Award No. 13312
Docket No. CL-13157

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5077) that:

1. Carrier violated the terms of the current agreement, effective Sept. 15, 1957, between the parties, when on April 17, 1960, it abolished the position of Clerk Floyd C. Miller, and his relief, R. Orsino at Pelham, New York, thereby removing the work and position out from under the scope of our current Agreement and unilaterally assigning the duties thereof to the Agent-Operator, an employe not covered by our Agreement,

2. Carrier shall be required to restore to clerical employes, the duties attached to the abolished position as of April 17, 1960, and,

3. Carrier now be required to allow Floyd C. Miller and/or his successors, 8 hours' pay at pro rata rate and 2½ hours' pay at punitive rate for five days each week, and R. Orsino and/or his successors, 8 hours' pay at pro rata rate and 2½ hours' pay at punitive rate for two days each week, commencing sixty days prior to November 7, 1960 and continuing until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: The Carrier maintains a Passenger Station at Pelham, New York, and prior to Oct. 2, 1959 the forces at that point consisted of:

Agent-Operator Walsh	7 AM to 3 PM
Clerk Orsino	5:30 AM to 1:30 PM,
Clerk Miller	2 PM to 10:30 PM.

Effective with the close of business on Oct. 2, 1959, Clerk Baggageman's position at Pelham, N.Y., reporting 2 P. M. EST—10:30 P. M. was abolished. (EMPLOYES' EXHIBIT #1).

The force at Pelham, N.Y., then consisted of:

Agent-Operator Walsh—hours 7 AM to 6 PM—one hour lunch, two hours overtime,

It is the Carrier's position that Pelham is a one-man agency and the Agent-Operator there assigned can properly perform all of the work at that station.

In Third Division Award 4392 (Referee Edward F. Carter) your Board stated:

> "This Division has decided many times that station work in one-man stations belongs to the Agent, a position under the Telegraphers' Agreement. It has also been decided that station work required to be performed outside of the assigned hours of the Agent at a one-man station is work which belongs to the Agent. With these principles, we are in complete accord."

From the Opinion in Award 5993:

> "There can be no question that at one-man stations as here involved all work of the station including clerical duties, come within Article I of the Telegraphers' Agreement . . ."

From the Opinion in Third Division Award 6975 (Referee Edward F. Carter):

> ". . . We have held many times, however, that station work in one-man stations belongs to the Agent, a position within the scope of the Telegraphers' Agreement. Station work outside the hours assigned to the agent of a one-man station is also work that belongs to the station agent . . ."

The Employes assert a violation of Rule 1-Scope. Carrier respectfully submits that the burden of proof rests upon the Organization. This burden of proof principle has been long established by the Adjustment Board. In Third Division Award 6359 (Referee Donald F. McMahon) your Board stated:

> ". . . we must hold that the burden of proof is on the one who asserts the claim. Mere words that a violation has occurred are not sufficient without positive evidence to substantiate the allegations as made . . ."

Carrier respectfully submits there has been no violation of Rule 1 (b) or any other rule of the controlling Agreement.

No provision of the applicable Agreement requires the Carrier to retain three assignments where only one is needed.

For all of the reasons set forth herein, Carrier respectfully submits the claim is without merit and should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: In accordance with the provisions of Section 3, First (j) of the Railway Labor Act, notice of the pendency of this dispute was served upon the Order of Railroad Telegraphers. That labor organization formally declined to participate herein. The Board may properly proceed to consider the case on the merits.

The material and relevant facts are not in dispute.

Prior to October 2, 1959, the Carrier employed an Agent-Operator (covered

by the Telegraphers' Agreement), two regularly-assigned Clerk-Baggagemen and a relief clerk (all under the Clerks' Agreement) at Pelham, New York.

Effective October 2, 1959, Carrier abolished one of the Clerk-Baggagemen's positions and reassigned the hours of work of the Agent-Operator position so that the occupant thereafter was paid two hours overtime each day.

On December 1, 1959, the Employes filed a claim on behalf of Clerks Miller and Orsino for two hours at the punitive rate, on grounds that the abolishment of the baggagemen's job and the subsequent assignment of overtime work to the Agent was a violation of the Clerks' Agreement. The Carrier paid the claim but allowed only the straight time rate.

On April 12, 1960, the same date the aforesaid claim was paid, the Carrier abolished the remaining baggageman's position at Pelham. Five days later the Carrier changed the hours of work of the Agent so that thereafter he worked from 6:30 A. M. to 6:00 P. M., with one hour for lunch, five days a week; thus earning 2½ hours' overtime each day.

On November 7, 1960, this claim was filed and ultimately was appealed to the Board.

The sole issue presented under the foregoing facts is whether the Carrier violated the Scope Rule of the Agreement, and, more specifically, Rule 1 (b), when it unilaterally abolished the sole remaining clerical job at Pelham and transferred the work thereof to the Agent-Operator.

Rule 1 (b) reads as follows:

> "(b) When new types of machines or electronic or mechanical devices are installed to perform work theretofore performed by employes coming within the scope of this agreement, the operation of such machines or electronic or mechanical devices shall be assigned to positions under this agreement. This rule shall not apply to the operation of mechanical telegraph machines installed to take the place of the transmission and reception of reports and messages formerly handled by telegraphers.
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> "Positions named above in this Rule 1 belong to employes covered by this agreement and nothing herein shall be construed to permit the removal of such positions from the application of these rules by transfer to another craft except by agreement between the parties signatory hereto. A 'position' is defined as an assignment for which work exists eight hours a day five days a week. Present practices at a facility in the ebb and flow of work between positions subject to this agreement and to other agreements will continue, provided such positions are located at the same facility."

The Board finds Rule 1 (b) to be applicable and controlling under the facts of this case.

As a general proposition a carrier may freely exercise its managerial discretion to abolish positions and reassign the work thereof to others entitled to perform it, in the interest of efficiency and economy of operations. (Award 10622) It is also free to assign overtime work when deemed necessary. (Awards 4351, 8346, 9240).

In the case before the Board, however, there is in evidence a controlling

rule (Rule 1 (b)) which restricts this Carrier's generally-recognized right to abolish positions and reassign the work thereof. It defines a position as "an assignment for which work exists eight hours a day five days a week" and expressly permits the application of the well-known "ebb and flow" doctrine. It also expressly prohibits the Carrier's unilateral removal of "positions" from Agreement coverage by transfer to another craft except by agreement of the parties. The fact that the rule speaks of "positions" rather than "work" is not significant. Work is the essence and substance of a position. The one cannot exist without the other and any attempt to draw a distinction between the two must necessarily fail. The Board finds that within the context of Rule 1 (b) "positions" and "work" are synonymous. Accordingly, under the express language cited above, neither may be removed from Agreement coverage and assigned to other crafts without the agreement of the Employes, except under an application of the aforesaid "ebb and flow" doctrine.

On the facts of record, the last clerical position at Pelham was a full eight-hours-a-day, five-days-a-week position, with a two-day relief assignment attached thereto. There is also persuasive evidence, not controverted, that the volume of business transacted at Pelham at the time of the abolishment, and subsequent thereto, had not declined substantially, if at all.

It is also shown that under the foregoing circumstances all the work of the abolished position was assigned to the Agent and thereafter he could not perform it along with his regularly-assigned telegraphic duties except on an overtime basis. Therefore, it cannot be held that this was another instance of assigning clerical work to a Telegrapher to "fill out" his time. Nor can it be viewed as work incidental to the Agent's telegraphic duties to be performed during his spare time. (Cf. Award 615). Thus the "ebb and flow" doctrine is not applicable here.

The Board is of the opinion that the findings of Special Board of Adjustment No. 194 (Clerks and St. Louis-San Francisco Rwy. Co., with Referee Wyckoff as Chairman) are pertinent and applicable here:

> "**First.** In practice the performance of clerical work at this station has not been treated by the parties as the exclusive work of either Clerks or Telegraphers. While it is true that the clerical work in dispute here has always been regularly assigned to Clerks, excess clerical work which the Clerks have not been able to perform within their regular assigned hours has been performed by Telegraphers to fill out their time. In these circumstances, no vacation of the Agreement is disclosed (Awards 7133, 4355, 4559 and see SBA No. 194 Award 9).
>
> "**Second.** The case is otherwise, however, in situations where the performance of clerical work by Telegraphers results in overtime work by Telegraphers. Since Telegraphers are entitled to perform clerical work only to the extent required to fill out their time, the performance of overtime clerical work by a Telegrapher, who is performing both clerical and telegraphic work during his assigned hours, is in violation of the Agreement."

The Board concurs in these conclusions.

Accordingly, it is held that Rule 1 (b) of the Agreement was violated and that the claim should be allowed, but only to the extent of payment to Claimants of 2½ hours at the pro rata rate for the period set out in the Statement

of Claim, less deduction of wages earned, if any.

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 the Agreement was violated.

AWARD

Claim sustained to extent set out in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of February 1965.

Serial No. 215

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 13312

Docket No. CL-13157

Name of Organization:

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

Name of Carrier:

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

In Award 13312, the Board found that the Carrier had violated Rule 1 (b) of the Agreement when it abolished certain clerical positions and assigned the work thereof to an employe of another craft who could not perform it along with his other regularly-assigned duties except on an overtime basis.

The damages sought on behalf of each of the Claimants were ". . . 8 hours pay at pro rata rate and 2½ hours pay at punitive rate for two days each week, commencing sixty days prior to November 7, 1960, and continuing until the violation is corrected."

The damages allowed by the Board were payment of 2½ hours at the pro rata rate to each Claimant for the aforesaid period, ". . . less deduction of wages earned, if any."

The rationale of the Board's decision was that the violation of the Agreement occurred when the covered clerical work was performed by an employe of another craft during overtime hours; that, therefore, the damages had to be limited to those overtime periods. Claimants, however, were not allowed 2½ hours at the overtime rate, as claimed, but at the pro rata rate instead because to become entitled to overtime pay, it must be shown that overtime work was performed. Here, there was no such showing.

Thus, the reparations allowed were limited in scope and application to the overtime periods only. It follows that the phrase "deduction of wages earned, if any" means overtime wages earned in each of the daily periods involved, and not, as the Carrier contends, deduction of 8 hours' daily compensation earned by claimants during their regular hours.

Under the Division's interpretation of Board Award No. 13312, the Carrier is required to allow each Claimant and/or his successors compensation of 2½ hours at the pro rata rate for the period set out in the Statement of Claim, less deduction of overtime wages earned, if any.

Referee William H. Coburn, who sat with the Division as a neutral member when Award No. 13312 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of January 1966.