

Award No. 12902
Docket No. CL-12928

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5021) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope Rule, by requiring and permitting a Gang Foreman in the Car Shop Office, Outer Yards, Toledo, Ohio, Lake Region, to perform clerical work accruing exclusively to clerical employes covered by the Scope of the Clerical Rules Agreement.

(b) The Claimant, Extra Clerk Marilyn K. Stevenson, be allowed eight hours' pay a day, each day, retroactive ninety days from November 30, 1959, to August 30, 1959, and all subsequent dates until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant, Mrs. Marilyn K. Stevenson, is the incumbent of a Group 1 position of Extra Clerk under the jurisdiction of the Assistant Train Master, in the Outer Yards, Toledo, Ohio, Lake Region. This position also protects extra service in the Toledo Car Shop Office in the Outer Yard. The Claimant has a seniority date on the seniority roster of the Lake Region in Group 1.

This provision clearly states that such suits "shall proceed in all respects as other civil suits" with the exception that the findings of this Board as to the stated facts will be accepted as *prima facie* evidence thereof. It is clear that this provision contemplates the application of the same rule of damages and the same rule against penalties in enforcing contracts as are applied in civil suits generally. An award contrary to these principles would be unenforceable as a matter of law.

In summary, the Carrier has shown that no rule of the applicable Agreement was violated in the instant dispute and, therefore, it is not necessary for your Honorable Board to decide the secondary issue of whether or not Claimant is entitled to eight hours' pay a day as a penalty. However, in the event that, contrary to the facts, it is decided that the Agreement has been violated in this case, the Carrier asserts Claimant would only be entitled to actual loss of earnings, if any, or, to say it another way, to be made whole.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that the Gang Foreman at Toledo Car Shop performs no work accruing exclusively to clerical employes, that no provisions of the Rules Agreement were violated, and that the Claimant is not entitled to the compensation which he claims.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: Notice of the pendency of this dispute was served on the Transport Workers Union of America in accordance with the requirements of Section 3, First (j) of the Railway Labor Act. That Organization declined to participate in this proceeding. The Board then may properly proceed to the consideration of this case on the merits.

A Joint Statement of Agreed Upon Facts is in evidence and reads as follows:

"JOINT STATEMENT OF AGREED UPON FACTS: Claimant Marilyn K. Stevenson held position of Extra Clerk under the jurisdiction of the Assistant Trainmaster, at Toledo, Ohio, which position also performs service on extra work in office of Toledo Car Shop.

At Toledo Car Shop, there is one position of clerk, Symbol No. U-3-E, 1st trick, with Saturday and Sunday rest days.

Claim is filed account Gang Foreman, Toledo Car Shop, are performing work of checking tracks, preparation of unemployment claims, preparation of positions subject to advertisement and award in long hand, etc."

Here the basic premise of the Employes is that the disputed work performed by the Gang Foreman fell within the Scope Rule of the Clerks' Agreement and, therefore, that covered clerical employes only should have been permitted or required to perform it. On the evidence of record this clearly is not a case where the specific work was once performed by Clerks and then taken away from them through abolition of clerical positions and assigned to others. Therefore, Rule 3-C-2 is not applicable here.

Thus the sole rule support for this claim stems from the general provisions of the Scope Rule which list positions but do not describe with any particularity the work attaching or inuring thereto. The Board has repeatedly and consistently held, in interpreting this portion of the Clerks' Agreement, that the burden of establishing covered employes' rights to perform certain clerical work must be carried by those advancing the claim by a showing on a preponderance of the evidence of record that such right is supported by custom and practice. (Awards 12556, 12365, 12219 are recent examples). The Board is aware of the difficulty confronting the Employes in establishing exclusivity under "custom, practice and tradition" because of the universality of clerical work as such. But at the very least there must be a convincing showing that the particular work has been performed by Clerks as a practice on the property so long established and recognized as to have the force and effect of unwritten law, or the law of the shop.

Here the Carrier has shown by competent evidence that while some of the duties performed by the Gang Foreman were clerical in character, they were a necessary incident to his other work in the Car Shop. In the face of this showing, the Employes must establish that this particular work had been performed by covered clerical workers for so long a period of time as to constitute a recognized practice confirming their alleged exclusive right to continue to perform it. In the case before the Board that showing has not been made. Such failure is fatal to the success of the claim. (Awards 12462, 9639, 9746, 9822).

Accordingly, the claim will be denied.

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 17th day of September 1964.