



Award No. 18627
Docket No. CL-18741

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6760) that

1. Carrier violated the Clerks' Agreement when, effective April 1, 1969, the Carrier utilized the service of an employe not subject to the Clerks' Agreement to perform the former duties of restricted position of Inspector Station and Claim Prevention, Little Rock, Arkansas, in violation of Rules 1, 2, 3, 5 and related rules of the current Clerks' Agreement.

2. Carrier shall be required to compensate Clerk D. C. Ross in the amount of \$721.94 for the month of April, 1969, with compound interest at the rate of 1% per month, starting with the sixtieth day after filing, and with claims continuing on the same basis for each subsequent month that Carrier utilizes the services of an employe not subject to the current Clerks' Agreement, in performing the duties of position of Inspector Station and Claim Prevention, at Little Rock, Arkansas.

(Claim to include all subsequent general wage increases.)

EMPLOYEES' STATEMENT OF FACTS: Effective July 1, 1943, the Clerks' Agreement on the Missouri Pacific Railroad was revised to provide for Phase C (Restricted) positions under Scope Rule 1, in part as follows:

"PHASE 'C'

(b) The occupants of the following positions shall not be subject to the application of Rules 4, 6, 7, 8, 9, 13 (b), (c) (d) and (f) and 14.

Department	Office	Position
	* * * * *	
Operating	Superintendent of Stations and Claim Prevention	Investigators
	Agencies	Chief Clerk - Wichita"

ant District Superintendent Stations also assists in preparation of data and recommendations in connection with station closings, dualization of stations and establishment of mobile agency routes and represents the Company at various state and local hearings relating to these changes.

In view of these facts there is no doubt that the position in question is official in nature, and is not one which should be subject to the Clerks' Agreement. Claim is without merit and is respectfully declined.

Without waiving the position set forth above, it is also our position that in any eventuality there could be no basis for monetary claim because claimant was on duty and under pay and experienced no loss in earnings. Furthermore, claimant was not available to have performed the service here involved.

Yours truly,

/s/ O. B. Sayers"

OPINION OF BOARD: On November 1, 1968, the incumbent of position of Inspector Stations and Claim Prevention was promoted to an official position, and Carrier abolished the position of Inspector Stations and Claim Prevention. Subsequently, an official position of Assistant District Superintendent Stations and Claims was established by Carrier. The Organization contends that the work here involved by the newly established position of Assistant District Superintendent Stations and Claims is subject to the Clerks' Agreement. Carrier contends that the remaining clerical functions of the clerical position is restricted and have been transferred to the General Members' Seniority District and roster; that the restricted position has been eliminated; that the abolishment notice is not required by the Agreement; and that the official position of Assistant District Superintendent Station and Claim Prevention is not subject to the Clerks' Agreement. Carrier further contends that the newly established position is administrative in nature, not requiring the exercise of routine clerical duties, but pertain to functions requiring the exercise of managerial judgments and prerogatives. Carrier also contends that the establishment of the position of Assistant District Superintendent Stations and Claim Prevention occurred on November 1, 1968, and that the Organization filed their claim on May 19, 1969, 199 days later, thereby failing to originate their claim within 60 days as required by Rule 43(a) of the controlling Agreement.

The contention of Carrier concerning the violation of the Time Limit Rule is not well taken, for the reason that Rule 43, Section 3, of the controlling Agreement permits a claim to be filed at any time for an alleged continuing violation of the Agreement * * * as long as such violation, if found to be such, continues. Therefore, this opinion must concern itself with whether or not the action of Carrier is in violation of the Agreement. If it is a violation, then the Time Limit Rule as contained in Rule 43(a) does not apply.

There are numerous awards holding to the effect that a Carrier cannot abolish a position under an agreement and assign the work to employees under a different agreement or under no agreement at all. In this instance,

Carrier has attempted to abolish position under an agreement and has assigned the work to an employe under no agreement. Award 2071 (Tipton); Award 2074 (Tipton), and Award 5196 (Wenke).

The record reflects that extensive negotiations were carried on between the parties wherein Carrier attempted to remove the positions in question from the scope of the Clerks' Agreement. These negotiations were unsuccessful on the part of Carrier. Therefore, it can only be concluded that Carrier has arbitrarily and unilaterally removed the restricted position at Little Rock from the scope of the Clerks' Agreement and has assigned the duties of that position to an employe not covered by the Clerks' Agreement which action constitutes a violation. The Organization has sustained its burden of proof that not only clerical work was performed by the position, but also outside work, including claim inspection, damaged analysis in order to take corrective measures, checking of stations for efficiency in operation, personal observation of wrecks and the handling of disposition of shipments. These additional duties give credence to the Organization's contention that the Inspector Position should be retained. Therefore, this claim will be sustained. However, under authority of Award No. 18464 (O'Brien), 18312 (Devine), 6656 (Wyckoff), 13478 (Kornblum), 11172 (Coburn) and 18433 by this Referee, interest 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 violated in accordance with the Opinion.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1971.

CARRIER MEMBERS' DISSENT TO AWARD 18627, DOCKET CL-18741

(Referee Gene T. Ritter)

The restricted position of Inspector Station and Claim Prevention was discontinued November 1, 1968; thereafter, those functions of a clerical nature were assigned to clerks. The remaining duties were assigned to other

employees. The Organization apparently recognized the propriety of Carrier's conduct because no claim was filed for some six and one-half months after the initiation of this arrangement. Thus the claim was not filed in accordance with the Timit Limit Rule, and it should have been dismissed for that reason, but further error was committed by the Referee's failure to give any weight to the Organization's acquiescence in Carrier's conduct for some six months.

Throughout the Opinion, the Referee deals with the various duties performed by the restricted position prior to November 1, 1968 as a unit, making no distinction between the clerical functions and others which were properly performed by other employees. Failure to take cognizance of this material element necessarily resulted in gross error.

With reference to the second paragraph, page 2, the Referee failed to enumerate the awards to which he referred; however, there are more numerous awards holding to the effect the assignment of work is Carrier's prerogative, absent restriction by law or agreement. Certainly there can be no violation of any agreement by the assignment to other employees of work to which the clerks haven't the exclusive right, regardless of whether they are members of any Organization. That fact hasn't any bearing on the situation. The sole question which should have been considered by the Referee after he made the mistake of failing to dismiss the claim under the Time Limit Rule was whether work belonging exclusively to the clerks had been assigned to others.

The lack of understanding on the part of the Referee is clearly revealed by his conclusion that, "Therefore, it can only be concluded that Carrier has arbitrarily and unilaterally removed the restricted position at Little Rock from the scope of the Clerks' Agreement and has assigned the duties of that position to an employee not covered by the Clerks' Agreement, which action constitutes a violation." No position was "removed" from the Clerks' Agreement, as the position of Inspector Station and Claim Prevention no longer existed and had not existed for some six and one-half months at the time the claim was filed which formed the basis of this dispute. Not even the Organization complained about the propriety of abolishing the position referred to in this dispute, nor was any such question submitted to the Third Division for decision. Reference to paragraph 1 of the Statement of Claim reveals their complaint to be account others were performing clerical work. No indication is made regarding what specific work was assigned in violation of the agreement. The record is absolutely devoid of even a scintilla of evidence that any work performed by other than clerks was exclusively that of clerks.

The only negotiations involved the removal of a position intact, which position would have included clerical work, as well as other work, which is clearly distinguishable from this dispute. Here the clerical work was assigned to clerks and the remaining work to others. How the Referee jumped to the conclusion that the Organization had "sustained its burden of proof" when what he states was proven was never in dispute, i.e., that the former position performed both clerical as well as other work. That fact is immaterial in attempting to reach a decision in this dispute. However, he again ignored the fact the covered work was assigned the clerks and NO work belonging exclusively to clerks was performed by anyone but clerks. The Referee then without basis usurps the Carrier's prerogative to determine

what positions will be assigned to accomplish the performance of the work of this Carrier, which is indeed shocking due to the obvious inability of the Referee to even understand the problem much less set himself up as some authority as to what positions should be maintained.

The Referee failed to discharge his obligation as such by ignoring the undisputed fact the claimant was unavailable to work his assignment in Little Rock at the same time he occupied an assignment in St. Louis, some 350 miles away, which should have been justification for denying the compensatory feature of the claim. Furthermore, the claimant was not qualified. Carrier had the unqualified right of appointment to the position and would not have assigned claimant to the position. Issues submitted to the Third Division are of vital interest to the respective parties and merit consideration in depth. The Award is palpably wrong; therefore, we dissent.

W. B. Jones
R. E. Black
P. C. Carter
G. L. Naylor
H. F. M. Braidwood