

Award No. 12716
Docket No. CL-12134

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Francis M. Reagan, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4830) that:

(1) The terms of the Clerks' Agreement have been violated when on July 29, 1959, Carrier required or permitted Roundhouse Foreman W. Beynon to perform work of calling certain enginemen for duty after yard office at Provo, Utah, had closed; and

(2) That Mr. L. E. Stone shall be paid a day's pay as General Clerk because of violation set forth in (1) above.

(3) That the terms of our Agreement were similarly violated on August 29, 1959, when Mr. Parsons, Night Foreman, called Engineer C. G. Brown.

(4) That Mr. L. E. Stone shall be paid a day's pay as General Clerk because of violation set forth in (3) above.

EMPLOYEES' STATEMENT OF FACTS: Prior to November 1, 1958, the Thistle and Provo engineers' and firemen's board was handled by engine crew dispatchers at Salt Lake City. Crews were called at Provo when employes were instructed to call them by phone and personal contact.

Under date of October 31, 1958, Mr. J. A. Greener, Trainmaster at Provo, Utah, issued letter of instructions stating that effective 12:01 A. M. November 1, 1958, G-2 Agreement with Engineers and Firemen consolidating Provo, Thistle and the Marysvale Branch assignments would become effective, establishing Provo as the terminal point. (Employees' Exhibit No. 5.)

Mr. Greener attached to his letter a current bus schedule between Provo, Thistle and the Marysvale Branch for use of the Bill Clerks at Provo.

- (5) There has been no violation of any rule of the current Clerks' Agreement.

Claim must be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The question presented here: Is General Clerk L. E. Stone entitled to a day's pay each for July 29, 1959, and August 29, 1959, because the Carrier used on shifts when Clerks were not employed, Round-house Foreman, W. Beynon, on one occasion and Night Foreman, Mr. Parsons, on the other occasion, to call certain enginemen?

Claim was made this course of conduct violated the Scope Rule of the agreement of November 1, 1953, with the Carrier:

"ARTICLE 1.

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

* * * * *

Group 2. . . . train and engine crew callers; . . ."

in that a member of the Clerks should have been called to do the work.

The facts of the case developed the following points:

1. The alleged violations occurred between the hours of 11:30 P. M. and 5:30 A. M. on two occasions, July 29, 1959, and August 29, 1959, when no Clerks were employed.
2. No Clerks were employed on these shifts because the Carrier had to reduce in force due to lack of business.
3. History and custom on the Carrier confirmed the fact that other than Clerks performed the duties of train and engine crew callers when the Clerks were not available.

It is the ruling of the Board:

The strength and vitality of the Scope Rule is confirmed specifically where, as here, the agreement provides in the Scope Rule "train and engine crew callers." Clerks should be used for these duties if available on the shift.

Clerks were not employed at the time of the alleged violations. The alleged violations were just two in number. They were isolated by their times of happening a month apart. There was no showing of conduct established on the part of the Carrier of a wilful intent to violate the agreement, i.e., the Carrier did not use the part of the working day when Clerks were not employed to call train and engine crews for all or a substantial part of its entire working day's needs, but only to answer its needs of the moment.

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

Claim denied.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1964.

CONCURRING OPINION AWARD 12716 — DOCKET CL-12134
(Referee Reagan)

The principle is firmly established that under a general scope rule, such as this, petitioner must prove exclusive performance by historical custom, tradition and past practice. Such proof was not made and the claim was properly denied.

W. M. Roberts
G. L. Naylor
R. E. Black
W. F. Euker
R. A. DeRossett