

Award No. 7132
Docket No. CL-7252

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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

(1) The Carrier violated and continues to violate the terms of the currently effective Agreement between the parties when on May 5, 1952 it abolished the Sunday assignment on the position of Chief Dispatcher's Stenographer, Ft. Scott, Kansas and thereafter unilaterally assigned the Sunday duties attached to that position to the Chief Dispatcher on Sunday May 11, 1952 and all subsequent Sundays.

(2) The Sunday duties formerly attached to the Chief Dispatcher's Stenographer position be restored to clerical employees and the occupant of the position, Mr. J. P. Fassler, be paid one day's pay at the penalty rate of his position for each and every Sunday May 11, 1952 until corrected.

EMPLOYEES' STATEMENT OF FACTS: Included in the force in the Chief Dispatcher's Office of the Carrier at Ft. Scott, Kansas, is a position of Chief Dispatcher's Stenographer occupied by Mr. J. P. Fassler, with assigned hours 9:30 A. M. to 1:30 P. M. and 2:30 P. M. to 6:30 P. M. Monday through Friday and rest days Saturday and Sunday. For over 25 years prior to May 5, 1952 this position was recognized as a seven day position and was filled seven days per week by the regular occupant of the position until September 1, 1949. Since September 1, 1949 and prior to May 5, 1952 the unassigned rest days of the position, Saturday and Sunday were filled by an available qualified extra employee who would otherwise have less than 40 hours in his work week or, in all other cases, by the regular employee at penalty rates. On May 5, 1952 the Superintendent issued a notice to the Chief Dispatcher that the Sunday assignment of the Chief Dispatcher's Stenographer position was abolished, (See Employees' Exhibit 1), thus reducing the position from a seven day position to a six day position. Concurrently therewith, without conference, negotiation or agreement, the Carrier arbitrarily and unilaterally assigned the Sunday duties of the position to the Chief Dispatcher who holds no seniority or other rights under the Clerks' Agreement and who continues to perform such duties on Sunday. The Saturday rest day work continues to be performed by an available qualified extra clerk who will otherwise have less than 40 hours in his work week or by the regular employee at penalty rates.

Carrier submits that so long as Rule 44 (b) retains its status as a disagreed rule that this Division cannot properly decide a reparation claim predicated upon a rule which is in disagreement between the parties.

The facts and circumstances in this dispute do not warrant a sustaining award and this Division is requested to so find.

All data submitted in support of Carrier's position have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: For more than 25 years, a position of Chief Dispatcher's Stenographer, now occupied by the claimant, Fassler, has existed in the Chief Dispatcher's Office at Fort Scott, Kansas. Prior to the Forty Hour Week Agreement, effective September 1, 1949, it was filled seven days per week. Since September 1, 1949, and prior to May 5, 1952, the position was assigned Monday through Friday, with Saturday and Sunday as rest days. The rest day work was performed by available extra employees who would otherwise have less than 40 hours in their work weeks or, in all other cases, by the regular employee. On May 5, 1952, the Stenographer position was reduced to a six-day position by abolishing the Sunday assignment. The Sunday work was assigned to the Chief Dispatcher who holds no rights under the Clerks' Agreement. The Saturday work is performed as before.

A joint check revealed that the Chief Dispatcher performed 2' 30" of clerical work during the hours of claimant's assignment. This does not include clerical work performed by the Chief Dispatcher, an around-the-clock position, before and after the hours of the Stenographer position. The Carrier questions the time of 2' 30" fixed by the joint check. While it is shown to be an estimated period, it appears to be fairly accurate and we accept the conclusion reached that the Chief Dispatcher was doing work of claimant's position 2' 30" on each Sunday during the period of the claim during the assigned hours of the Stenographer position.

The record is clear that for many years prior to May 11, 1952, the Stenographer position was assigned seven days each week. A substantial part of the work remained to be performed on Sundays. The Chief Dispatcher performed at least 2' 30" minutes thereof on Sundays during the assigned hours of the Stenographer position. Other work which would normally have been performed by the Stenographer was performed by Chief Dispatchers outside the assigned hours of the Stenographer. No question is raised that a Stenographer was required Monday through Saturday. We do not think the "ebb and flow" principle can apply to the Sunday work. Many necessary clerks positions are incidental to other positions. This is a situation inherent in many clerical positions. In a case such as we have here, the correct rule is announced in Award 5623, wherein it is said:

"The principle applicable to a determination of this claim has been set forth in numerous awards of this Board. While it may be true as contended by Carrier that at other points on the system this type of work is performed by telegraphers as part of their regular assignments, the fact remains that at this location such work had increased to such an extent that it became necessary to assign a clerk. Under such circumstances when clerical work has been assigned exclusively to the clerical position during the week that same work may not be assigned to employees not under the Clerks' Agreement on the assigned off days of the clerical position. (See Awards 4477, 2052, 3425, 3825, 3858, 4832.) The Forty-Hour Week Agreement did not change the application of that principle. It follows that the Carrier's action was violative of the Agreement and the claim must be sustained." (Emphasis supplied.) See also Award 6216.

We conclude, therefore, that under the authority of the foregoing principle, the substantial stenographic work performed by the Chief Dispatcher on Sundays belonged to claimant in the absence of the use of extra or unassigned employe entitled to perform it.

There is some discussion in the docket concerning the right of the Carrier to stagger the work of this claimant with that of other stenographic employes. We do not want to be understood as affirming or denying that the Carrier has or does not have any such right. That issue is not before us in this dispute.

The Carrier relies heavily on Awards 2334 and 4355. By distinguishing these awards, the controlling rule is pointed up on the present case.

In Award 2334, it was held that a foreman or other employe could properly perform the clerical work incidental to his position, but when such clerical work increased to such an extent that the foreman needed assistance to perform it, it belonged to an employe under the Clerks' Agreement. Conversely, when the clerical work receded in volume so that the foreman could perform it, the clerical position could properly be abolished and the remaining clerical work could again be performed by the foreman. But this is not the situation in the present case. The clerical position was required six days per week and substantial work remained on the seventh day (Sunday). The rule announced in Awards 5623 and 6216 applies, not the rule stated in 2334.

In Award 4355, the same distinction exists which was recognized by the award itself in the use of the following language therefrom:

"The holding is in no way to be considered to impinge upon the accepted and well founded rule that work covered by an Agreement and regularly performed by an employe covered thereby during the week may not be assigned to an employe not covered thereby on Sundays."

Upon a consideration of the whole record and the applicable rules, we conclude that the claim must be sustained. It will be sustained, however, at the pro rata rate, it being for work not performed on rest days. If any holiday work is involved, it will be paid for at the time and one-half rate under Rule 32, current Agreement.

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 per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1955.