

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

CENTRAL OF GEORGIA RAILWAY COMPANY

(M. P. Calloway, Trustee)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier is violating the Clerks' Agreement of November 15, 1926, by permitting or requiring Janitor Dolph Lester to perform clerical duties as hereinafter listed, and that therefore,

(1) This work shall be restored to the scope of the Clerks' Agreement and assigned to employees in accordance with the rules thereof, and that,

(2) All employees involved in or affected by said violation of agreement shall be compensated in full for any monetary loss resulting from the Carrier's action retroactive to April 5, 1941.

EMPLOYES' STATEMENT OF FACTS: On April 5, 1941, Local Chairman Mr. L. S. McLeroy filed a letter of protest with Freight Agent Mr. H. Riley, Atlanta Freight Agency, Atlanta, Ga. against performance of clerical work by Janitor Dolph Lester, copy of which is shown as Exhibit "A."

The clerical work referred to in the above is listed as follows:—

1. Trip to and from Terminal Station to get mail, which consumes at least fifteen (15) minutes in A. M., usually about 8:30 A. M.
2. Opens and stamps all incoming mail, which consumes at least ten (10) minutes or from 8:30 to 8:40 A. M.
3. Second trip to Terminal Station to carry mail for Train No. 2, which consumes at least ten (10) minutes or from 8:40 to 8:50 A. M.
4. Fills orders for stationery and supply room, which consumes at least twenty (20) minutes or from 8:50 to 9:10 A. M.
5. Binds various files and records and pads forms with carbon paper, which consumes at least one hour or from 10:00 A. M. to 11:00 A. M.
6. Padding carbon and work in storeroom, which consumes at least one (1) hour or from 1:00 P. M. to 2:00 P. M.
7. Copying form 195 on Hectograph Machine one (1) hour or from 4:00 P. M. to 5:00 P. M.
8. Copying on Hectograph Machine forms 60 and 61 (Passing reports mailed to various Commercial Agents and Offices) and running Mimeograph Machine, which consumes two (2) hours or from 2:00 P. M. to 4:00 P. M.

There is also in effect a "MEMORANDUM OF AGREEMENT" in connection with the above agreement, which was executed on the same day (November 10, 1941) and which reads as follows:

"Memorandum of Agreement between the Central of Georgia Railway Company, H. D. Pollard, Trustee, and the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees.

"It is agreed and understood that all positions now held by colored employees will be filled only by colored employees.

"It is agreed and understood that the present rates of pay and working conditions now in effect with red caps will be continued, subject to the provisions of the amended Railway Labor Act.

"It is understood and agreed that unassigned, extra or floating gang labor on the Savannah docks and wharves will be paid time and one-half when required to work outside of established working hours.

ACCEPTED FOR

CENTRAL OF GEORGIA
RAILWAY COMPANY
H. D. Pollard, Trustee

BROTHERHOOD OF
RAILWAY & STEAMSHIP
CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION
EMPLOYEES

(s) R. R. Cumming
General Manager

(s) B. H. Clegg
General Chairman"

POSITION OF CARRIER: There has been no violation of either the Clerks' Agreement, effective November 15, 1926, or that covering Miscellaneous Employees, effective December 1, 1941.

The work claimed by the Employees as being clerical work is not clerical work, but that which is usually done by janitors and porters employed not only by railroads but all other lines of business, and by all other janitors and porters employed in its stations and General Offices of this Carrier.

The work assigned to the position of Porter in the Atlanta Agency, occupied by Dolph Lester (colored), is properly assigned, and has been over a period of 23 years.

The first paragraph of "MEMORANDUM OF AGREEMENT" executed November 10, 1941, in connection with Agreement covering Miscellaneous Employees, and effective December 1, 1941, reading—

"It is agreed and understood that all positions now held by colored employees will be filled only by colored employees."

was insisted upon by the Carrier to protect the positions and assignments of its colored employees, and was readily agreed to by the Committee executing the agreement.

The Carrier contends that were it to allow this claim, it would violate the terms of this "MEMORANDUM OF AGREEMENT."

There is no merit whatever in this claim, and it should be denied.

OPINION OF BOARD: There is in evidence an Agreement, effective November 15, 1926, the scope of which, exclusive of certain exceptions not here pertinent, is as follows:

"Rule 1. EMPLOYEES AFFECTED

"These rules shall govern the hours of service and working conditions of the following employees, subject to exceptions noted below: Clerks, Warehouse Foremen, Office Boys, Messengers, Chore Boys,

Checkers, Baggage and Parcel Room Clerks, Train and Engine Crew Callers, and Operators of Office and Station Equipment Devices."

Rules 3 and 71 of said Agreement read:

"Rule 3. DEFINITION OF CLERK

"All employees who are required to do clerical work or office duties of any nature in any department, station or office shall be considered clerks within the meaning of this schedule."

"Rule 71. EXISTING AGREEMENTS

"The rules of this agreement shall supersede and be substituted for all rules of existing agreements, practices and working conditions."

Subsequently, the parties entered into another Agreement, bearing effective date of December 1, 1941, with a scope rule reading:

"These rules shall govern the hours of service, rates of pay and working conditions of the following employees: Laborers employed in and around stations, storhouses and warehouses, including freight handlers, baggage and mail handlers, office and station janitors and porters, red caps, elevator operators, maids, cleaners (other than in Mechanical or Roadway Departments), and those performing other similar work."

There is also before us a Memorandum of Agreement, dated November 10, 1941, which contains the following provision:

"It is agreed and understood that all positions now held by colored employees will be filled only by colored employees."

The first question for our determination is whether the claimant, employed at the Atlanta Freight Agency, should be classified as a clerk under the Agreement of 1926 or as a janitor under the Agreement of 1941. To avoid any immaterial controversy as to the nature of the duties performed by the claimant, which the petitioner claims were clerical, we accept, for the purposes of this opinion, the carrier's statement thereof:

- "1. Going to and from Terminal Station to carry mail.
2. Opening and stamping incoming mail.
3. Second trip to Terminal Station to carry mail.
4. Filing orders from supply room.
5. Binding various files and records.
6. Padding carbon and work in storeroom.
- [7. Copying on Hectograph machine."
- 8.

The carrier's submission further discloses that claimant's regular hours were from 6:30 A. M. to 4:30 P. M. on week days and from 7:00 A. M. to 11:00 A. M. on Sundays; and that he devoted 4½ hours on each week day, 15 minutes on Sunday and, in addition thereto, 30 minutes each week and one hour each three months to the performance of the alleged clerical duties above described.

As this Board said in Award 806, "there are few, if any, employees of a carrier, from the president down to the laborer, who does not perform some clerical work in connection with his regularly assigned duties." Manifestly, therefore, the scope rule of the Agreement of 1926 and the definition of a clerk contained in Rule 3 thereof are not to be interpreted as having any such narrow and meticulous meaning. To hold that a janitor should be classified as a clerk merely because he incidentally performs some functions that might, technically, be deemed of a clerical character would defeat the purposes of both Agreements with which we are concerned. Fortunately, we have here a practical and efficient yardstick for determining the claimant's

proper classification. More than half of his working time is devoted to the duties upon which that issue is to be resolved. The parties agree that he is either a clerk under the Agreement of 1926 or a janitor under that of 1941. It only remains for us to fit his admitted duties into the appropriate scope rule.

We have no hesitancy in expressing the opinion that carrying, opening and stamping mail, filing orders, binding files and records, padding carbon, and operating a Hectograph machine, fall more naturally and logically within the category of the duties of clerks, office boys, messengers, chore boys, and operators of office equipment, than within those enumerated in the scope rule of the 1941 Agreement, heretofore quoted in full. The fact that the position occupied by the claimant carried the title of "janitor" is of no consequence, one way or the other. It is the character of the work actually performed that is controlling. For an exhaustive discussion of that subject see Award 1314; also Award 2091.

The carrier concedes that the Memorandum of November 10, 1941, providing that "all positions now held by colored employes will be filled only by colored employes," is supplemental to the Agreement which became effective December 1, 1941, and we have already determined that the claimant's rights are fixed by the Agreement of 1926. It follows that said Memorandum has no bearing on this case.

Finally, it is asserted on behalf of the carrier that the claimant acquiesced in the performance of the same duties for 24 years without protest. Rule 71 of effective Agreement of November 15, 1926, wrote out all "existing . . . practices and working conditions," and substituted specific rules in lieu thereof. The continuing violation of a rule will not change or diminish its binding effect, though acquiescence in respect to such conduct may estop the claimant from recovering for the period prior to the time when said violation was called to the attention of the carrier. The petitioner is requesting only that the position be classified, rated, and the current agreement applied as of April 5, 1941, when it called the carrier's attention to the violation. This conforms to the established practice. Award 1518.

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 applicable agreement as contended by the petitioner.

AWARD

Claim (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of July, 1944.