Award No. 3825
Docket No. CL-3853

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Clerk G. W. Bechtol be paid eight hours at punitive rates due to Yard Master performing certain clerical work on January 8th, 15th, February 12th, 19th and 26th, 1945. (Docket W-365)

EMPLOYES' STATEMENT OF FACTS: The claimant, G. W. Bechtol, is regularly assigned to clerical position B-49-G, Lincoln Yard, Detroit, Michigan, rate of pay $217.96 per month, advertised to work 7:00 A. M. to 4:00 P. M. (one hour for lunch) with relief day Monday. This position is a "seven day" position, the occupant of which is necessary to the continuous operation of the carrier.

An extra list of one employe is established at Lincoln Yard to fill vacancies in that territory, under the terms of the Rules Agreement of May 1st, 1942. The extra employe was on duty on the dates involved in this claim filling clerical positions B-49-G and B-52-G, therefore, was not available to perform the work claimed except within the tour of duty of the positions he was filling.

The Yard Master performed certain clerical duties, ordinarily performed by and assigned to the incumbent of clerical position B-49-G, on the dates in question, the character of which consisted of "side-carded inbound road trains, checked hold track, checked industries by auto, delivered and received bills from Wabash Railway, answered 'phone in connection with tracing cars and answering inquiries from patrons." Because of this claim was made as indicated in the Statement of Claim and was denied by the carrier. No other claims were filed.

There is in evidence a Rules Agreement between the parties bearing effective date of May 1st, 1942, which is on file with your Board.

POSITION OF EMPLOYES: This dispute involves the application of the Agreement between the Carrier and the Brotherhood regarding the proper assignment of clerical work.

The scope of the Agreement provides in part as follows:

"These Rules shall constitute an Agreement between The Pennsylvania Railroad Company and its employes of the classifications herein set forth as represented by the Brotherhood of Railway

(e) When employes paid on a tonnage or piece work basis are to be allowed compensation on the basis of time and one-half under the provisions of this Rule (4-A-6) the compensation allowed will be calculated in accordance with the provisions of Rule 4-A-1 (d)."

Assuming that the Yard Master had performed work which is covered by the Scope of the Agreement and that the Claimant was entitled to be called for such work, the only penalty, under the applicable Agreement, that could be assessed against the Carrier is that provided in Rule 4-A-6 quoted above, i. e., a minimum of three hours' pay at the pro-rata rate. However, as the Carrier has pointed out, none of this work accrues exclusively to clerks and, therefore, the Claimant is not entitled to the compensation claimed.

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement Between the Parties and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreements between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that under the applicable Agreement the parties to this dispute that the work performed by the Yard Master at Lincoln Yard between the hours of 8:00 A. M. and 4:00 P. M. on the dates in question was incidental to the performance of his supervisory duties as such, and was not work which accrued exclusively to the clerical forces, of which craft the Claimant was a member and, therefore, no violation of the Agreement occurred.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This Docket presents the claim of G. W. Bechtol, first trick Clerk, for 8 hours at overtime rate for each of five certain days in January and February, 1945, on which days the first trick Yardmaster performed certain clerical duties. Each of the days in question was a regularly assigned relief day of claimant and his position was then being filled by the one Clerk on the extra list in that Yard.

The Organization contends that the duties performed by the Yardmaster come within the Scope of the Agreement covering clerical employes and that the Claimant should have been called on each of said relief days to perform the work in question.

The Carrier, on the other hand, contends that the work done by the Yardmaster was incidental to his supervisory duties and was not work that belonged exclusively to the Clerks.

In support of its contention the Carrier relies on Rule 3-C-2 of the Agreement which provides that:

> "When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:"
>
> (1) To another position or positions covered by the Agreement if any remain at the place where the work of the abolished position is to be performed.
>
> (2) Where no position covered by the Agreement exists where such work is to be performed then such work may be performed by a Yardmaster if
>
> (a) less than four hours work per day of such abolished position remains to be performed, and
>
> (b) if such work is incident to the duties of the Yardmaster."

The Scope Rule of this Agreement covers all clerical work, as there defined, "except as provided in Rule 3-C-2."

Rule 3-C-2 clearly only provides that employes not covered by the Agreement may perform clerical work incident to their positions when it is work previously assigned to a clerical position which has been abolished.

The parties agree that the work done by the Yardmaster here was not "work previously assigned to" a clerical position which had been abolished.

While there have been some awards of this Board holding that the performance of some clerical duties by others than Clerks, where such duties were incidental to the positions of the persons performing them, did not constitute a violation of the Clerks' Agreement, such Awards were based on general Scope Rules which contained no exceptions. Here the Scope Rule has the one expressed exception—as to "work previously assigned" to a position which has been abolished.

One expressed exception to a provision in a contract negatives the intention of the parties that there should be any other exceptions implied. This rule of construction was recognized by this Board in Award No. 2009.

In the Employes' Rebuttal Brief the Organization contends that "this very work" was "assigned by the Carrier in its own bulletins advertising clerical positions at this point" and "is work performed daily by clerks."

The Carrier by relying on Rule 3-C-2 recognized the work as clerical work, since that Rule covers only the disposition of work which has been assigned to clerical positions.

The Carrier insists that even if there was a violation of the Agreement it was the Extra Clerk who was filling the position on the days in question who was entitled to the extra work performed by the Yardmaster.

The Carrier, however, points out that under the applicable Rule of the Agreement any possible claim by the Extra Clerk is now barred by lapse of time. Rule 7-B-1.

Award No. 2282 holds that if it is shown that the Carrier has violated the Agreement by assigning work covered by the Agreement to employes not covered by the Agreement, the Claimant need not prove that he would have been given the work if it had not been assigned to an employe outside of the Agreement.

The record here contains no evidence as to how much time was consumed by the Yardmaster in performing this work. We therefore find no justification for allowing Claimant more than the three hours minimum pro-

vided by Rule 4-A-6 for regularly assigned employes notified or called to perform work between their regular work periods.

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 as claimed.

AWARD

The claim is sustained as to three hours pay at pro rata rate for each of the five days in question.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of March, 1948.

DISSENT TO AWARD 3825, DOCKET CL-3853

In the paragraph of the Opinion of Board, second following the recitation of provisions of Rule 3-C-2, the word "only" was placed selectively by the Referee rendering the Award to insure that the statement of that paragraph may not be read other than as stated that "Rule 3-C-2 clearly only provides that employes not covered by the Agreement may perform clerical work incident to their positions when it is work previously assigned to a clerical position which has been abolished." (Underscoring added.)

This but emphasizes that which is stated in the next following paragraph of the "Opinion of Board" that "the work done by the Yardmaster here was not 'work previously assigned to' a clerical position which has been abolished", and accordingly it is evident that Rule 3-C-2 by the Award in this case does not cover the situation presented by this dispute. In fact, the Referee orally explained that the violation which the Award found was a violation of the Scope Rule.

In thus finding, the Award holds contrary to the many awards of this Board dealing with the right of Yardmasters to perform clerical duties incident to their positions under circumstances of such analogy as should have controlled in the instant case.

The Opinion, having discarded the exception to the Scope Rule represented by Rule 3-C-2, does not give justification for an award contrary to the holdings of prior awards in analogous cases.

/s/ C. C. Cook
/s/ A. H. Jones
/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan