Award No. 2553
Docket No. CL-2526

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

(1) The carrier has violated and continues to violate its agreement with the Clerks' Organization when it removes routine daily yard clerical work from the scope and operation of working and wage agreements at the Kansas City Yard Office and permits the assigning of said duty and work to be performed by the Yardmasters at that point who hold no seniority rights under the Clerks' Agreement, and,

(2) That the Carrier shall be required by appropriate award and order to assign said clerical work to the clerical employes working under the scope and operation of the rules of the Clerks' Agreement, and,

(3) That the now assigned clerical employes adversely affected by the carrier's action shall be reimbursed for claims as filed with the carrier for one to five hours overtime on various dates since March 1940, and also that the 5:00 A. M. assigned yard clerk be compensated for three hours at overtime rate each day from February 3, 1941, account not being called to perform clerical work that was performed by the Night Yardmaster, except for period of 30 days from February 23, 1943 to March 23, 1943, when an additional clerical position existed with hours of service from 11:59 P. M. to 7:59 A. M.

EMPLOYES' STATEMENT OF FACTS: There exists at the Kansas City Yard Office five regular assigned clerical positions coming under the scope of the Clerks' Agreement with hours of assignment as follows:

12 midnite to 8:00 A. M.
5:00 A. M. to 1:00 P. M.
7:30 A. M. to 4:30 P. M. (12 noon to 1:00 P. M. meal period)
1:00 P. M. to 9:00 P. M.
3:30 P. M. to 11:30 P. M.

Also one regular assigned relief clerk to work the above assignments on the assigned incumbents' day of rest.

These five assignments during the 24 hour period have existed since March 1940 and at which time the General Chairman of the Clerks' Organization registered complaints and subsequently filed claims account violations of the

OPINION OF BOARD: Dockets CL-2374, CL-2379, CL-2400, CL-2425, MW-2367, CL-2526, CL-2527 and CL-2544 were initially deadlocked on the issue of giving notice to persons or organizations, other than parties to the disputes, whose interests may be affected by awards on the merits. The Carrier Members take the position that binding and conclusive awards can be rendered only after notice is given to all whose rights may be involved.

The question raised is not a new one to this Division. It has been exhaustively considered in at least five cases and adverted to in another. In two cases only has it been held that notice to other than parties to the dispute is a prerequisite to the rendition of a valid and binding award as between the parties. These are Awards Nos. 1193 and 1400. The first was a dispute involving seniority rights. Before hearing the dispute on the merits, the Board, sitting with a Referee, ordered notice to be given to the person whose seniority rights were challenged by the claim. In Award 1400 the claim was denied because parties whose rights would have been affected by its allowance had not been given notice. In the others—Awards Nos. 371, 844, 902 and 2253—decision on the merits was reached without notice to parties other than those to the dispute. In each of these cases, as in Awards Nos. 1193 and 1400, it was recognized that the dispute might involve rights of parties other than those of record. If there were such parties, the award, of course, would not be binding on them. But it was held that this did not affect the jurisdiction of the Board to entertain the dispute nor impair its power to render a binding and conclusive award as between the parties to it. This for the simple reason that neither the Statute (Section 3-j, The Railway Labor Act) nor the Rules of Procedure established by the Board require notice to parties other than those to the dispute.

Of course, the Carrier Members challenge this proposition. But it was so effectively maintained and established by analysis of the Statute in Awards Nos. 844, 902 and 2253 that it would seem no longer debatable. Indeed, as we read the Opinions in Awards Nos. 1193 and 1400, no attempt was made to refute the proposition that the Statute and Rules of Procedure set up by the Board require notice only to the parties to the dispute. In Award 1400 the Referee's remarks amounted to nothing more than advice to the Board with respect to Rules of Procedure. He undoubtedly acted within his power as referee when he joined the Carrier Members in denial of the claim. From the decision, however, it is very apparent that he was aware that, as referee, he could not trench upon the rule-making power vested in the Board. Section 3 (u), The Railway Labor Act.

In Award No. 1193, the Referee, in joining the Carrier Members in requiring notice to be given to a party other than those to the dispute, did trench upon the rule-making power of the Board. Not only that, he exceeded the power conferred upon referees by the Act, which is, "to sit with the Board as a member thereof and make an award."

However desirable a referee may think notice to parties other than those to the dispute would be, he cannot order it because the Statute and Rules of the Board do not require it. The limitation of the power of referees is epitomized in the memorandum of the referee attached to Award No. 902, reading:

> "Since, in my opinion, the Board has jurisdiction over the parties and power to make an award which will bind them, the question is not whether the Board may lawfully proceed to dispose of the case, but whether it ought to do so. While the rules of the Board provide for notice only to the parties, the Board could, if it wished, provide for notice to other persons who might be affected by awards. But whether the Board should do so or not is a question beyond the province of a referee. The Amended Railway Labor Act provides (U. S. C. A. Title

45, Sec. 153, First) that the Board shall 'adopt such rules as it deems necessary to control proceedings before the respective divisions * * *,' while a referee's function is 'to sit with the division as a member thereof and make an award.' "

We conclude that it is necessary to give notice of hearing only to the parties to the dispute.

This is a blanket claim which, but for the candid admission of fact, made by the carrier in its submission, would be without evidentiary support. It is urged in behalf of the carrier that the "burden of proof" is on the organization and that the claim should be dismissed because it has failed to adduce any evidence in support of it. Although the burden of proof may be on a party to establish a fact, he does not have to adduce evidence to establish a fact which his adversary admits. The claim is based on the assertion that yardmasters perform clerical work falling within the scope of the Clerks' Agreement. The carrier admits that yardmasters perform clerical work. It denies, however, that the work falls within the scope of the agreement because: (1) the clerical work which is the subject of controversy "is nothing more than similar work they (yardmasters) have performed for more than forty years in the Kansas City yard"; (2) the work in controversy is incidental to the duties of yardmasters; (3) "that it is permissible to assign certain clerical work to other than clerks provided it does not exceed four hours per day. . . ."

We think none of these contentions are tenable. First. The assignment of work, falling within the scope of an agreement, to employes not covered by the agreement cannot be justified by long continued practice. See Awards 180, 425, 458. The best evidence that the work in controversy falls within the scope of the Clerks' agreement is that the work is performed by clerks up to the capacity of the clerical staff on duty. The reason that a limited amount of the work is performed by yardmasters is either due to insufficient clerical help or reluctance on the part of the carrier to call upon employes, covered by the agreement, for overtime service. Second. By the same token it is apparent that the work is not incidental to duties of the position of yardmaster. Third. Rule 2 (a) defines clerical workers as "Employes who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records. . . ." etc.

It has been repeatedly held by this Division that the rule of itself does not justify the carrier in assigning clerical work of less than four hours' duration to employes not covered by the agreement. Awards Nos. 458, 751, 754, 1551. In Award No. 754 it was said:

> "The four hour rule relied on by the carrier has no application; it is simply a line of demarcation between two classes of employes both within the agreement and not a limitation on the scope of the agreement."

Notwithstanding these decisions, the carrier argues that the following interpretation of Rule 2, contained in the controlling agreement, supports its contention:

> "INTERPRETATION: It is not the intent of this rule to permit assignment of clerical work occurring in the spread of eight hours to **more than one position not classified as a clerk** for the purpose of keeping the time devoted to such work, by any one employe below four hours per day." (Emphasis added.)

We think it is apparent that the interpretation was an attempt to state the principle laid down in the awards cited and as expressed in Award No. 754. Since the work in controversy falls within the scope rule of the agreement the carrier was and is obligated to call upon employes, who are covered by the agreement, to perform it.

The claimants are entitled to reparation, in accordance with the provisions of Rule 40, as for calls on the days, covered by the claims referred to in the carrier's submission, when clerical work was performed by yardmasters.

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; and

That the carrier violated the agreement.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of April, 1944.