Award No. 12509
Docket No. CL-12233

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Joseph S. Kane, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4869) that:

(a) The Carrier violated rules of the current Clerks' Agreement when it assigned or permitted the Operator at Bellingham, Washington, an employe outside the scope of that Agreement, the work of checking the local freight train; and

(b) That Clerk C. W. Byron be paid a call of each date the Operator performed such work during the period extending from August 24, 1959 to October 9, 1959, inclusive.

EMPLOYES' STATEMENT OF FACTS: Prior to January 2, 1959 and during the period encompassed by this claim, Carrier employed the following force at Bellingham, Washington:

Employe	Position	Assigned Hours	Assigned Work Week
D. V. Finley	Agt-Operator	8:00 A. M. - 5:00 P. M.	Mon-Sat
George Smith	Operator	4:00 P. M. - 12:00 MN	Mon-Fri
Clark Robinson	Cashier	8:00 A. M. - 5:00 P. M.	Mon-Fri
C. W. Byron	Barge Clerk & Yd Checker	8:00 A. M. - 5:00 P. M.	Mon-Fri

The position of Cashier and the position of Barge Clerk & Yard Checker are fully covered by the current Agreement between the parties, whereas, the positions of Agent-Operator and Operator are covered by the Telegraphers' Agreement. The Operator was assigned telegraphic train order work and such miscellaneous station work as he could properly perform within his regular tour of duty.

The work of making the car to car check of the outgoing train consisted only of walking about five (5) blocks from the building in which the operator located, which building, incidentally, is situated right in the yard itself, and the Operator completed said check of the outgoing train in approximately 30 minutes.

That the Operator could properly perform the work of making a car to car check of the outgoing train within the hours of his assignment when not actually performing communication duties is evidenced by the fact that there was a mere 1½ hours of wire work to perform during the operators entire tour of duty and by the further fact that when, on October 11, 1959, the train operation at Bellingham was changed from a night operation to a day operation or, in other words, when the one (1) local freight train was called for 2:00 P. M. departure instead of 11:30 P. M. and the work of making a car to car check of the outgoing train was assigned to the barge clerk position (assigned hours of 7:00 A. M. to 4:00 P. M.) occupied by Claimant Byron, it was possible to abolish the operators position.

As stated, when the train operation at Bellingham was changed from a night operation to a day operation and the train called for 2:00 P. M. departure instead of 11:30 P. M. the operators position was abolished at the close of the assignment thereof on Friday, October 9, 1959 and the duty of making a car to car check of the outgoing freight train and preparing a wheel report for the train crew which was, when the train was called for 11:30 P. M. departure and the operator was the only employe on duty, assigned to and performed by the operator within his assigned hours and when not actually performing communication duties, was assigned to the Barge Clerk position occupied by Claimant Byron.

The Clerks' Organization now contends that even when the train service at Bellingham was a night operation and the train called for 11:30 P. M. departure when the operator was the only employe on duty, the work of making a car to car check of the outgoing train while it was in the yard prior to departure should have been performed by a clerical employe even though there was no clerical employe on duty; even though the work involved is not exclusive to clerical employes; even though the work involved consumed only about 30 minutes of the operators time; even though it was possible for the operator, who was on duty and under pay, to perform said work within his regularly assigned hours and when he was not actually performing communication duties; and even though a multitude of Third Division Awards have reserved to the Carrier the right to assign "clerical" work to Telegraphers to the extent of their ability to perform it within their daily assignment when not actually performing communication duties. There is no schedule rule, agreement or any other ruling or governing force which supports the employes contentions or claim and the Carrier respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim arose when the Carrier had the Operator at Bellingham, Washington make a car check of the outgoing train while in the yard and prepared to depart. It was the contention of the Claimant that this work, performed by the Operator, was a violation of the Clerk's Agreement.

The Claimant, a Barge Clerk assigned 7:00 A.M. to 4:00 P.M., Monday through Friday. The Operator assigned 4:00 P.M. to 12:00 Midnight Monday through Friday. On or about August 24, 1959 the Carrier commenced having the Operator make the car check in the yard during his tour of duty. At this time the Operator was the only employe on duty. Some time, during his tour, of duty, and prior to departure time, the Operator would go down the yard approximately one mile, check the cars and return. It took the Operator about 30 minutes to make the car check and his work as an Operator entailed about 1½ hours during his shift. The distance walked is disputed between approximately 5 to 7 city blocks.

On October 9, 1959 the Carrier changed the departure time for the train from 11:30 P.M. to 2:00 P.M., and abolished the position of Operator and assigned the work involved to the Claimant.

It was the contention of the Claimant that the work performed by the Operator belonged to the Clerks under the Scope Rule of their Agreement.

Furthermore, the Carrier violated Article V, of the National Agreement when the Superintendent declined the claim without furnishing a reason for such disallowance. In the interim period the claim had been appealed to the next highest officer before the Superintendent attempted to correct his failure to give a reason for the denial of the claim.

It was the contention of the Carrier that this work did not belong exclusively to the clerks, but could also be assigned to an Operator to perform within his daily assignment. The Carrier also responded to the alleged violation of Article V, by stating that the failure to state the reason for the denial of the claim was corrected during the 60 day period. In correspondence prior to the expiration of the 60 day time limit a reason for the denial was communicated to the Claimant. Thus correcting any defects that might have existed in his original denial.

Thus two questions are presented in this claim.

Did the Superintendent violate Article V, of the National Agreement when he failed to give a reason for his denial of the claim, but subsequently, and prior to the expiration of the 60 day time limit did communicate such reasons for the denial to the Claimant?

Was the work performed by the Operator in violation of the Clerks' Agreement, particularly the Scope Rule?

Article V, of the National Agreement is as follows:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

An examination of Section (a) does not limit, in any respect, the right of the Carrier to give reasons for the denial of the claim on more than one occasion during the 60 day period. The only limitation on the Carrier, or a Claimant, is that the denial and reasons must be sent to the Claimant within 60 days from the date the claim was filed. The fact that the denial was subsequently appealed to the next highest officer does not limit or cut off the 60 day period for a reply to the claim.

The facts in this dispute reveal that the denial was made without reasons and on a subsequent date within the 60 day period reasons were communicated to the Claimant by correspondence. However, in the interim period the claim was appealed to the next highest officer. The Claimant thus alleged that the Carrier could not now give reasons for a denial of the claim as the appeal cut off the 60 day time limit.

This Board is of the opinion that under Article V, there is no prohibition against either party to a dispute amending or supplementing their correspondence by giving additional evidence or reasons for a course of conduct, if such amending takes place within the 60 day period. Nothing in Article V, bars such action within a 60 day period nor does a subsequent appeal shorten the period. It might further be stated that the purpose of the Railway Labor Act is to encourage the parties by conference to have all pertinent facts discussed in the first instance rather than place limits on such rights. Article V, places no apparent obstacle to that purpose. Thus Article V, was not violated.

The next question presented:

Was the work performed by the Operator in violation of the Clerks' Agreement, particularly the Scope Rule?

An examination of the Scope Rule, which is general in nature and reserves no specific work as herein performed to the Clerks. The work of car checking had not previously been performed by the Clerks. In addition it has been argued and not denied in the submission that the Operator can be assigned clerical duties when he is not actually performing communication duties. The duties performed took about 30 minutes and required the Operator to go down the track approximately 5 to 7 blocks. A question was raised in the record by the Claimant.

Was the work incident to his position or proximate to his post of duty?

This Board is of the opinion that the answer to that question is, Yes. The Claimant states in reference to the Operator as follows:

> "... this position was assigned such miscellaneous clerical work as could be properly performed during the incumbents' tour of duty. . . ."

The claim resolves itself around two questions:

Was this work incidental and proximate to his post of duty?

Was this work miscellaneous clerical work?

The work was incidental and subordinate to his work at the station as an Operator. It was further stated that to have the Operator check cars this far from his station was not in close proximity to his work and in so doing was in

violation of the Agreement. The work was performed in the yard and as close to his normal post as yard work would generally entail. The record does not suggest any limits as to how far he might depart from his post to do miscellaneous clerical work. However, we must consider the expression "proximate to his post," in relation to the size of the yard and its general plan. The time spent on the activity does not indicate he traveled far from his post. Thus without additional evidence it is impossible to determine that the work was not proximate to his post. We are further of the opinion that the work performed was miscellaneous clerical work. It was not routine clerical work as is usually understood to be work at a desk. It was work diverse from his duties as an Operator. What meaning the Claimant gives to the expression, "miscellaneous clerical work," is not clear in the record.

Thus after an examination of the record and the Awards of this Division we are of the opinion that the Claimant has failed to prove by a preponderance of the evidence that the Scope Rule of the Clerk's Agreement was violated.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

That the claim is denied according to the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of May 1964.