

Award No. 10506
Docket No. CL-9436

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

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

(a) The Carrier has violated and continues to violate the rules of the Clerks' Agreement by permitting and/or requiring employees of another craft to perform the clerical work involved in preparing billing repair cards for repairs made on the California Zephyr equipment at Oakland Coach Yard, Oakland, California, and

(b) That Mr. Wm. H. Mitchell, Passenger Car Accountant, in the office of the Chief Mechanical Officer at Sacramento, California is entitled to and shall now be compensated for eight hours pay at his regular rate for each shift that write-up men in the Oakland Coach Yard have performed the clerical work in connection with preparing billing repair cards for repairs made on the California Zephyr equipment—this in addition to compensation already received by Mr. Mitchell for service on regular work days. This claim is to begin September 29, 1955, and continue until the violation herein involved is corrected and the work again performed by employees within the scope and operation of the Clerks' Agreement.

EMPLOYEES' STATEMENT OF FACTS: Under date of November 28, 1955, the claim herein involved was filed with Chief Mechanical Officer Mr. E. T. Cuyler through the following letter:

“4872 — You Street
Sacramento, California
November 28, 1955

Mr. E. T. Cuyler, CMO,
The Western Pacific R R Co.,
3500 — 24th Street
Sacramento 18, California

3.

Practice of seven years is controlling.

There is a further reason why your Board is constrained to deny the instant claim. The procedure about which complaint has been made was instituted in March, 1949 when the California Zephyr service was inaugurated. No objection was made by the Organization when the procedure was instituted nor was any made subsequent thereto until the instant claim was filed in November, 1955, six and one half years later. The Organization must be considered estopped now to allege a violation of the Agreement in the face of the unvarying practice of six and one half years. See the following Third Division Awards holding that an unchallenged practice establishes the status of the parties with respect to the work involved in that practice: 816, 848, 2338, 3839, 4954, 5747, 6112, 6299, 6392, 6704, 6929, 6959, 6961, 6980 and 6996. As was stated in Award 6996:

"We must conclude that the parties through the years intended to limit any exclusive claim to the disputed work on the part of the Telegraphers."

Additionally, Carrier desires to point out the following with respect to the instant claim:

(1) the named claimant is employed at Sacramento, California whereas the work he is claiming is performed at Oakland, some one hundred forty miles distant;

(2) no action has been taken by Carrier which has resulted in any pecuniary loss to any clerical employe;

(3) the claim is for eight hours pay for each shift upon which carmen prepare billing repair forms whereas such work is performed by carmen in considerably less than eight hours per shift;

(4) part (b) of the Statement of Claim says that the claim is to continue until the work is "... again performed by employes within the scope and operation of the Clerks' Agreement"; the facts are that the work in dispute has never been performed by employes within the scope of the Clerks' Agreement.

In summary, Carrier asserts the instant claim is completely without merit and urges your Board to deny it in its entirety for the following reasons:

1. the work in dispute has historically been performed by members of the carmen's craft and is incidental to their other duties;

2. the work in dispute is not covered by the scope of the Clerks' Agreement;

3. the Organization is estopped from claiming an exclusive right to the disputed work in the face of the firmly established practice.

All of the above has been presented to the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: It appears from the evidence that one of the duties of the Claimant Mitchell is to render bills against other Carriers for repairs and materials furnished to cars belonging to such Carriers by Car Department (Mechanical) employes of the respondent Carrier.

In 1948 this respondent Carrier had entered into an arrangement with two other Carriers to inaugurate a new deluxe passenger train between San Francisco and Chicago — "The California Zephyr". The equipment (cars) for this train was to be furnished proportionately by the three Carriers.

The Agreement between the Railroads operating "The California Zephyr" called for mechanical maintenance of the equipment by this Carrier at San Francisco. This Carrier had to start performing passenger car maintenance on its own cars as well as the "California Zephyr" cars of other Carriers. Carrier constructed a coach yard and repair facilities at Oakland, California, 140 miles distant from Sacramento where Claimant Mitchell is assigned.

For some three months or more in 1948, the Passenger Car Department mechanical employes at Oakland mailed in bad order report cards to the Sacramento office of the Carrier from which Claimant Mitchell prepared bills against the two other Carriers involved for repairs and material furnished to their Zephyr cars. After this time and beginning March 19, 1949, the Car Department employes of the Carrier entered the material and man hours utilized on Form 183 and mailed this form, without any pricing thereon, to the Sacramento office. Claimant Mitchell then took such forms, priced the materials and labor, prepared the bills in final forms and entered them against the proper Carriers. This eliminated only one thing so far as disclosed by Petitioners claim, the preparation of billing cards or the recopying of entries from bad order cards onto Form 183.

Though not set forth in the "Statement of Claim", made on the property, the Claimant now alleges a violation of the Agreement by reason of a definite and specific act of the Carrier on March 19, 1949, in transferring the work of the preparation of billing cards from the Clerks to the Car Department employes. This contention was not timely raised and is barred by Article V of the National Agreement of August 21, 1954, which became effective January 1, 1955. Under Section 2 of Article V the Petitioner had sixty (60) days beyond January 1, 1955, to present any claim Petitioners cared to make; this the Petitioner failed to do. (See Award 8886—McMahon).

It is contended, however, by the Claimant that the Carrier has violated and continues to violate the Agreement by permitting employes of another craft to perform clerical work in preparing billing repair cards. It is their contention that this was within the Scope of the Agreement between Petitioner and Carrier, effective December 16, 1943. This the Carrier denies. The Agreement is, as follows:

"SCOPE

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

"(1) Clerks.

"(2) Other office, store and station employes, such as office boys, messengers, chore boys, train announcers, gate-men, baggage and parcel room employes, train and engine crew callers, operators of certain office or station appliance devices, telephone switchboard operators, elevator operators, office, station and warehouse watchmen and janitors, and other employes performing similar service.

“(3) Laborers employed in and around stations, storehouses, warehouses, ice houses or ice docks.

“Positions within the scope of this agreement belong to the employes 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.”

In Award 615 (Swacker) this Board adopted the principle that the Scope rules describe the class of work, they do not specify directly the inclusion of all such classes of work. This principle has been followed consistently in subsequent awards.

More specifically, in considering the Scope rule with regard to “Clerks”, it can be observed there are very few, if any, employes of a Carrier from the president down to the laborer who do not perform some clerical work in connection with their regularly assigned duties. This Board has consistently held that such Agreements do not purport to reserve all clerical work to Clerks. (See Award 10164—Gray).

The Claimant has the burden of proving that the clerical work performed by another craft was exclusively that of the Clerks. Billing repair cards have been made by employes outside of the Agreement since 1949 without any protest by Claimant until this claim was initiated. This work is incidental to that of a Car Department employe and has been historically and traditionally performed by them over the years. (See Award 9204—Stone; Award 8331—Johnson).

In our opinion the Claimant has failed to sustain the burden of proving the Agreement has been violated.

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 this 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 3rd day of April 1962.