 1954 letter agreement was made.

Prior to 1952 there was no yard work at Carpenter because the industry which occasioned it was not established there before that date.

The Organization contends that the Bill Clerk performed Yard checks at Decoto before the abolishment of that position and that such work there and similar work performed at other locations serviced by the Hayward Agency are properly the work of the "reestablished" Clerk's position. It argues that this is so because that is generally Clerk's work within the Scope Rule and because it was the type of work performed in the "abolished position" which was "reestablished" under the letter agreement.

Carrier has two alternate theories. One is that "the abolished position will be reestablished" as used in the letter agreement means essentially the same thing as "the position will be reestablished as it was constituted immediately prior to its abolishment" in Rule 40(f) of the supplement to the main Agreement entered into at the same time. In answer to the general claim that the yard checks are work of the type performed by Clerks, Carrier responds that all clerical work is not the exclusive province of employees covered by the Organization's agreements in the light of the long history that such work was performed by Agents and Agent-Telegraphers.

We do not believe that this general issue is before us. The parties by their agreements and conduct have limited the issues to those posed by application of their settlement agreements subsequent to Award 5790.

Award 5790 (Wenke) held that the "ebb and flow" doctrine could not operate to sanction the transfer to an Agent of work which had been performed by a Clerk because of the contractual provision banning "removal of positions from the application of these rules." A critical factor in the case was that the work in dispute had been performed by the Clerk.

It was this Award that established the basis of the July, 1954 agreements between the parties. Of course, it did not limit their agreements; but it does shed light on the principles embodied in the agreements.

The letter agreement of July 2, 1954 is also quite clear. Where, as here, a joint check discloses that three hours of clerical work is being performed by someone other than a Clerk at specific places where Clerk's jobs had been abolished "the abolished positions will be reestablished." (Emphasis added.)

The parties could have said that a clerical position will be "created" or "established." But they said reestablished which denotes the entention of reviving the position as it had existed when it was established previously.

The letter agreement went on to provide that if the first joint check reveals that fewer than three hours of clerical work is being performed, the claim would be withdrawn and "handled for the future under Rule 40(f)."

Part 3 of Rule 40(f), quoted above, provides that after the abolishment of a Clerk's position, the transferred remaining work is subject to a check at the request of the General Chairman. If the check reveals that more than three hours of such clerical work is being performed per day, "the position will be reestablished as it was constituted immediately prior to its abolishment . . ."

The letter and Rule 40(f) provisions are essentially the same. Rule 40(f) is somewhat more precise and more limited. We need not decide how much more limited or whether the Rule 40(f) limits (especially as to the words "immediately prior") apply equally to the situations covered by the letter agreement.

The Rule merely reenforces the conclusion derived from the letter agreement and Award 5790 that the test to be applied is whether the disputed work had been part of the abolished position.

With this test in mind, we turn to the detailed evidence of the work performed by the Bill Clerk.

When bulletined in 1948, the position was described as follows:

"Applicant will be required to assist agent with regular station work and do billing, sealing of cars, etc. at Decto and other points handled by Hayward station. Automobile needed per Memorandum of Agreement No. 6, Clerks' Schedule."

The work specified was "assist[ing] agent with regular station work", "billing" and "sealing of cars, etc. at Decoto and other points handled by Hayward Station."

The only part of the description significant for our purposes is the "sealing of cars, etc. at Decoto and other points."

A more detailed description of the Bill Clerk's work is contained in a description (dated in 1949) provided by the last incumbent. It reads:

"Yours of the 29th of January regarding duties of bill clerk at Haywards Calif. the following was a daily routine of course there were things that came up at different intervals,

"The hours were from 11 AM to 8 P.M. when I left the first thing I did on arrival was to check with the two pack[ing] houses at Decoto to ascertain their needs for the following day, and if refers were needed to order them from the P.F.E. at Oakland by phone.

"I would then make the 1407 report of cars recd, also make form 826 report of cars on hand. Then I would revise and make out freight bills for car loads and L.C.L. freight received, then make received abstracts, if a car of mdse, had been set out at the freight house I would go to warehouse and unload the freight and check it into warehouse, I also would file the tariffs answer telephone and make out OS & D reports and do what ever there was to do. About this time I would go to dinner which was between 3 P.M. and 4 PM. I would then deliver the L.C.L. freight to the drayman and about this time I would have then go to Decoto to the packing houses I would sign and seal the cars loaded then return to freight office, make out way bill. Forwarded abstract switch list for train crew make out and file message with chief dispatcher as to the work to do make out market report to superintendent.

"I would then take over the passenger end sell tickets for No. 40 check baggage notify 3 & Wash St when their were passengers to get on train wait for No. 40 and put baggage on train.

"About this time if I was a good boy I could go home.

(Signed) K. F. Henrich"

The only mention of this statement of work of the kind in dispute here is "sign and seal the cars loaded." The description shows that such work was a very small, perhaps infinitesimal part, of the duties of the position. Moreover, it is not demonstrated that the signing and sealing were more than a routine physical act not requiring clerical checking at that point.

This is decidedly inadequate proof that the claimed yard check had been performed at Decoto by the Bill Clerk.

The claim as it relates to Carpenter was based upon the theory that as this type of work, i.e., yard checks, had been performed by the Bill Clerk at "Decoto and other points handled by Hayward Station", such work at Carpenter should be made part of the reestablished job. It could be argued that the bulletin description encompassed the work and so covered such work at "other points." It might also be argued that the purpose of the agreement requires the inclusion of work of the same kind as that performed before abolition even though arising after abolition.

We need not decide such an issue because the factual basis (performance of the type of work elsewhere) which would make necessary a resolution of the issue is not present in this case.

We conclude that Claimant has not proved the facts essential to a sustaining award.

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;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employe 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 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 25th day of May, 1960.