Award No. 7222
Docket No. CL-7035

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violates the rules of the Clerks' Agreement at Corning, New York, when on December 24, 1952, it removed clerical work from the Scope and Coverage of the Clerks' Agreement, and when;

1. It abolished the 2nd Trick Ticket-Clerk-Messenger position, hours 4 P. M. to 12 Midnight, working seven days per week, occupant C. R. Smith, an employe holding seniority on Roster 19A in which seniority district position is located, and assigned all of the duties attaching to the Ticket Clerk-Messenger position to a newly established position of Operator-Clerk, an employe holding no rights under the Clerks' Agreement, and,

2. It failed and refused to reassign clerical work attaching to the position to clerical employes remaining at the location where the work was to be performed, but, in lieu thereof assigned the remaining work to an employe outside the Scope and coverage of the Clerks' Agreement, and,

3. That Carrier shall now reestablish the 2nd Trick Ticket-Clerk-Messenger position at Corning, N. Y., and restore employe C. R. Smith to the position, and,

4. That the Carrier shall compensate employes Clark, Neally and all others affected at overtime rate of pay for all duties remaining from the Second Trick Ticket Clerk-Messenger position during hours outside their regular hours of employment assigned to and performed by an employe not covered by the Clerks' Agreement, and,

5. That the Carrier shall compensate employes Smith, Clark, Neally and all others affected for wage loss sustained by reason of the above violations of the Clerks' Agreement retroactive to December 24, 1952, and until violation complained of has been corrected. (Case No. 1038)

EMPLOYES' STATEMENT OF FACTS: On November 22, 1952, the Erie Railroad Relocation Project at Corning, New York, was completed. The Erie Passenger Station and tracks at the corner of Erie Avenue and Pine Street were closed and abandoned. In addition the Tower and Yards west of the Passenger Station were closed and abandoned. The Freight Station was

3003, 3211, and 3221, were intended mutually by the parties to be set aside by reading into Rule 1(c) a scope provision such as here contended for. **The provision must be construed in the light of what the parties were attempting to accomplish which we think was a proper disposition of exclusive clerical work upon the abolishment of a clerical position. There was, therefore, no violation of the current agreement."** (Emphasis supplied.)

Although different from the instant case, which involves work not belonging exclusively to clerks, the Board has consistently held in a long line of awards that most employes of a carrier of necessity perform some clerical work in connection with their regular assigned duties, and that telegraphers with telegraphic duties to perform have the right to perform **clerical** duties to the extent necessary to fill out their time, provided the clerical duties are incidental to, or in proximity with, their work as a telegrapher. See Awards 615, 636, 4288, 4559, 4734, 5014, 5110, 5024 and others.

In another long line of awards dealing with failure to abrogate past practices, which are pertinent to this issue, The Board has consistently held that when a contract is negotiated and existing practices are not abrogated or changed by its term, such practices are enforceable to the same extent as the provisions of the contract itself. Here, if not admitted, the petitioner must concede that long prior to its first agreement the telegraphers sold tickets and performed all work in connection therewith together with other work, and that neither the 1936 agreement nor the current agreement abrogated these practices or destroyed the telegraphers' right to continue this work. It must be borne in mind that in the absence of rules the Carrier has an unlimited right to say who shall do a particular job, and that right is paramount in the absence of a clear, precise, and specific rule creating an exclusive right in the employes. The question always is not whether the agreement permits the Carrier, but whether it forbids the Carrier to require the work. Awards 1397, 1435, 2436, 4104, 4791, 5564 and 5747.

Without waiving any of the foregoing, the Carrier submits that the clerical employes lost nothing as a result of the change required by the order of the New York State Public Service Commission. There were three clerical positions at the old passenger station, and after the rearrangement there were three clerical positions at the new passenger station. Furthermore, when the operator-clerk took his assignment on second trick, clerk Smith displaced clerk Novitski and the latter took over the duties of M. of W. timekeeper position which had been bulletined earlier and no applications received. Therefore, even if the claim were one of substance and merit, which it is not, the claim set forth at the beginning of this submission covering all others affected is not in order. Furthermore, it is noted that the claim requests payment at the overtime rate. This part of the claim is also not in order. This Division of the Board has long held that the right to perform work is not the equivalent of work performed. Awards 4244, 4534, 4616, 4552 and many others supporting this principle.

In view of the facts presented and for the reasons stated herein, the claim is not supported by the applicable agreement and should be denied.

The Carrier submits that all data in support of its position in this case has been discussed with or is known to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: Before considering this dispute on its merits, it is necessary to dispose of a Motion in this docket to the effect that action be withheld pending the giving of notice of hearing to other parties involved.

In view of a number of awards of this Board and the decision of the Supreme Court of the United States in the case of Whitehouse vs. Illinois Central Railroad, and the finality of this matter (No. 131, October Term of U. S. Sup. Ct., 1954), followed by the dismissal of the cause of action by

the United States District Court, the Board now has jurisdiction over the only necessary parties to this proceeding and over the subject matter hereof. Prior Award 5759 of this Board was ill advised.

Claim is here made that Rule 1 (b) and (c) of the effective Agreement was violated when the duties of an abolished Ticket-Messenger position were assigned to an Operator-Clerk, a position not covered by the effective Agreement.

Rule 1 (b) and (c) 1 and 2 provide as follows:

"(b) Should any position or positions now covered by all the rules of this agreement be transferred to other departments or offices, or new positions be created taking over the duties of positions now covered by all the rules of this agreement, such transferred or new positions will continue under all the provisions of this agreement unless otherwise mutually agreed to between the Management and General Chairman or their representatives.

(c) 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 other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed.

2. In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yardmaster, Foreman, or other supervisory employe, provided that less than 4 hours' work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of an Agent, Yardmaster, Foreman or other supervisory employe."

The record indicates that prior to November 22, 1952, there were two Ticket Clerk and one Ticket Agent positions at this site. On this date Respondent placed in use a new passenger station and certain other facilities. The new station was a considerable distance from the freight and yard offices and, because of this fact, messenger service was required as well as transportation facilities for train and engine crews. In order that this added need could be provided for, said work was assigned to ticket clerks and the job titles of such positions were changed to Ticket Clerk-Messenger (except the position of Ticket Agent, which remained the same). On December 24, 1952, the second trick Ticket Clerk-Messenger position, assigned hours 4:00 P. M. to 12:00 Midnight, was abolished and a position styled Operator-Clerk was established, with the duties thereof incorporating those previously performed by the abolished Ticket Clerk-Messenger position.

Petitioners assert that historically all positions at the old passenger station had been placed under the Clerks' Agreement and that this was followed by Respondent's acquiescence that the messenger and transportation services were to be performed under the Clerks' Agreement by those employes classified as Ticket-Clerk-Messenger. It was further asserted that the Scope Rule of the existing Agreement specifically provides that any duties previously performed by employes covered by the Agreement shall be assigned thereafter only to those positions or employes remaining under the Agreement, thus precluding their assignment, as here, to employes not covered by the Agreement.

The Respondent asserted that no trains arrived during the hours of assignment of second trick Ticket Clerk-Messenger position, hence there

existed no need to transport train and engine crews. The Respondent contended that the second trick Ticket Clerk-Messenger position in question was created only because the opening of the new passenger station could not be accomplished concurrently with abandonment of the "A.Q." Tower; that when the remaining telegraphic work was transferred to the passenger station the need for the temporarily created position of Ticket Clerk-Messenger, second trick, no longer existed for the reason that the duties thereof (Ticket Clerk-Messenger position) could readily be performed by the Operator-Clerk in conjunction with, and incidental to, his telegraphic duties which included the handling of telephone messages and reports, notifying the Train Dispatcher of the arrival of freight trains, and operating a "test panel." The Respondent asserted that the assumption of the clerical duties in question was "work incident to and directly attached to the primary duties * * * (and)—may be performed by employes of such other craft or class", which in the instant case was the Operator Clerk.

Rule 1 (e), cited by the Respondent as controlling, provides as follows:

> "(e) Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements, or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, may be performed by employes of such other craft or class."

The resolution of the confronting dispute depends upon the coverage of the Scope (Rule 1) Rule of the effective Agreement. It is not an ordinary scope rule, being broader and more comprehensive than most such rules. The attention of the Board has been focused on prior awards of this Division both on and off of the Respondent's property wherein the present rule (or rules of identical content) have been interpreted.

Scrutiny of Rule 1 (b), 1 (c) 1 and 2, and 1 (e) is required.

Rule 1 (b) in essence stipulates that (in the absence of an agreement to the contrary), in the event positions now covered by this Agreement are moved to new locations, or new positions created assuming the duties of positions then covered by the Agreement, such newly created positions shall remain under the terms of the Agreement.

Rule 1 (c) 1 sets out that when positions then covered by the Agreement are abolished the remaining work thereof (if any) shall be assigned to any other positions (clerical) that are then existing at the location of the abolished position.

Rule 1 (c) 2 covers those instances where there are no remaining (clerical) positions at the location of the abolishment and enumerates to whom and in what manner the remaining duties (if any) of the abolished position may be assigned.

Rule 1 (e) sets out circumstances under which employes of a different class or craft (then clerks) may perform work incident to and directly attached to the primary duties of such other class or craft.

Immediately prior to the time in question there existed at the passenger station two ticket clerk and one ticket agent positions. Because of the then present need, the duty of driving a company vehicle used to transport train and engine crews, and other specific messenger duties were assigned (around the clock) to the occupants of the ticket clerk positions and the job title of such positions changed to Ticket Clerk-Messenger. Thus the terms and provisions of Rule 1 (b) were considered, applied and made effective.

Rule 1 (c) (2), wherein provision is made for the performance of the remaining duties of an abolished position in those instances where there is no remaining position covered by the Agreement remaining at the loca-

tion is inapplicable here inasmuch as there were positions (clerical) remaining at the location in question coming under the effective Agreement.

Inasmuch as the complaint here concerns the assignment of remaining clerical duties of the abolished Ticket Clerk-Messenger (second trick) position to the occupant of an Operator-Clerk position not covered by the Agreement, we are more directly concerned with the application of Rule 1 (c) 1 and 1 (e).

That there were other clerical positions at the location is not subject to question. Neither is the fact that certain remaining duties (above set out), which were previously assigned to the abolished Ticket Clerk-Messenger position, were assigned to the Operator-Clerk. Thus, if the action of the Respondent in assigning these remaining duties to the Operator-Clerk, is to be found permissible, in the premises, the propriety of such action must be sustained under the terms of Rule 1 (e) since the broad provisions of Rule 1 (c) 1 require that any remaining duties of a position coming under the Agreement (when abolished) must be assigned to any existing positions remaining at the location.

We are not impressed by the Respondent's contention that the short period of time the second trick Ticket Clerk-Messenger position existed has any bearing here. If the parties to the Agreement had intended that the element of time was to be considered, the rule would have so stated. In this respect it is silent. Neither are we impressed by the contention of the Petitioner that the only types of work that can be considered as "incidental to" to "such other craft or class" are enumerated in the rule. The phrase or clause "such as" was not intended to be other than "explanatory" of intent.

The Respondent argues that the remaining duties of the abolished Ticket Clerk-Messenger position were properly assignable to the Operator-Clerk within the meaning of Rule 1 (e) since they (the remaining duties of the position so abolished) were "incident to and directly attached to * * * (and) may be performed by employes of * * * other craft or class", within the meaning of awards of this Board holding the primary duties of a telegrapher may be augmented with such clerical work as is required, to the extent of filling out his assignment.

This Board held in Award 615 that clerical duties could be assigned to a telegrapher without limitation (except his ability to perform same during the course of his assignment) to fill out the hours of his assignment. In Award 636, however, this broad principle was in effect somewhat modified when it was held that while a telegrapher could perform clerical duties to the extent set out in Award 615, such duties (clerical) were to be performed in the proximity of his post and such work (clerical) was not to be brought to him (telegrapher) to perform.

Duties of the abolished Ticket Clerk-Messenger position which were assigned to the Operator-Clerk included the performance of messenger service, on foot, to points beyond and outside the passenger station and possibly driving a vehicle which transported train and engine crews. Certainly some work of the abolished position remained.

If the performance of these duties was considered in the light of the holding of this Board in Award 636, it might well be said that they were not properly assignable to the Operator-Clerk. However, this fact standing alone is not controlling here. Rule 1 (c) is, however. There being other clerical positions at the location where the work of the abolished position of Ticket Clerk-Messenger was to be performed, such work should have been assigned to the other positions so remaining under Rule 1 (c) 1, for the reasons erpressed in Award 3906, interpreting the same rule as here present, when it was stated:

> "This rule prescribes the method for the disposition of the work remaining in a position such as was abolished here. Under the

clear and unambiguous language of the rule the remaining work is to be assigned to another or other positions covered by the Agreement if there are other positions at the location where the work is to be performed. * * *

At the location of this abolished position there were other clerical positions. As to this there is no question. Therefore, under the Rule it became the duty of the Carrier, in order to conform to the Rule, to assign the work of the abolished position, if any remained, to those positions. * * *"

Having determined that the Agreement was violated, we proceed to other facets of the claim as presented. This Board has held on many occasions that it does not possess the power to order a restoration of the position abolished. Awards 1300, 3583 and 3906. The Respondent may avoid future penalties by a compliance with the Agreement in other ways than the restoration of the abolished position. That portion of the claim seeking reparations is valid only at the pro-rata rate. The Claimants here performed no work; they were denied work to which they were entitled. Awards 6528, 6544. The request that the wage loss be computed retroactive to December 24, 1952, is meritorious.

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 effective Agreement.

AWARD

Claims 1, 2 and 5 sustained in accordance with the Opinion and Findings.

Claim 3 denied in accordance with the Opinion and Findings.

Claim 4 sustained at pro-rata rate, except as to holidays which shall be at the time and one-half rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 2nd day of February, 1956.