

Award No. 6871

Docket No. CL-6919

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY (Western Lines)**

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

(a) Carrier violated the rules of the Clerk's Agreement when it failed to call R. M. Marx to perform work on September 3, 1951; and,

(b) R. M. Marx shall now be paid six hours and thirty minutes (6'30") at New Mexico, for September 3, 1951.

EMPLOYEES' STATEMENT OF FACTS: Prior and subsequent to the date the instant claim arose, September 3, 1951, all of the freight bill expensing at Albuquerque, New Mexico, was regularly assigned to and performed by the incumbents of the following positions:

Position No.	Title	Avg. No. Hours Per Day
1188	Expense Clerk	6'
1230	Utility Clerk	2' 30"
1197	Utility Clerk	2' 45"

On Monday, September 3, 1951, a legal holiday, the occupant of Expense Clerk Position No. 1188, whose major duties consist of expensing freight bills, was called to report for work and was used seven hours expensing freight bills in preparation for Tuesday's business. In fact, there were more bills to be expensed on that date than one man could accomplish, but instead of calling Mr. R. M. Marx, the regular occupant of Utility Clerk Position No. 1230 and the senior of the other two employees who were regularly assigned to expense freight bills, Carrier called Station Accountant K. H. Guthrie, Position No. 1181, whose regular work assignment has no connection whatsoever with expensing freight bills, and used him for six and one-half hours performing such work.

POSITION OF EMPLOYEES: There is in evidence an agreement between the parties bearing effective date October 1, 1942, and supplemental agree-

ment of course contains no such rule, and this Board is admittedly without authority, under the Railway Labor Act, to write a new rule into the Agreement.

Without receding from its position that the work performed September 3, 1951, was not assigned to Utility Clerk Position No. 1230 and that the Utility Clerk had no preferential right thereto, the Carrier directs attention to the fact that the Employees' claim, that the time concerned be paid for at the time and one-half rate, is contrary to the well-established principle of this Board that contractual right to perform work is not the equivalent of work performed. See Third Division Awards 5266, 5236, 5177, 5117, 4645, and others.

In conclusion Carrier requests this Board to deny the Employees' claim in the instant dispute for the reasons that:

1. The work required to be performed September 3, 1951, at Albuquerque, belonged to the Expense Clerk, and not to claimant.
2. Neither the rules cited by the Employees, nor any rule of the Clerks' Agreement, supports the claim.
3. In the absence of an Agreement rule to the contrary, it is Management's prerogative to determine who, if anyone, shall be called to assist with another employee's work.

All that is herein contained has been both known and available to the Employees and their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: On Labor Day, Monday, September 3, 1951, a holiday under Article 8 (1) of the Agreement, the Carrier required work in connection with the writing, expensing and preparation of less-than-carload freight bills at its Albuquerque, New Mexico, freight office where, among others, it maintained the four clerical positions here in question, namely; Expense Clerk, Utility Clerk, Utility Bill Clerk and Station Accountant.

The record, although in conflict as to the work Claimant performed, makes it clear that for a long time prior to the date in question all freight bill expensing necessary at the Albuquerque office, for both L. C. L. and carload freight, had been performed by the employees regularly assigned to the first three of the positions last above mentioned and that up to that date the Station Accountant had never been called to perform any such work. Nevertheless on the particular morning in question, since there was more L. C. L. freight bill expensing work than could be handled by the Expense Clerk, who concededly spent most of his assigned time on that particular type of work, the Carrier called the Expense Clerk and the Station Accountant to perform it. Subsequently, Claimant, R. M. Marx, who was the regularly assigned occupant of the Utility Clerk Position, progressed the instant claim on the property on the theory the Current Agreement gave him the right to perform it. When it was there denied he brought it to this Division of the Board for consideration and decision.

In view of what has been stated it becomes apparent the first question to be determined is factual. What, in view of the conflicting views of the parties on this point, was the nature of the work performed by Claimant on his regularly assigned position prior to the involved holiday? Upon a careful review of the record, although Carrier advances specious arguments to the contrary, it becomes crystal clear that a substantial portion of the duties of Claimant's position, as regularly assigned to him by his superiors, was carload freight bill expensing. It must be conceded the evidence as to L. C. L. freight bill expensing is highly conflicting and far from satisfactory, the proof on this point consisting in the main of assertions by Claimant that he had been

assigned to do some of that work in the past and averments by Carrier directly contrary. Nevertheless, the record discloses that Claimant had been assigned by Carrier officials to do **freight bill expensing work**. Moreover, although Carrier urges they do, the facts as here presented fail to definitely establish any sound ground for distinguishing between the involved carload and L. C. L. freight expensing, so far as the degree of skill required to perform either type of work is concerned. Under such circumstances, especially when it is remembered that theretofore all work of both types had been kept up and performed by the Expense Clerk, the Utility Clerk and the Utility Bill Clerk in the joint performance of the assigned duties of the three positions, we are constrained to conclude that the work of Claimant's position (Utility Clerk) must be regarded as including L. C. L. freight bill expensing.

Article 7, Section 1-e of the current Agreement reads:

"Section 1-e. Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by the senior qualified and available off-in-force-reduction employe who will otherwise not have 40 hours of work that week; **in all other cases by the regular employe.**" (Emphasis supplied)

With the controversial and decisive factual question determined as heretofore indicated, we have little difficulty in concluding that under the confronting facts and circumstances Claimant was the regular employe within the meaning of that term as used in the emphasized portion of the heretofore quoted Rule. This conclusion, since it is conceded the work in question was not a part of any assignment, means that Carrier's action in assigning the Station Accountant to perform such work resulted in a violation of Article 7, Section 1 (e) and that Claimant must be compensated for its infraction at the prorata rate for six (6) hours and 30 minutes, the time conceded to have been put in by the Station Accountant in performing it. This, we may add, is the proper rate under well-established Awards of this Division (See, e.g., Award No. 6730 and the decisions there cited), notwithstanding Claimant's contention to the contrary, where, as here, only the right to perform work which is not a part of any assignment is involved. Articles 8 (1) and 7 (2) on which Claimant relies, it is to be noted, are not decisive because they comprehend work performed on a legal holiday.

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 Agreement was violated.

AWARD

Claim sustained at the pro rata rate in accord with the Opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. I. Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of January, 1955.