

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Thomas J. Kenan, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL No. 5815) that:

(1) The Carrier violated the Clerks' Agreement, particularly Scope Rule 1, when it permitted or required the Manager of Equipment Service Accounts, Mr. W. R. Boone, to perform clerical work which is subject to the Clerks' Agreement.

(2) Carrier shall now compensate Miss Louise Smyre, the senior qualified employe of that department, the difference between the monthly rate of \$550.00 and the rate she is now being paid as occupant of the position of Foreign Per Diem Clerk. Such compensation to be based on three hours per day beginning July 1, 1964, and continuing until the violation ceases to exist.

EMPLOYEES' STATEMENT OF FACTS: On July 1, 1964, the so-called "Official Position" of Manager of Equipment Service Accounts was established and Mr. W. R. Boone was appointed. This move created a vacancy of the Chief Clerk position, which Mr. Boone was previously assigned to. Since the date of July 1, 1964, Mr. W. R. Boone has continued to perform the duties which he performed as Chief Clerk and was work that consisted of a large portion of detail clerical work.

The establishment of this official position is not covered by the current Agreement, and the Carrier transferred work covered by the agreement to this non-scope position.

This claim was properly filed with the Carrier and was handled up to and including the highest officer of the Carrier authorized to receive claims. (Employees' Exhibits A through G.)

(Exhibits not reproduced.)

In dividing the office November 1, 1963, insofar as possible, the work relating to transportation matters was moved to Pine Bluff and work relating to Car Accounting matters remained in the Tyler office with the Chief Clerk, Mr. W. R. Boone, in charge of the office under jurisdiction of Auditor at Tyler. The Superintendent of Transportation and Assistant to Superintendent Transportation were moved to Pine Bluff.

The force in the divided offices then was as follows:

TYLER	PINE BLUFF
Chief Clerk	Superintendent of Transportation
Chief Clerk - Record Room	Asst. to Supt. of Transportation
Head TOF Clerk	Traveling Car Agent
Assistant Head TOF Clerk	Secretary
Home Per Diem Clerk	*Special Movement Clerk
Foreign Per Diem Clerk	Embargo & Misc'l Statements Clerk
TOF Clerk	Steno-Clerk
Statistical & Report Clerk	
Tonnage Comptometer Clerk	*Formerly Assistant Chief Clerk
Car Miles Comptometer Clerk	
Asst. Home & Foreign Per Diem Clerk	
Asst. Home & Foreign Per Diem Clerk	
Private Lines Miles Clerk	
Steno-Clerk	

Due to added duties and responsibilities placed on the Chief Clerk in the Tyler office after November 1, 1963, as well as certain other adjustments needed in office assignments, further changes in force were made July 1, 1964. Effective that date Chief Clerk Boone was promoted to a newly created official position in charge of the office with title of Manager Equipment Service Accounts. Position of Chief Clerk Record Room was abolished and J. S. Smith, who had been occupying that position, was promoted to position of Chief Clerk.

As result of these changes July 1, 1964, complaint was filed by Protective Committee Member Bryan in the Car Accounting office August 15, 1964 (Exhibit 2), and claim was filed by Local Chairman W. D. Metcalf August 27, 1964 (Exhibit 3), as indicated in the Statement of Claim.

The claim was denied, and also denied on appeal.

The applicable schedule agreement is that effective April 1, 1946 (re-printed January 1, 1963), as amended by Supplemental Agreement dated July 22, 1949, and Memorandum of Agreement dated August 5, 1950, relating to the Forty Hour Week, copies of which are on file with the Board.

Exhibits 1 to 11, inclusive, are attached hereto and made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to November 1, 1963, the Carrier's force in the office of the Superintendent of Transportation, Tyler, Texas, consisted

of two officers (not subject to the Agreement) and 19 clerks (subject to the Agreement), which entire force handled certain car accounting matters and certain transportation matters. On November 1, this force was divided, the transportation matters being transferred to Pine Bluff, Arkansas, and the car accounting matters being retained at Tyler. Both officers, as well as several of the clerks, were transferred to Pine Bluff.

While the remaining Tyler force operated for several months under the Chief Clerk (who held an "excepted" position under the Agreement), on July 1, 1964, the Carrier created the new official position of "Manager of Equipment Service Accounts", promoted Chief Clerk W. R. Boone to such official position, promoted to the position of Chief Clerk Mr. J. S. Smith, who had occupied the position of "Chief Clerk Record Room", and abolished the vacated position of Chief Clerk Record Room.

The Employees contend that Mr. Boone, after appointment to the official position of "Manager of Equipment Service Accounts", continued to perform, for an average of at least three hours each day, clerical work which he had previously performed as Chief Clerk, work which the Employees contend falls within the scope of the Agreement. To substantiate such contentions, the Employees provided the Carrier with a detailed account of Manager Boone's work habits during representative periods of time, which account was prepared by an employee who worked in Manager Boone's office. The account specified particular work, of a routine clerical nature, which Manager Boone was performing, which work had earlier been partially performed by Mr. Boone when he was the Chief Clerk and which had been partially performed by the Embargoes and Miscellaneous Statements Clerk, which latter position had been moved to Pine Bluff. The account also specified that the new Chief Clerk, J. S. Smith, was not performing the work of such position when it had been held by Mr. Boone but, rather, that Mr. Smith was continuing to perform the duties he had earlier performed when he had filled the now abolished position of "Chief Clerk Record Room."

The Carrier contended that any clerical work being performed by Manager Boone was only incidental to and necessary in the performance of his new managerial duties. No evidence was submitted to support this contention.

Since the Employees amply upheld their burden of proof and the Carrier countered such only with unsupported assertions, the Board has no alternative but to accept the Employees' factual case as established. See Award No. 11828 (Seff). The Board accordingly finds that work covered by the Scope Rule of the Agreement is being performed by an officer of the Carrier, a person not covered by the Agreement. This is a patent violation of the Agreement.

The Carrier argued before this Board that should the Board accept as fact (as we have done) the Employees' assertion that an officer was now performing work previously performed by the Chief Clerk, the Employees still have the burden of proving that such work can only be performed by one covered by the Agreement. The Carrier's theory behind this argument was that since the Chief Clerk position is an "excepted" position (excepted from those provisions of the Agreement primarily concerned with promotion, assignment and displacement—but not Rule 1, the Scope Rule), it is understood that some of the work performed by the Chief Clerk is of the type that officers ordinarily perform, involving judgment and discretion, and

not being reserved to persons covered by the Agreement. The immediate weakness in this reason for disallowing the claim is that it was not raised on the property. The Carrier's argument there was that the questioned work was "incidental to and necessary in the performance of" Mr. Boone's work filling a newly created official position. The Carrier is limited, before this Board, to the reasons it gave on the property for disallowing the claim. Award No. 12388 (Engelstein). And, there is a complete failure of proof to substantiate this argument, which failure must be juxtaposed with the Employees' positive evidence that the work in question was of a routine clerical nature and had for years been associated with the old positions of Chief Clerk and of Embargoes and Miscellaneous Statements Clerk, both being positions covered by the Scope Rule of the Agreement.

The Board must finally consider what is the proper measure of damages. Since the established evidence is that an officer of the Carrier performed work, for three hours per day, which should have been performed by the Employees, the Claimant is entitled to be paid for a call of three hours per work day during the period the violation occurred. There is some mention in the record that the activity in question perhaps ceased some time ago. If the parties can determine that this is the case, then the Claimant should be allowed a three-hour-per-day call until the cessation. Otherwise, the Claimant should be allowed such a call until the activity does cease, and the Carrier is hereby ordered to cease requiring Manager Boone to perform that work mentioned in the record of this claim which he earlier performed when he was Chief Clerk.

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 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 allowed, to the extent and in the manner set forth above in the Opinion.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1968.

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