

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

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

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:

(1) The carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) violated and continues to violate its several agreements with the organization when on May 1, 1943, after due notice it failed and refused to assign to positions covered by the said agreements, incidental clerical work, then and now performed at Altus, Oklahoma, by the Agent-Yardmaster, the so-called Telegrapher-Cashier and the so-called Telegrapher-Clerk; and

(2) That the carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) refused and continues to refuse to classify and restore the work to the scope and operation of the clerical agreement; and

(3) That the carrier (Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas) shall now be required by an appropriate award and order of the Board to:

(a) Recreate the position of Chief Clerk—rate \$7.10 per day, and

(b) Recreate the position of Cashier—rate \$6.60 per day, and

assigned to the said positions and restore to the scope and operation of all the agreements and rules extant between the respective parties, all of the incidental clerical work, as set forth in the Statement of Fact, there to remain until removed therefrom by the proper processes set forth in the agreement (Rule 78) and the Railway Labor Act—1934—amended; and

(4) That the said positions of Chief Clerk and Cashier be advertised and assigned under the appropriate rules of the agreement as of May 1, 1943, and that any and all other employees adversely affected by the illegal and unlawful act of the carrier in assigning the said work and duties to positions and or persons not covered by the clerical agreement, shall be reimbursed for all their money losses.

Carrier's Reply to "Petitioner's Supplementary Rebuttal to Carrier's Answer in Docket CL-2544, Award 2597," and

Carrier's Detailed Reply to "Employes' Rebuttal Statement Answer in Docket CL-2544, Award 2597."

The carrier hereby incorporates in and makes a part hereof Award 2597 and pertinent parts of Award 2596 referred to in Award 2597 and all defenses which may grow out of or arise from said awards.

Except as expressly admitted herein, the Carrier denies each and every, all and singular the allegations contained in all of the organization's and the employes' submissions of any kind or character submitted, or to be submitted in Docket CL-2544, Award 2597, or in this action, and respectfully requests that the Petitioner be placed on strict proof of any and all allegations contained in said submissions.

(Exhibits not reproduced.)

OPINION OF BOARD: The ultimate question for decision in this claim is whether Carrier has improperly assigned work comprehended by the Clerks' Agreement to employes covered by the Telegraphers' Agreement. Petitioner asks that two positions under the Clerks' Agreement which were abolished by Carrier be recreated, and the clerical work now being performed by employes covered by the Telegraphers' Agreement be restored to the newly created positions.

However, before discussing the merits of the claim we must dispose of some procedural objections which will require a brief account of the history of this claim which was before the Board at a previous submission.

This same claim was previously filed with the Board on September 8, 1943, and a decision was rendered on June 1, 1944 in Award No. 2597. It is Carrier's first contention that this award finally disposed of the controversy, and is thus binding on Petitioner. By the award the claim was dismissed "without prejudice" for the reasons stated in Award 2596 written by the same referee, involving the identical issues, and which was also dismissed "without prejudice."

The claim in Award 2596 was also filed by the Clerks but against a different Carrier. The dispute was over the same contention that work was removed from the Clerks' Agreement and assigned to Telegraphers. The opinion pointed out that the Telegraphers' Organization had a vital interest in the decision of that claim, so vital, in fact, it had sought to intervene, unsuccessfully, as a party to that claim but was not permitted to do so because the right to intervene was not provided for either by the Railway Labor Act or the Rules of Procedure set up by the Board pursuant thereto. The opinion then stated that to sustain that claim would deprive the Telegraphers' Organization of substantial rights without giving them an opportunity to be heard. The opinion finally quoted from Award 1400 to the effect that in disputes involving the question of which of two crafts is entitled under contractual rights to the work in question, as a matter of fairness both crafts should have the opportunity to be heard. The opinion concluded with the quotation: "No such claim should be sustained without granting a hearing to the craft which will lose as well as the one which will gain by the wanted decision." The opinion nowhere discussed, and clearly refused to decide, the merits of the claim. We presume this was for the apparent reason that the Telegraphers' Organization was not a party to the claim, although the opinion recognized and even stated it had no legal right to intervene. Perhaps it was the thought of the Referee that the question of intervention should be thrashed out in court. This was later done. But whatever the Referee's reason was, his purpose to make no decision on the merits is clearly ascertainable from the opinion and doubly so from the award of dismissal "without prejudice." The Referee, a judge of a State Supreme Court, well knew the significance of that order. Its meaning is clear and has been uniformly established.

The order of dismissal "without prejudice" is used for the purpose of showing no decision on the merits of the controversy has been reached or made. It is an order intended to prevent the very contention Carrier is making here, namely that Petitioner is barred from again making the very same claim that was there presented. Such an order preserves to a petitioner the right to file another claim on the same dispute. The courts have said: "The words 'without prejudice' merely indicate that the suit is dismissed without a decision on the merits." *People ex rel. Waite v. Bristow*, 391 Ill. 101. "Dismissal of a suit 'without prejudice' simply operates to prevent the dismissal from barring any new suit which plaintiff might thereafter desire to bring on the same cause of action." *Williams v. Mid-South Paving Co.*, 25 So. (2d) 792. Applying such rule to the claim here we must hold that the dismissal without prejudice of this claim by Award 2597 does not bar Petitioner from refileing it and having it decided on the merits.

But Carrier argues in effect that the Board had no authority under the Railway Labor Act to enter such an order so that the words "without prejudice" are mere surplusage. It relies on Section 3(m) which provides that awards of the various divisions of the Board "shall be final and binding upon both parties to the dispute." It contends that since the claim was fully submitted and heard that the decision was one upon the merits. By this latter contention it recognizes, as it must, that awards to be final and binding must be those which are rendered on the merits, or are given such effect by law, otherwise they would not be valid for constitutional reasons. Had the Referee by Award 2597 intended to decide the claim on its merits against Petitioner it would have been unnecessary to include in the award the extended discussion about Telegraphers not being a party to the claim. We are cited no provision of the Railway Labor Act or rule of the Board which denies the Board the authority to dismiss a claim "without prejudice."

Since Award 2597 was rendered, a court test has been had of the right of the Telegraphers to intervene in a claim instituted by the Clerks and pending before this Board, in which the Clerks contended certain work comprehended under its agreement was assigned to Telegraphers. On this question the court said: "The Act authorizes the Board to interpret and to apply the collective bargaining contracts of the craft in controversies between the crafts and the carriers involving the contracts; but it is given no authority to pass on disputes between the crafts." Thus the Court announced the rule that such right of intervention before this Board, as was claimed by the Telegraphers, was not authorized by law. See *ORT. v. NOTM. Ry. Co.*, 156 F. (2d) 1. Application for certiorari to review this decision was denied by the United States Supreme Court. 329 U. S. 758. It is significant that the Court in that case found it involved an identical issue considered in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, where the United States Supreme Court said: "For O.R.C.'s agreement with the railroad must be read in the light of others between the railroad and the B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood." So we find that even though we may consider another agreement in determining what is the established usage and custom, the party who made that other agreement may not intervene. That issue is thus settled. The case of *D. & H. R. Corp. v. Williams*, 129 F. (2d) 11 involved a different situation so that its decision is not apposite here.

The next question is whether Award 615 authorizes the Carrier generally to remove work from under the Clerks' Agreement so long as it assigns such work to Telegraphers. If Award 615 can be said to permit such a practice, it announces an exception to a rule well established by a number of awards. See Award 2071. Award 615 stresses throughout in general language "limitations" on the exclusive right of clerks to perform clerical duties. For example, it mentions that at one-man non-telegraph stations the agent is expressly incorporated in the Telegraphers' Agreement. No doubt there may be exceptions to the Clerks' right to clerical work have become established by established custom and usage. But there is no longer the stated exception included in the Clerks' scope rule as originally promulgated by the United States Railroad Administration expressly "excepting such (clerical duties) as come within

the scope of working agreements or those hereafter negotiated with the railroad telegraphers." This exception was cited and relied on by the author of Award 615, although it had been previously deleted from the Clerks' Agreement and was not included in the agreement considered in ruling that award. In Award 2071 we criticized this action, and pointed out that a later agreement which has eliminated an express exception should not be interpreted the same as a previous one containing that exception. And in Award 636 the same author of Award 615 remarks that the latter award was stated in broad language but should be understood with reference to the precise situation there presented. In our opinion Award 615 does not authorize a Carrier to remove at will work from the Clerks' Agreement and assign it to Telegraphers. This may be done only when permitted by agreement or in those specific instances established by long custom and usage as to be considered proper exceptions to the Clerks' Agreement.

We now turn to the facts of this dispute. We find the parties herein agreed upon the rate for each individual position covered by their Agreement in Addenda No. 4 effective January 1, 1929. It listed the following clerical positions at Altus: General Clerk, Warehouse Foreman, Clerk, Trucker, Chief Clerk, Cashier, Trucker.

Similar positions at Altus were listed in Addenda No. 2, effective December 16, 1923, and were carried over into Addenda No. 3. So it is evident that for a number of years employees under the Clerks' Agreement were performing the clerical work at Altus. However, Addendum No. 5, effective August 1, 1937, showed the clerical positions reduced to two, Warehouse Foreman, and Clerk. But that Addendum contained this agreement:

"In the event it becomes necessary to create additional or other positions not specifically provided for in the attachments, such positions shall be created under the provisions of rule 68 of said agreement (Clerks' Agreement effective August 1, 1935) which reads as follows:

"The wages for new positions shall be in conformity with wages for positions of similar kind or class in the seniority district where created."

The abolishment of the positions at Altus has long been protested by the Petitioner and resulted in the filing of this claim. Petitioner asked Carrier to join in a check of the work performed at Altus, and upon Carrier's refusal made its own check in April, 1943, the results of which appear to be undisputed. It showed three Clerks' positions at Altus as against seven in 1929. It also showed three positions not covered by the Clerks' Agreement, namely, Agent-Yardmaster, Telegrapher-Cashier, and Telegrapher-Clerk, all with day-time hours. The Agent-Yardmaster performed no telegraphic duties. The Telegrapher-Clerk performed telegraphic duties at Welon Yard for thirty minutes each day. Welon Yard is 1.7 miles distant from Altus where that employee performed the clerical duties. The check further showed that the three employees covered by the Telegraphers' Agreement daily performed sixteen hours and fifteen minutes of clerical work. This is more than the work Petitioner is seeking to recover by the establishment of the two clerical positions.

It appears clear to us that Carrier has improperly assigned work comprehended under the Clerks' Agreement to employees not covered by the Agreement. Carrier may not justify its removal of the work from the Clerks' Agreement because it assigned such work to Telegraphers. The record shows clerks performing the clerical work at Altus at least since 1923. There is nothing in the Clerks' Agreement which authorizes Carrier to remove work therefrom and assign it to Telegraphers, and we find no evidence of established usage and custom in this case which would warrant the performance of such clerical work at Altus by Telegraphers. It is interesting to note that in Award 636 the referee who also was the author of Award 615 condemned the performance of clerical work by a telegrapher at a point a mile distant from where he performed his telegraphic duties, similar to the situation we have here in the position of Telegrapher-Clerk.

While it appears clear to us that Carrier has violated the agreement which requires an award sustaining the claim, still we are not disposed, in view of the long delay in arriving at its final disposition which delay is not attributable to any fault of the Carrier, now to sustain item 4 of the claim for penalties retroactive to May 1, 1943. Carrier's opposition to this claim was excusable under Award 615 as it had been previously construed, and Carrier may not be charged with the delay caused by the dismissal of this claim without prejudice by Award 2597. The other items of the claim must be sustained.

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 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 Carrier violated the agreement.

AWARD

Claims 1, 2 and 3 sustained.

Claim 4 denied as to compensation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of June, 1948.

DISSENT TO AWARD 3932, DOCKET CL-3714
DISSENT TO AWARD 3933, DOCKET CL-3715
DISSENT TO AWARD 3934, DOCKET CL-3716

This opinion and award disregarded the clear intent and purpose of the Agreements in effect, and the practices and customs of long standing under said Agreements. Practical consideration of the record in that respect will point out the error of this award. As reliance is placed on Award 2071, attention is directed to dissent to that award and by reference thereto is made a part of this dissent.

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

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 3932

DOCKET NO. CL-3714

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

NAME OF CARRIER: Missouri-Kansas-Texas Railroad Company
Missouri-Kansas-Texas Railroad Company of Texas.

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

For the proper understanding of the meaning and effect of an Opinion and Award, they must be read in the light of these elements: 1. The claim as stated; 2. The facts presented by the record in support of and in opposition to the claim; and 3. The issues and contentions raised by the parties under such facts.

The claim upon which the Award was made was stated in four counts. Briefly they were:

1. That clerical work was being performed at Altus, Oklahoma, by certain employes covered by the Telegraphers' Agreement, and that Carrier refused to assign such work to clerks to whom it properly belonged, in violation of the Clerks' Agreement. (While the claim specifies "incidental clerical work" it was clearly understood by both parties that clerical work as described by the Scope Rule was meant.)

2. That Carrier refused to restore such clerical work to the Clerks.

3. That Carrier be ordered to recreate at Altus two positions—Chief Clerk and Cashier—and to restore the clerical work in question to such positions.

4. That Carrier be ordered to advertise and assign such positions as provided by the Clerks' Agreement, and with retroactive penalties.

The Award sustained Claims 1, 2 and 3; and denied Claim 4 as to the penalties only.

The facts in the record which were not apparently disputed showed in minute detail the various items of clerical work which were being performed at Altus by the employes under the Telegraphers' Agreement, and claimed by the Clerks. This work required sixteen hours and fifteen minutes per day for its performance. Carrier's chief contention was that long established custom and usage authorized it to assign such work to the employes covered by the Telegraphers' Agreement.

The Award ruled in effect:

1. That the clerical work in question should have been assigned to positions under the Clerks' Agreement, and Carrier violated such Agreement by

permitting the three employees under the Telegraphers' Agreement at Altus to perform it.

2. That Carrier improperly refused to restore such work to the Clerks.

3. That Carrier was ordered to recreate the positions of Chief Clerk and of Cashier at Altus, and to restore such work to those positions.

4. That Carrier was ordered to advertise and assign such positions to Clerks, but without liability for retroactive penalties.

It now appears that Carrier has only partially complied with the Award. In obedience to the Award it has recreated the position of Cashier under the Clerks' Agreement. But it has failed to recreate the position of Chief Clerk under such Agreement. It still permits part of the clerical work in question to be performed by employees covered by the Telegraphers' Agreement.

The Award is clear, definite and unambiguous. We find no valid reason for Carrier not to fully comply with the Award. It should recreate the position of Chief Clerk and assign the clerical work in question to such position.

Carrier is attempting at this time to reargue procedural issues previously raised as well as the merits of the claim. All these matters were finally settled and determined by the Opinion against the contentions of Carrier. We do not find it is the purpose of an interpretation to reconsider matters which were definitely and clearly disposed of by the Opinion. The Opinion expressly states, "... and we find no evidence of established usage and custom in this case which would warrant the performance of such clerical work at Altus by Telegraphers." Thus the contention that by established usage and custom Carrier was authorized to assign the clerical work in question to Telegraphers was ruled against Carrier and in favor of the Clerks. The Opinion points out that previously such clerical work had been assigned to Clerks, and under Addendum No. 5 Carrier had agreed, in effect, to assign such work arising in the future to the Clerks.

The Opinion and Award were based on the facts contained in the record as presented to the Division. Those facts were found to support the claim that the position of Chief Clerk should be recreated.

A subsequent change in the circumstances will not authorize a party on its own determination to violate an Award of the Division. The Award should be obeyed even if it should be a fact that because of changed conditions the business done at Altus may not now warrant such a position. When changes occur subsequent to the situation on which an Award is based, Carrier should proceed subject to the terms and requirements of the Agreement in making such readjustments as are proper under the changed conditions. In the meantime, however, Carrier must comply with the Award unless the matter is amicably settled by mutual agreement of both parties.

Referee James M. Douglas, who sat with the Division as a member when Award 3932 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of December, 1949.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 3932

DOCKET NO. CL-3714

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Em-
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NAME OF CARRIER: Missouri-Kansas-Texas Railroad Company
Missouri-Kansas-Texas Railroad Company of
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By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of December, 1949.