Award No. 14645
Docket No. CL-13554

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5176) that:

(a) The Carrier violated the clerical Agreement when on January 27, 1960, it abolished the Warehouse Foreman position, rate $418.90 per month, at Herington, Kansas, and assigned clerical work to the Agent;

(b) The Carrier be instructed to return the clerical work to the Clerks at Herington, Kansas;

(c) E. G. Zeiner be paid a call, two (2) hours at $436.11, punitive rate, each day, Monday through Friday, January 27, 1960, to November 1, 1960; William M. Smith be paid a call, two (2) hours at $436.11, punitive rate, each day, Monday through Friday, from November 1, 1960, until the violation has been discontinued; J. J. Trapp, Relief Clerk, be paid each Saturday from January 27, 1960, until the violation has been discontinued, 2-hour call at $436.11, at punitive rate; also the claim be continuous for any other clerk who may have or will in the future work the Chief Clerk position;

(d) R. W. Jones be paid a call, two (2) hours at $415.55, punitive rate, each day Tuesday through Saturday, January 27, 1960, until the violation has been discontinued;

H. D. Nunn, Relief Clerk, be paid a 2-hour call at $415.55 for each Monday, at punitive rate, from January 27, 1960, until the violation has been discontinued; also the claim be continued for anyone who may have or will in the future work the position of Cashier–General Clerk.

All rates subject to General Increases.

EMPLOYES' STATEMENT OF FACTS: January 20, 1960, the following notice was issued to the Warehouse Foreman at Herington, Kansas, by Trainmaster T. J. Hull:

OPINION OF BOARD: On December 1, 1959, as a result of negotiations between Carrier and the Telegrapher organization, the supervisory position of Agent at Herington, Kansas became subject to the Telegraphers' Agreement. Effective January 26, 1960, Carrier abolished the position of Warehouse Foreman at Harrington covered by the Clerks' Agreement. The work of the Warehouse Foreman was assigned to remaining clerical employes and the Agent, an employe covered by the Telegraphers' Agreement.

The Brotherhood of Railway Clerks claims that the reassignment of the work was improper and in violation of the Clerical Agreement. It contends that the Agent performs no telegraphic work and that the work he was assigned has always been handled by clerks under the Clerks' Agreement. In short, it is the Brotherhood's position that Carrier reclassified the Agent position for the purpose of performing clerical work, not telegrapher work, and in so doing, Carrier was doing indirectly what it could not do directly, that is, assigning work under the Scope of the Clerks' Agreement to a Supervisory Agent, a company official.

Carrier maintains that the reclassification of the Supervisory Agent was proper under the Telegraphers' Agreement, and did not require the approval of the Railway Clerks' organization. It asserts that the Agent, as the primary employe at a station, can perform all of the work at the station, and therefore the transfer of some clerical duties to this employe was proper. It emphasizes that telegraphers are frequently given clerical work to fill in their time. With the reduction of supervisory duties, the Agent was assigned telegrapher work, and he was properly given clerical duties from the abolished clerk's position which were incidental to his position and which he formerly performed.

The record shows that before the reclassification of the Supervisory Agent's position the occupant did not do any telegraphy work or the clerical work under consideration. Employes subject to the Brotherhood of Railway Clerks were assigned the clerical work and the telegrapher duties were handled at the telegrapher office about a block from the Agent's office. When the Agent became subject to the Telegraphers' Agreement, he did not do any work which involved the use of telegrapher equipment. Such equipment continued to remain at a separate location than that of the passenger and freight station at Herington, Kansas, where the Agent was stationed. The record does not support the assertion that the clerical work transferred to the Agent was work that he formerly performed in his capacity as a supervisory official. This was work which had been traditionally performed by clerks.

Telegraphers may fill out their time with clerical work incidental to their telegrapher duties, but in this instance the Agent neither carried out telegrapher duties nor were the clerical duties those which had been performed by him in the past.

The Agreement between Carrier and the telegraphers is not a subject for our consideration since the Clerks' organization is not a party to it. The issue is whether or not the Clerks' Agreement was violated.

We hold that the assignment of clerical work to the Agent was in violation of the Railway Clerks' Agreement. Claim is sustained.

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 violated.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of July 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14645, DOCKET CL-13554 (Referee Engelstein)

Award 14645 rules that clerks have an exclusive right to work transferred to the Herington Agent in order to fill out his day. The ruling is based on the erroneous finding that ". . . This was work which had been traditionally performed by clerks."

This finding accepts the Employes' argument that the involved work was never incident to any position other than positions covered by the Clerks' Agreement and has been performed exclusively by the clerks on Carrier's entire system. In his memorandum to the Referee, the Labor Member stated the argument this way:

> "The involved work has always been performed by the employes under the Clerks' Agreement. Carrier has not asserted otherwise, nor has it contended that the work is not performed **exclusively — system wide — by clerical employes.** Unchallenged is the Employes' statement — first sentence (R-12):
>
> > '* * * Furthermore, the work which is being assigned to the Agent has been handled by the Clerks ever since there is any record of such work being done * * *.'"
> > (Emphasis ours.)

A fair reading of the record indicates that Carrier did deny that the clerks performed this work exclusively, system-wide (portions of the record relevant to this point were fully reviewed for the Referee in the memorandum submitted by the Carrier Members). The Employes did not prove this work had been traditionally performed by clerks and, therefore, the claim should have been denied under the consistent decisions of this Board. See **Awards 13400** (Bailer), **11584** (Rose), **11336** (Coburn), **10741** (Miller), **10301** (Bonebrake), **4559** (Wenke), involving these same parties and Agreement; also see **Award 13923** (Engelstein), among many others.

The repeated references to "telegraphic work" and "telegrapher equipment" in this award are misleading and irrelevant. This was work at the

agency and (contrary to this award) such work was incidental to the Agent's position. Carrier was entitled to require the Agent to fill out his day with work of the agency, as stated in **Award 4559** (Wenke) which involved these same parties and Agreement:

> "This Board has often said that **there are few, if any, employes of a carrier,** from the president on down, **who do not perform some clerical work in connection with their regularly assigned duties; that the performance of such clerical work incident to a position by the occupant thereof who is not within the scope of the Agreement is not in violation thereof;** and that if the clerical work incident to a position increases and is assigned to a position under the Clerks' Agreement and performed by the occupant thereof, then, if it decreases, Carrier may abolish the position and return the remaining work to the **position from whence it came and to which it is incident.** That is, clerical work incident to a position outside of a Clerks' Agreement may flow from such position to positions under the Clerks' Agreement and then, if it decreases, back to the position to which it is incident. See Awards 806, 1405, 1418, 2138, 2334, 3211, 3735 and 3989 of this Division." (Emphasis ours.)

This award also exceeds the jurisdiction of the Board in ordering Carrier to pay a monetary allowance which is not provided for in the Agreement, and which cannot be supported under any principle of damages recognized in contract law.

The claim is clearly a demand for an illegal penalty. In the first place, the claim is for four hours per day at the overtime rate (a two-hour call for the Chief Clerk and a two-hour call for the Cashier-General Clerk), yet the Employes' submission establishes that the Agent spent only a fraction of that amount of time doing the work that was transferred from the positions of Foreman and Chief Clerk (see the agreed-upon list of all work transferred at page 4 of the Employes' submission and the Agent's list of time spent doing various tasks at page 7 of the Employes' submission). In the second place, the Employes do not question the complete truth of Carrier's statement that:

> ". . . these claimants would not have been recipients of two hours extra daily even if the work had been distributed in a manner where no violation was alleged by the Organization. They were in no [way] damaged. On the contrary, the rates of the positions involved in this claim were given upward rate adjustments effective August 1, 1960, which as the Carrier understood at the time disposed of the matter, . . .
>
> These claimants were in no way damaged. . . ."

The Employes note this statement of Carrier in their rebuttal, and their only response is a reference to certain of the findings in Award 6284, which are erroneous, but which in any event do not support this claim for four hours per day at the overtime rate when the record does not even support a finding that the Agent spends two hours per day doing the involved work. This Board has no jurisdiction to create such a penalty. See Part II of Carrier Members' Dissent to **Award 14623.**

The award is also defective in that it affirmatively indicates the Referee refused to give any consideration to evidence which the Board is required by law to consider. The award erroneously finds that the Agreement be-

tween Carrier and the Telegraphers ". . . is not a subject for our consideration. . . ." Since the Clerks, on the basis of practice, are here claiming an exclusive right to work now assigned to an employe covered by the Telegraphers' Agreement and rules of that Agreement indicate this work is not traditionally the work of Clerks, the Board is legally obligated to consider those rules in adjudicating the claim. See the ruling of the United States Supreme Court in **ORC vs. Pitney**, 326 U. S. 561. Also see **Slocum vs. The Delaware, L&W RR**, 339 U. S. 239 and **ORT vs. Union Pacific**, 349 F. 2d 408, cert. granted, 383 U. S. 905.

We dissent.

G. L. Naylor
R. A. DeRossett
H. K. Hagerman
C. H. Manoogian
W. M. Roberts

[Page references contained herein refer to original document.]

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 14645, DOCKET CL-13554

Award 14645, Docket CL-13554, is entirely correct both as to findings of fact and as to awarding the remedy requested.

Carrier's basic argument simply asked that it be assumed that **no work was covered by the Clerks' Agreement**; therefore, Carrier was free to abolish clerical positions at will and assign the Clerk's work to whomever it wished. Now that simply is not, and has never been, the intent and meaning of collective bargaining Agreements. Rather, the intent and meaning of such collective bargaining Agreements, although it has been lost or obscured too often, is best set forth lately in recent Award 14591, Dorsey, wherein it is held:

> "The precise issue is whether Carrier was contractually barred from transferring work exclusively within the Scope of the Agreement to persons not within the collective bargaining unit of that particular contract. Who the persons may be or their relationship to Carrier is not material.
>
> The heart of the collective bargaining agreement is the work and the right to perform that work vested in the employes in the collectiv bargaining unit as against the world. The bargain once made may not thereafter be lawfully unilaterally changed by either party."

In view of the attempt in this case, it is well to add that the bargain once made may not thereafter be lawfully unilaterally changed by either party entering into an Agreement with some other or different party.

The Award is correct in all respects and the dissent merely repeats arguments and allegations duly considered prior to the adoption thereof.

D. E. Watkins
Labor Member
8-10-66

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