Award No. 7372
Docket No. CL-7519

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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

(a) That the Carrier violated the terms of Clerks' Agreement No. 7 when on January 11, 1949, it nominally abolished position of Ticket Clerk, rate $9.64 per day, hours 11:00 P. M. to 7:00 A. M., located in the Passenger Station Ticket Office, Staunton, Virginia, and concurrently therewith reassigned the remaining force, resulting in the assignment of clerical work to an employe not covered by the Agreement, and

(b) That the senior available furloughed employe be paid a pro rata day's pay at the wage rate applicable to the position of Ticket Clerk for January 11, 1949, and each day subsequent thereto as may be determined through joint check of the records to and including April 2, 1954, on which date the condition was corrected. The claim contemplates that on any day it should develop that there was no furloughed employe available, regularly assigned employe or employes to be designated by the Organization shall be additionally compensated in lieu of a furloughed employe.

EMPLOYES' STATEMENT OF FACTS: On or about January 11, 1949, as well as for several years prior thereto, passenger service provided at Staunton, Virginia, was essentially as follows:

Train No.	Type of Service Provided	Leaving Time
43	All Pullman Norfolk—Cincinnati	2:52 A. M.
3	Coach and Pullman Washington—Cincinnati	3:10 A. M.
2	Coach and Pullman Cincinnati—Washington	4:00 A. M.
42	Coach and Pullman Cincinnati—Norfolk	5:05 A. M.
13	Coaches only Charlottesville—Huntington	8:20 A. M.
4	Coach and Pullman Cincinnati—Washington	8:45 A. M.
46	Coach and Pullman Detroit—Norfolk	9:50 A. M.
104	Coaches only Hinton—Charlottesville	1:40 P. M.

During 1954 several new industries located at Staunton. One in particular (American Safety Razor Company) moved from Brooklyn, N. Y., and this has caused increase in the passenger business, involving employes moving back and forth to their homes in or around New Yark City until they make permanent removal. Several cases of not being able to sell the required tickets with the two ticket clerks occurred, and **on January 6, 1955, a third ticket clerk** was put on, with the hours for the three ticket clerks again being made 8:00 A. M. to 4:00 P. M., 4:00 P. M. to 12:00 midnight, and 12:00 midnight to 8:00 A. M., so as to give continuous or around-the-clock ticket office operation.

But even this did not adequately meet the conditions, because at times during the daylight hours there was more than one ticket clerk could properly handle, while at other times during the 24 hours there were periods in which there was nothing for the ticket clerk to do. **On February 21, 1955,** the hours of the three ticket clerks were changed to:

Ticket Clerk .....8:00 A. M. to 5:00 P. M., with one hour meal period.

Ticket Clerk .....11:00 A. M. to 8:00 P. M., with one hour meal period.

Ticket Clerk .....8:00 P. M. to 5:00 A. M., with one hour meal period.

The tabulation just given shows the assignment of the ticket clerks as of the date of preparing this Response, and it will be seen from this that ticket clerks have been assigned to do the major portion of the actual ticket selling. As extraordinary conditions arise, the combination freight and ticket agent will sell tickets or do other ticket office work, the same as the ticket agent at this point has always done as a part of his work under the Telegraphers' Agreement.

CONCLUSIONS

The Carrier has supported by its evidence in this Response the seven points made at pages 22-23 of this submission, and the claim should be denied on the basis of those points.

All data in this submission have been discussed in conference or by correspondence with the Employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim that the Carrier violated its agreement when it abolished a ticket clerk position at Staunton, Virginia, and re-assigned a part of the remaining ticket work to the Ticket Agent, an employe under the Telegraphers' Agreement. The record shows that immediately prior to the abolishment of the third trick ticket clerk, three ticket clerks performed the ticket selling at Staunton. Thereafter the ticket selling work was performed by the two remaining ticket clerks and the ticket agent. The various times that the ticket agent was assigned to sell tickets are set out in the record and we shall not burden this opinion with them.

The record shows that in 1915, the ticket office force at Staunton consisted of the ticket agent and an assistant ticket agent who performed all the station work including ticket selling. In 1917, the assistant ticket agent position was designated as ticket seller. In 1927, a second clerical position was established to handle ticket selling. In 1943, a third ticket clerk was added but the ticket agent continued to be assigned alone to sell tickets on a part of his assignment. On July 3, 1943, the three ticket clerks were assigned around the clock. A fourth ticket clerk was later assigned and

subsequently abolished before the present claim arose. On January 11, 1949, the third ticket clerk position was abolished and the ticket agent was again used to sell tickets which prompted the present claim. The Carrier insists that with a reduction of business at Staunton, it had the right to abolish the third trick ticket clerk position and return the ticket agent to the selling of tickets under the ebb and flow theory established by the awards of this Division. It is the contention of the Organization that the agreement effective January 1, 1945, eliminated the ebb and flow theory when Rule 1(b) was added to the scope rule. Rule 1(b) provides:

> "Positions within the scope of this Agreement belong to employes herein covered and nothing in this Agreement shall be construed to permit the removal of such positions from the application of these rules except as provided in Rule 65".

It is the contention of the Carrier that the originial rule demanded by the Organization was made applicable to "positions or work" and that the words "or work" were removed so that the rule would apply only to "positions" in accordance with the existing understanding on the subject. The Organization disputes this fact and says that Carrier understood the purpose to be the elimination of the ebb and flow theory and that, after extensions of time and further consideration, it was accepted on that basis. In any event, this Division has passed upon the meaning of language similar to Rule 1(b).

Several awards of this Division have held that rules similar to Rule 1(b) require that the work of a position may not be removed from the application of the agreement except by agreement or mediation. The reasoning of these decisions is expressed in Award 5790 as follows:

> "In determining the meaning of the foregoing provision quoted from Rule 1 Carrier asks us to consider the rule proposed by the Organization during negotiations preceding its adoption. If a rule is clear then the history of the negotiations leading up to its adoption should not be considered in determining its meaning for we are then limited to a consideration of the intention made manifest thereby as we do not have authority to rewrite or amend the rules or provisions of the Agreement itself. See Awards 2467, 4181, 4506, 5133, and 5430 of this Division. Of course, if the rule or provision agreed to can be said to be ambiguous the opposite would be true.
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> "The word positions, when used in connection with an agreement, has been defined by this Division as '"positions" which are subject to the agreement are protected to the craft by the agreement, and since "work" is of the essence of a position such work which is the manifestation of the position and the indentity of it is likewise protected to the craft.' Award 1314 of this Division."

Similar awards of this Division to the same effect are: Awards 3563, 5785, 6141, 6444. We think, therefore, that the Carrier violated the Agreement when it assigned ticket selling work to one under the Telegraphers' Agreement after January 1, 1949, which had been performed immediately prior thereto by clerks. Claim (a) is sustained. Claim (b) is sustained at the pro rata rate on the minute basis for all time the Ticket Agent was assigned to sell tickets from January 11, 1949, to April 2, 1954, the date the violation was corrected.

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 as per opinion.

AWARD

Claim (a) sustained. Claim (b) sustained per opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1956.

DISSENT TO AWARD NO. 7372, DOCKET NO. CL-7519

The right and duty to sell tickets is inherent in a position of ticket agent covered by the Telegraphers' Agreement. In this dispute the ticket agent had sold tickets for many years, hence such work could not be found to belong exclusively to Clerks. This being true, the majority have incorrectly interpreted Rule 1(b), for that rule only concerns itself with the removal of positions having the exclusive right, by agreement, to the performance of certain work.

The majority also erred in ignoring the issue raised by the Division's failure to give due notice of all hearings to other employes involved in this dispute.

The Record showed that a sustaining award would have an adverse effect on employes represented by The Order of Railroad Telegraphers. The majority also knew that President Leighty of The Order of Railroad Telegraphers has referred a counter-grievance to this Division, thus we were afforded an opportunity to consolidate these disputes and thereby avoid the possibility of rendering null and void awards such as the Division made in **Awards 3932, 3933, 3934, 4735 and 5014.** However, the majority have again ignored the clear provisions of Section 3, First (j) of the Railway Labor Act which required this Division to decide these disputes in a single proceeding of which due notice and an opportunity to be heard was given to all employes and labor organizations involved.

Since our "Dissent to Award No. 7311, Docket No. CL-7214" additional judicial authority has been handed down to support the correctness of our position.

On September 13, 1954, in **Missouri-Kansas-Texas Railroad Company et al v. National Railroad Adjustment Board et al,** Civil Action No. 50 C 684, Judge John P. Barnes of the United States District Court for the Northern District of Illinois, Eastern Division, issued a final decree holding that "Awards 3932, 3933, 3934, 4735 and 5014, and the Orders accompanying these awards, are null and void." The Court then enjoined and restrained both the Clerks and Telegraphers from prosecuting any action to enforce said awards, and/or filing any claim or claims predicated upon any of said awards and orders. Further, on September 21, 1954, the Court issued a mandatory "Injunction Writ" commanding the National Railroad Adjustment Board, its members and their sucessors, to reopen Dockets CL-3714, CL-3715, CL-3716, TE-4540 and TE-4953, and to consolidate them into a single hearing of which due notice and an opportunity to be heard would be given the labor organizations and employes specified in the "Injunction Writ".

The Carrier Members were, and have been at all times, willing to comply with the aforesaid "Injunction Writ", however the execution thereof was

stayed by an appeal to the United States Court of Appeals for the Seventh Circuit. On June 22, 1956, on motion of counsel for the defendents — appellants[1] the appeal was dismissed, with costs.

This dismissal can only be interpreted to mean that the Conclusions of Law in Civil Action No. 50 C 684 were correct, and that the members of this Division do have a duty to give notice and an opportunity to be heard to all employes and labor organizations involved in disputes before the Board.

For the reasons given in our "Dissent to Award No. 7311, Docket No. CL-7214," and for the Division's failure to follow the law-of-the-land as announced in **Missouri-Kansas-Texas Railroad et al** v. **National Railroad Adjustment Board et al,** supra, we dissent.

/s/ C. P. Dugan
/s/ W. H. Castle
/s/ R. M. Butler
/s/ J. F. Mullen
/s/ J. E. Kemp

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[1] The Defendants—Appellants were as follows: The Order of Railroad Telegraphers; J. W. Whitehouse; R. B. Boyington; The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; G. B. Goble, Gerald Orndorff; Roger Sarchet; J. H. Sylvester and C. R. Barnes.