

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20429
Docket Number CL-20447

David P. Twomey, Referee

PARTIES TO DISPUTE: {
(**Brotherhood** of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station **Employees**
(**The** Kansas City Southern Railway Company

STATEMENT OF CLAIM: **Claim** of the System Committee of the Brotherhood
(CL-7434) that:

(1) Carrier violated and continues to **violate** the Scope Rule, Rule 1, of the current Clerks' Agreement and Article **VIII** of **Mediation** Agreement, Case No. A-8854, dated February 25, **1971**, when, beginning April 17; **1972**, Carrier caused CTC Operators (Centralized Traffic Control Operators) at Heavener, Oklahoma, to use **IBM** Machine installed in CTC Section of the office April **14**, 1972, to **perform** clerical work exclusively **theretofore** performed by clerks at Heavener, Oklahoma, and identified as follows:

(a) Punch **IBM** cards on interchange cars to and from following railroads at the following stations;

Port Smith, Arkansas	MOP Rwy. Co. - SLSF Rwy. Co.
Sallisaw, Oklahoma	MOP Rwy. Co.
Panama, Oklahoma	Texas and Pacific Rwy. Co.
Poteau, Oklahoma	SLSF Rwy. Co.
Howe, Oklahoma	Rock Island Rwy. Co.

(b) Punch **IBM Demurrage** cards for the following stations;

Port Smith, Arkansas, Sallisaw, Oklahoma and Marble City, Oklahoma.

(c) Also, **punching** originating **IBM** Train Consist and Wheel Card for cars picked up by locals, operating in and out of Heavener, Oklahoma, i.e., Fort Smith Local, **Sallisaw** Local, FSVB, AW Local and South Local (five separate Locals).

(2) Carrier shall now compensate the following clerks and or their successor(s) for damages and damages to the **Agreement**, account of Carrier's violative action, on the following **basis**:

(a) C. E. Bain, Clerk, Heavener, Oklahoma, work week Monday through Friday, for five (5) hours and thirty (30) minutes at penalty (overtime) rate on April 17, 18, 19, 20, 21, 24, 25, 26, 27, 28; May 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31; June 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 1972. Claim is for dates listed and subsequent dates until violation is corrected and Carrier is to consider this as a continuous claim for C. E. Bain and/or his successor(s).

(b) T. H. Johnston, Clerk, Heavener, Oklahoma, work week Wednesday through Sunday, for five (5) hours and thirty (30) minutes at penalty (overtime) rate on April 19, 20, 21, 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31; June 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 1972. Claim is for dates listed and subsequent dates until violation is corrected and Carrier is to consider this as a continuous claim for T. H. Johnston and/or his successor(s).

(c) L. W. Strickland, Clerk, Heavener, Oklahoma, work week Thursday through Monday (a seven-day worked position with no regular assigned relief on Tuesday, and as incumbent, is proper claimant), for five (5) hours and thirty (30) minutes at penalty (overtime) rate on April 17, 18, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30; May 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30; June 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 1972. Claim is for dates listed and subsequent dates until violation is corrected and Carrier is to consider this as a continuous claim for L. W. Strickland and/or his successor(s).

(d) L. A. Huckabee, Relief Clerk, Heavener, Oklahoma, work week Saturday through Wednesday, for five (5) hours and thirty (30) minutes at penalty (overtime) rate on April 17, 18, 19, 22, 23, 24, 25, 26, 29, 30; May 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31; June 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 1972. Claim is for dates listed and subsequent dates until violation is corrected and Carrier is to consider this as a continuous claim for L. A. Ruckabee and/or his successor(s).

OPINION OF BOARD: **Employees** rely on **two** distinct contentions to support their claim. The **Employees'** first contention is that the Carrier violated and continues to violate the Scope **Rule** of the current Clerk's Agreement by requiring CTC **Operators(now titled Telegraphers-Clerks)** at Heavener, Oklahoma to use an IBM 1050 Machine installed in the **CTC** Section of the office to perform clerical work, which work was previously exclusively performed by clerks at Heavener, Oklahoma. The **Employees** second contention is that the Carrier's **actions** violated and continues to violate Article VIII of the Mediation Agreement, Case No. A-889, dated February 25, 1971, dealing with consolidation of Clerk-Telegrapher **work**. We consider each of these contentions separately below.

The contention of a Scope **Rule** violation. The **Employees** rely on Scope **Rule** 1(b) which reads as follows:

"(b) **Mechanical** devices used in the performance of work ordinarily performed by employees subject to the scope of this agreement will be operated by **employees** covered by said **agreement**."

The Clerks' **claim** that **Rule** 1(b) reserves to **employees** covered by the Clerks **Agreement** the operation of **mechanical** devices to perform work ordinarily performed by such **employees**, by a showing that by history, **custom** and practice such work has been performed by the Clerks and was being performed by the Clerks at the **time** the **Agreement** was consummated.

In Awards **19286** and **15857** this Board has already decided that the Scope **Rule** here in **question** is **general** in nature and does not reserve specific work. This **Board** has frequently held that where the Scope **Rule** is general in nature, the right to specified work **will** be reserved to the Organization if the work was by **history**, custom and tradition performed **exclusively** by the Organization; but, resort to history, custom and tradition **must be** system-wide, with the burden of proof through competent **evidence** upon the Petitioner. See Awards **19800, 19517, 14279, 13580, 12787, 11526, 8207**, among numerous other awards. The Petitioners in the case now before the **Board** have not alleged and certainly have not proven a system-wide practice that would support a claim under the above General Scope Rule Doctrine. Thus we must deny the claim based on Scope **Rule**.

Further support for denying the **Employees'** contentions based on the above-quoted Scope **Rule** may be found in **Award 19286**. In **19286**, dealing with the same Scope **Rule** and the **same** Carrier, the Clerks' contentions were denied. We quote from that opinion as follows:

"The Clerks, also filed a submission in this dispute **alleging** that the operation of the aforesaid **IBM** machines is work belonging to the Clerks.

The Clerks Scope Rule is very general **in** nature and does not define the work covered. We therefore **must** look to the work ordinarily performed by employees under the Scope of the Clerks' Agreement. In so doing we find that some of the work done on 1050 machines is generally done by Clerks while Telegraphers also operate the 1050 machines.

Carrier takes the position that 'while the work involved in this case is engaged in by Clerks represented by the **BRAC** it is not **exclusively** assigned to them.' In this assertion we concur."

On the **Employees'** contention that Article **VIII** of the **February 25, 1971** Mediation Agreement was violated by the Carrier's actions, Article VIII reads in part:

"ARTICLE VIII - CONSOLIDATION OF CLERK-TELEGRAPHER WORK

Section 1. At the option of a carrier (emphasis supplied) as provided in Section 2(a) hereof, and in order to permit a carrier to make work assignments interchangeable between Clerks and Telegraphers, the separate scope rules of the Clerks and Telegraphers agreements will be jointly applicable to all Clerk and Telegrapher **employees** after the procedures **in** Section 2 have been complied with. . . .

Section 2.

(a) Subsequent to the date of this Agreement a carrier desiring to **implement** the provisions **of** Section 1 of this **Agreement will** notify the General Chairmen **of** the Clerks and Telegraphers of its desire, designating which rosters it desires to combine.

Section 9. If a Carrier combines work **and/or** functions **performed** by clerks and telegraphers prior to the date seniority rosters **are** combined, with the purpose or effect of depriving an **employee** of benefits provided for under Sections 6 and 7 of this Article, the benefits of Sections 6 **and 7** of this Article shall apply to the employee as of the date when he is affected **by such combination, provided seniority** rosters are combined **under** this Article VIII. (Emphasis supplied).

The **Board** does not have the power to rewrite agreements. Article VIII, Section 1. states, "At the option of a carrier." The language is clear **and unequivocal**. This Board cannot **make mandatory** that which **in** the language of the parties is clearly optional.

Further **support**, other than the clear-cut language of Section 1, for the finding that Article VIII is optional, not mandatory, is **found** in Section 9. This section gives the remedy for a situation where a Carrier **combines** work prior to the date the seniority rosters are combined with the effect of depriving **employees** of certain benefits found in Sections 6 and 7 of Article VIII. The specified remedy of Section 9 is **inapplicable** however if the Carrier **combines** work under authority other than Article VIII, for a proviso to Section 9 allows for the Section 9 **remedy only** where "seniority rosters are combined under this **Article VIII**." It is clear from reading Section 9 coupled with Section 1 that the parties did not **intend** that Article VIII be the exclusive rule covering the **combina-**tion of work **involving** telegraphers and clerks. **Only** when a Carrier exercises its **option** to combine work under Article VIII **may** the Carrier be bound by Article VIII.

FINDINGS: The Third Division of the Adjustsent **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 tne **Agreements** were not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.

LABOR MEMBER'S DISSENT TO AWARD 20429
(DocketCL-20447)
(RefereeTwomey)

Award 20429 is palpably in error because it permits the Carrier to combine Clerks' and Telegraphers' work at its option without following the procedures set out in Article VIII. We have no quarrel that the clearcut language of Section 1 is optional and not mandatory; but if the Carrier constructively exercises this option, it must do so in accordance with the bargain it made. This was not done, and the Award is in error, I dissent.


J. C. Fletcher
10-4-74