

Award No. 14088
Docket No. CL-12588

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**

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4915), that:

1. The Carrier violated and continues to violate the Clerks' Agreement when it abolished the position of Relief Clerk, Welch and Northfork, West Virginia, effective March 28, 1960. Also, when it abolished the position of Cashier-Ticket Clerk at Welch, West Virginia, effective March 30, 1960 and removed a part of the remaining work assigned to these positions from the scope of the Clerks' Agreement by assigning the work of selling railroad and Pullman tickets to the Agent-Operator, who is an employe not covered by the Clerks' Agreement.
2. The Carrier shall restore the work of selling railroad and Pullman tickets at Welch, West Virginia to the scope and application of the Clerks' Agreement and to the employes covered thereby.
3. Ticket Clerk T. A. Meredith, or his successor, shall be paid two, 2-hour calls, at the overtime rate of his regular clerical position each day, Monday through Friday, beginning March 30, 1960 and continuing until this violation is corrected.
4. Clerk G. L. Rush, the present incumbent of the position of Cashier at Welch, West Virginia, or his successor, shall be paid eight hours pay at the overtime rate of his regular clerical position for April 2 and 3, 1960, his assigned rest days, and each subsequent Saturday and Sunday until this violation is corrected.

EMPLOYEES' STATEMENT OF FACTS:

1. Prior to Monday, March 28, 1960, the Carrier maintained a station force at Welch, West Virginia consisting of the following:

Agent
Cashier-Ticket Clerk
Ticket Clerk
Clerk-Warehouseman

take or be accorded telegrapher's duties but the converse is not true; on the contrary, where two positions are involved, one, that of a clerk, and the other, that of a telegrapher, and one is to be abolished, the telegrapher — if any telegraph duties remain — has the absolute right to the position including the assumption of the remaining clerical duties. As previously stated, this condition subsisted at the time, long before, and ever since clerks' agreements were executed and they were made in the light of these conditions which are a clear limitation or exception to the exclusive right of clerks to the performance of clerical duties."

AWARD 4288

"We think the rule stated in Award 615, as limited by Award 636 and other subsequent awards, means that telegraphers with telegraphic duties to perform have the right to perform clerical duties to the extent necessary to fill out their time, but that said clerical duties must be incidental to or in proximity with their work as a telegrapher."

AWARD 4492

"It is the rule, long adhered to by this Board, that a telegrapher with telegraphic duties to perform may properly perform clerical work which is incidental or in proximity to his telegraphic work, in such amount as to fill out the telegrapher's assignment."

Please also see Third Division Awards 3988, 4355, 4477, 5250, 5796 and 7198.

The Carrier asserts that its position as set forth in this submission clearly proves there is no merit to the Employees' claim in this case.

Denial of the claim in its entirety is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: The record shows that this Division found that The Order of Railroad Telegraphers is involved in this dispute and, per Section 3, First (j) of the Railway Labor Act, was afforded an opportunity to be heard. It declined to participate herein.

In handling the dispute on the property and in its submission to this Board, the Carrier took the position that the claim had not been handled in accordance with the requirements of Article V of the August 21, 1954, National Agreement which the parties incorporated in their Rules Agreement as Rule 41. That issue was referred to the National Disputes Committee established by Memorandum Agreement dated May 31, 1963, to decide disputes involving the interpretation or application of certain stated provisions of specified National Nonoperating Employee Agreements. On March 17, 1965, that Committee rendered the following Findings and Decision (NDC Decision 19):

"FINDINGS: (ART. V) Paragraphs 1(a) and 3 of Article V of the August 21, 1954 Agreement provide that:

'All claims or grievances must be presented in writing by or on behalf of the employee involved . . .

3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. . . .'

Carrier contends that paragraph 1(a) of the claim on behalf of 'successors' is barred because Article V requires the naming of each individual for whom claim is presented.

The National Disputes Committee rules that Claimants have been identified on the record both by name and as the incumbents of certain positions, and that inasmuch as the term 'successors' as used in the claim refers to the successors of the named claimants as the incumbents of certain positions it adequately identifies additional claimants even though it does not specifically name them.

DECISION: The part of the claim on behalf of 'successors,' as referring to successors of the named claimants as the incumbents of certain positions, is not barred by Article V of the August 21, 1954 Agreement.

This decision disposes of the issues under Article V of the August 21, 1954 Agreement. The docket is returned to the Third Division, NRAB, for disposition in accordance with Paragraph 8 of the Memorandum Agreement of May 31, 1963."

The facts show that prior to March 30, 1960, the station force at Welch, W. Va., consisted of an Agent-Operator covered by the Telegraphers' Agreement, and a Cashier-Ticket clerk, a Ticket Clerk, and a Relief clerk, the latter three positions being under the Clerks' Agreement.

On or about March 30, 1960, the Carrier abolished the Relief clerk and Cashier-Ticket Clerk position. The rest days of the Ticket Clerk were also changed. The Carrier then established the position of Cashier with hours of 7:00 A.M. to 4:00 P.M., Monday through Friday, rest days Saturday and Sunday. No relief on Saturdays and Sundays was provided for this position and the work of selling railroad and Pullman tickets which had formerly been one of the primary duties of the Cashier-Ticket Clerk position was not included among the Cashier's duties. That work, which is the subject matter of this dispute, was assigned to the Agent-Operator, hence the claim.

The issue is whether there was a violation of the Scope Rule or the Clerks' Agreement under the foregoing facts. That rule contains the following provision:

"Positions within the scope of this Agreement belong to the employees covered thereby and nothing in this Agreement shall be construed to permit the removal of positions from the application of these rules subject to such modifications and exceptions hereinafter set forth and except in the manner provided in Rule 66."

Identical scope rule language has been the subject of many Board interpretations. Unfortunately these decisions conflict. The result is a split of authority that has apparently encouraged the resubmission of the same question time and again to the Board. That question is whether the word "Positions" in-

cludes and is, therefore, synonymous with "work." It was answered decisively some 5 years ago in a soundly reasoned opinion of this Board — Award 9416 with Referee Bernstein participating. There precisely the same contentions were made by the parties as have been presented here. After a thorough review of the precedents, the Board in Award 9416 made the following pertinent findings:

1. Rule 1 (e) (identical with Rule 1 (a) in this case) prohibits the transfer of the work of positions covered by the Agreement to employees outside that coverage.
2. Rule 1 (e) prevents the application of the "Ebb and Flow" doctrine, both as to work which has been performed exclusively by the abolished position and also that performed in common with the other craft.
3. The Carrier violated the Scope Rule (1(e)) when it abolished a clerical position and assigned a portion of the remaining duties to an Agent.

We concur in and adopt as controlling the foregoing findings of Award 9416 as applied to the facts of the instant case.

Accordingly, the Board finds that Rule 1 (a) of the Agreement was violated. The claim, therefore, will be sustained as follows:

1. Paragraph No. 1 will be sustained.
2. Paragraph No. 2 will be dismissed as calling for an ultra vires act of the Board.
3. Paragraph No. 3 will be denied on grounds that Claimant suffered no actual loss.
4. Paragraph No. 4 will be sustained for payment at the straight time rate.

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 Employees involved in this dispute are respectively Carrier and Employees 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 shown in Opinion and Findings.

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.

**CARRIER MEMBERS' DISSENT TO AWARD NO. 14088,
DOCKET NO. CL-12588**

Award 14088 is in basic error and we dissent.

Following the re-arrangement of work on March 30, 1960, there remained at the location involved the same number of clerical positions as were in existence prior to that date. The net result was simply the removal of some work of selling railroad and Pullman tickets from one of the clerical positions and the assigning of such work to the agent and operator. There was no removal of positions from the application of the Agreement.

Based upon the record before the Division in the dispute covered by Award 14088, any contention that the words "positions" and "work" are synonymous is without foundation. The record contained conclusive evidence that in negotiations leading to the adoption of Rule 1(a), effective October 1, 1959, the Organization proposed a rule which, if adopted, would have had the effect of freezing to clerical employees all work then being performed by them. However, the rule proposed by the Organization was not adopted, and it is clear from the record that the terms "positions" and "work" were not considered synonymous during the negotiations and at the time of the adoption of Rule 1(a). As this Division held in Award 12415, with the same Referee participating:

"As to the first question, it appears from the record that the Brotherhood during negotiations leading to the consummation of the 1957 Agreement, sought unsuccessfully to include a requirement that the work be performed under the 'direct' supervision of a foreman. Had that requirement been agreed to, the rule would have to be read to mean that a foreman must be present at all times and at every place where covered employees worked. That requirement was considered and rejected by the parties when they entered into the Agreement. This Board may not now supply what the parties themselves failed to include. (Awards 5079, 7153, 10425, 12192.) . . ."

The principle enunciated in Award 12415 should have been adhered to in the dispute covered by Award 14088 rather than relying on an award on another property involving a dissimilar situation where there was an actual reduction in the number of clerical positions, and which award itself has not been adhered to in subsequent awards involving the same parties (Awards 14064, 12360, 12149, 12148, 11755, for example).

The record in the dispute also showed conclusively that the work involved, the selling of railroad and Pullman tickets, is not, by practice, custom and tradition, exclusive to clerical employees, and, as we stated in Award 13680, with the same Referee participating:

" * * * That ticket selling and clerical work incident thereto may properly be performed by telegraphers in this industry and on this property is not open to question.

* * * * *

P. C. Carter
R. E. Black
D. S. Dugan
T. F. Strunck
G. C. White