

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

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

THE TEXAS MEXICAN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that

(a) The carrier violated the Clerk's Agreement when it used Mr. J. P. Hughes, a person holding no rights under the Clerk's Agreement to perform work of rechecking interline accounts settlements. Also

(b) Claim for all loss sustained by employees involved in or affected by the carrier's violation.

EMPLOYES' STATEMENT OF FACTS: On October 9, 1939 the Carrier entered into a contract with the Railway Interline Audit System for a recheck of the carrier's interline freight account settlements for the period November 1, 1936 to November 1, 1939. (Exhibit A.)

On November 2, 1939, the Brotherhood advised the carrier that the contracting out of this work was a violation of the Agreement between the carrier and the Brotherhood and that employees holding rights and working under the clerks agreement would have to be used for the recheck work.

From May 10, 1940 to May 17, 1940, both dates inclusive, a Mr. J. P. Hughes, an employe of the Railway Interline Audit System, was engaged to recheck the interline settlements of the carrier which work had theretofore been and is now being performed by the Rate Clerk working under the Clerk's Agreement.

During this period Mr. Hughes was unable to find any discrepancies of any kind. All recheck work prior to and since has been performed wholly by the Rate Clerk employed by the carrier and working under the Clerks' Agreement.

POSITION OF EMPLOYES: The following rules of our current agreement are applicable in this case.

Rule 1.

"These rules shall govern the hours of service, wages and working conditions of all the following employees, subject to the exceptions noted below:

(1) Clerks.

"Machine operators (such as typewriters, calculating machines, bookkeeping, accounting and statistical machines, dictaphones, key punch, teletype, and all other similar equipment.

interline freight account settlements for the period of time from November 1, 1936, to November 1, 1939, a true copy of said contract is designated as Carrier's Exhibit No. 1. On or about the 11th day of April, 1940, said contract was amended as shown by letter dated April 11, 1940, of Railway Interline Audit System to M. M. Leyendecker. A true and correct copy of said letter is designated as Carrier's Exhibit No. 2. A true and correct copy of M. M. Leyendecker's letter replying to the above letter is designated as Carrier's Exhibit No. 3. It is to be noted that the remuneration for the work to be performed by the Railway Interline Audit System is contingent upon its discovery of funds already lost to the Carrier, and that all of the work to be performed by said Railway Interline Audit System was the re-checking of work which the employees of the company had already done and re-checked once. In short, the Carrier contracted with the Interline Audit System for the purpose of having its records re-audited, without cost, and also to recover any money which may have been inadvertently overlooked in previous checking by the employees.

POSITION OF CARRIER: It is the position of the Carrier that this contract does not cover any of the work belonging to the clerks under their agreement with this Company. The clerks in the auditing department have assigned duties requiring eight hours each work day. Some of their assigned duties are to work up the interline freight settlements; they are also given time to recheck their work once done in this regard. Those are the duties of the clerks insofar as the interline accounts are concerned. Then under the contract of the Carrier with the Interline Audit System, an outside and disinterested auditor comes in and checks the work of the clerks outlined above. The clerks are deprived of none of their duties; they are deprived of none of their work. They lose nothing, because they have completed their duties and assignments in respect to the interline freight accounts. On the other hand, by this contract, the Carrier is afforded an opportunity, without cost, of recovering funds which may have been lost inadvertently by the clerks. In no sense, have the employees been damaged; and the Carrier has been benefited. It must be borne in mind also that the Interline Audit System is working on a contingent basis and they are paid only out of funds, if any, recovered by them and which funds, if recovered, otherwise would have been lost to the Carrier. The Audit System is not paid on a day or time basis; if no errors are discovered, it receives no compensation from the Carrier.

Looking at the entire situation from another angle, this point of argument arises. If the Carrier knew or felt that its employees checking the interline freight accounts were dishonest, and if the Carrier were unable to call in an outside auditing system, how could this dishonesty be uncovered? The Carrier does not question or even doubt the honesty of its present employees but simply advances this proposition as grounds for sustaining its position. To hold that this Carrier cannot employ an outside and disinterested auditing system, and on a contingent basis, would certainly be interfering with well recognized and experienced principles of sound business practice.

In short, it is the position of the Carrier that this independent contract takes none of the duties or work from the clerks, and that it merely carries out sound and well recognized business practices. It is submitted that neither the wording nor spirit of said contract violates the clerks' agreement.

OPINION OF BOARD: The facts in this case are not in dispute. The Carrier entered into a contract with the Railway Interline Audit System for a recheck of the carrier's interline freight account settlements. Payment was to be contingent on the amounts recovered by the Carrier.

The committee claims that the work called for by this contract was covered by the agreement between the employees and the carrier and that the performance of it by outside parties was a violation of the agreement.

It is well settled that work within the scope of an agreement belongs to those who are covered by the agreement and the carrier has no right to assign it to other employees or to outsiders. Awards 323, 360, 385, 425, 637, 751,

752, 753, 754, 757, 779, 1122, 1125, 1404, 1647. Rule 1 of the current agreement specifically recognizes this well recognized principle. But the mere calling attention to the doctrine does not settle the question before us.

This Board has held repeatedly that all clerical work is not covered by such an agreement as this, for in the nature of things much clerical work must be performed by other employes as an incident of their regular duties. Award 806. Only such work is included as is ordinarily performed by the employes filling the designated positions under the agreement. Award 1689.

The committee in this instance seeks a construction of this agreement which it seems to us is altogether too narrow. It says that there are only two questions to be determined:

- "1. Is the work performed by Mr. Hughes clerical work?
- "2. Does the Agreement between the Carrier and the Brotherhood cover clerical work?"

But there is much more to the problem than that. Such a restricted interpretation would among other things prevent the performance of even incidental clerical work by outsiders.

In applying the agreement to the facts of any particular case, it is the duty of this Board to give to the language used by the parties such permissible construction as will carry out the spirit of the agreement, and to avoid an interpretation which will produce a result clearly not within the contemplation of those who negotiated it.

The checking and rechecking ordinarily done by the clerical force of the carrier had been completed in this instance. There was no more work which they could do. There is nothing in the agreement which bars the railroad from contracting for an outside audit and such an audit after the work ordinarily performed by the regular employes is completed is not an infringement of their duties, even though it does of necessity involve the performance of clerical work.

In deciding whether certain work is covered by an agreement, there are many borderline cases. This, however, is not one. It seems clear to us that the agreement has not been violated.

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 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;

That the carrier has not violated the current agreement as claimed by the petitioners.

AWARD

Claim (a) denied.

Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division.

ATTEST: H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 19th day of May, 1942.