Award No. 5579
Docket No. CL-5510

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on September 3, October 29, November 5, 13, 19 and 26, 1949, and each succeeding Saturday, except during the period September 9 to on or about October 24, when the Railroad was inoperative due to the strike of the running crafts, until July 1, 1950, it removed the work of handling mail and baggage on and off passenger trains arriving at Collinston, Louisiana during the hours 5 P. M. to 9 P. M.; 10 P. M. to 2 A. M., the assigned hours of Clerk J. N. Fontenot Monday through Friday, also the work of calling the third brakeman for northbound freight trains entering Arkansas, working mail on Bastrop, Louisiana mail truck at 5:30 P. M. and other clerical work required to be done on Saturdays, such as checking yard, making switch list and wheel reports for Monroe-Bastrop turnaround local, out from under the scope and operation of the Clerks' Agreement, which work comprised the substance of the ordinary and regularly assigned duties of Clerk Fontenot and utilized employes outside the Clerks' Agreement and covered by the Wage Agreement of another craft and who held no seniority rights under the Clerks' Agreement entitling them to perform the work;

2. Clerk J. N. Fontenot, seniority date August 25, 1941, Clerks' Group 1 seniority roster, Little Rock—Louisiana Division, shall be paid a day's pay for eight hours at the punitive rate of $2.15 per hour, amount $17.20, beginning Saturday, September 3, and continuing each date stipulated and on Saturdays thereafter continuing until the dispute is disposed of and the claim satisfied.

EMPLOYES' STATEMENT OF FACTS: Collinston, Louisiana is located approximately 175 miles south of Little Rock, Arkansas on the Little Rock—Louisiana operating division of the Missouri Pacific Railroad. Collinston is the junction point with a branch line of the Railroad of this same operating division, which branch line runs from Eldorado, Arkansas, approximately 68 miles north of Collinston through Collinston to Vidalia, Louisiana approximately 100 miles south of Collinston and is a mail transfer point for all points both north and south of Collinston on the Missouri Pacific Railroad and where

the need is for one employe only the telegrapher has absolute right to the clerical work. This was said with respect to complete abolishment of a position. Our situation at Collinston is identical with respect to Saturday but the clerk position was not abolished. The work required of the telegrapher on Saturday, including work the clerk previously did on that day, is not sufficient to keep the telegrapher busy. It would be a decidedly wasteful practice to also maintain this clerk position on Saturday. We have need for only one employe and we have need for a telegrapher on Saturday. Under your awards the telegrapher is the position to be retained.

Briefly stated, our position in this dispute is that the work involved was not exclusively within the scope of the Clerks' Agreement and even if it had been there is no agreement obligation on the part of the Carrier when a clerk assigned to a five day position is required for service on his rest day, to work him eight hours on such day.

(Exhibits not reproduced.)

OPINION OF BOARD: When the Forty Hour Week Agreement became effective September 1, 1949, the Claimant was assigned to work five days per week, Monday through Friday, and some of the work he had previously performed on Saturday was assigned to employes covered by the Telegraphers' Agreement.

Based on the facts of this case we think that such action is contrary to the intent and purpose of the Forty Hour Week Agreement, which provides for the establishment of regular relief positions among the same class of employes in the same seniority district to perform rest day relief service on positions where the work of the position must be performed on six or seven days per week (Rule 21 (d) and (e)), and if that not be done, that work of a position required beyond the five day assignment may be performed by an available extra or unassigned employe who will not otherwise have forty hours of work that week, and if that cannot be done, then it must be performed by the regular employe (Rule 25½).

Those provisions establish the manner of filling positions on rest days and the employes entitled on such days to perform the services regularly and customarily assigned to and performed by the position. The fact that the services involved are not reserved exclusively to Clerks under the Scope Rule does not justify the assignment of such duties on rest days to employes of another craft or class in violation of those specific rules.

The claim is for eight hours' pay at time and one-half rate for each Saturday from September 3, 1949 to July 1, 1950, after which date the work was performed by Clerks at another point. It is urged that the work could have been performed on a call basis and that the claim should be so limited. Since mail and baggage handling was required at various times from 5:30 P. M. to 10:50 P. M., it does not appear that the work could have been performed on a call basis. It is also urged that if the claim be sustainable, the pro rata rate of pay is proper under our awards. We have regularly held that the penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the regular occupant of the position would have received if he had performed the work. Since no relief position was established to cover the rest days on this position, it appears that the regular occupant of the position would have received time and one-half if he had performed the work.

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 Employe involved in this dispute are respectively Carrier and Employe 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of December, 1951.

DISSENT TO AWARD NO. 5579, DOCKET CL-5510

This Award is erroneous for the following reasons:

First, it purports to be based upon the provisions of the 40-Hour Week Agreement when, in fact, the provisions of that Agreement are not involved. While Claimant cited Rules 25 and 25½ of that Agreement, the claim was based upon the contention that the work on Saturday was improperly removed from the Scope of the Clerks' Agreement. While the Opinion recognized that "* * * the services involved are not reserved exclusively to Clerks under the Scope Rule * * *," it holds that it must nevertheless be performed by a clerk because of provisions of the 40-Hour Week Agreement having to do with the manner of setting up assignments or otherwise arranging for the performance of work in six or seven-day service. If particular work is not within the coverage of the Clerks' Agreement, then no provision of the 40-Hour Week Agreement can bring it there. The 40-Hour Week Agreement had nothing to do with the determination of craft lines nor did it, in any particular, allocate the exclusive right to perform particular work to any craft or class. Once it is determined that the Clerks' Agreement does not reserve to Clerks the exclusive performance of the work in question then no provision of the 40-Hour Week Agreement can accomplish the exclusive reservation of that work to Clerks.

Second, the Opinion (in paragraphs 2 and 3) indicates the methods by which work can be performed in six-day operations under the 40-Hour Week Agreement are (1) by the establishment of regular relief positions (2) by the use of extra or unassigned employes and (3) by working the regular employe overtime on the sixth day. Such holding is not consistent with prior Awards of this Division which clearly establish that the first option available to the Carrier is the staggering of work weeks in six-day positions.

Third, the Opinion holds that since the work in question was performed at various times from 5:30 P. M. to 10:50 P. M. (a spread of 5 hours and 20 minutes) it could not have been performed on a call basis. The call rule (25-d) provides for a **minimum** payment of three hours for two hours' work or less. When the Carrier calls an employe under this rule, it has no assurance that the work in queston will be completed within two hours and all that the rule requires is that the employe be paid at the rate of time and one-half when he is used under the rule and that he be paid for not less than two hours at that rate of pay. Consequently, there is no basis for the conclusion that the call rule could not have been used in this case. In fact,

in Award 5580 decided this same day, it was held that the call rule was applicable under almost exactly the same circumstances.

Fourth, after deciding that the call rule is not applicable, the Opinion holds that compensation for the time not worked by Claimant is due at the rate of time and a half. This conclusion is contrary to many Awards of this Division.

For the reasons stated the Award is erroneous and we dissent therefrom.

/s/ R. H. Allison

/s/ R. M. Butler

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ A. H. Jones