

Award No. 7427

Docket No. CL-7496

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, 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 Employees on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on Saturdays, July 17, 31 and August 7, 1954, the Carrier required the Agent-Telegrapher at Forrest City, Arkansas to perform the duties of signing bills of lading and billing carload freight, and in so doing, moved this clerical work out from under the scope and operation of the Clerks' Agreement, which is work constituting the ordinary and regularly assigned duties, each assigned work day, Monday through Friday, of Fred V. Swanson, and utilized an employee outside the Clerks' Agreement and covered by the wage agreement of another craft, who holds no seniority rights under the Clerks' Agreement entitling him to perform this work;

2. General Clerk Fred V. Swanson shall be paid a "call" of two hours at punitive rate of \$2.54625 per hour, account Carrier's action on

Saturday, July 17, 1954
Saturday, July 31, 1954
Saturday, August 7, 1954,

and on all subsequent Saturdays, until the violation of Agreement is discontinued and the claims satisfied, account Carrier's action in violation of Rule 1, Rule 2, seniority and overtime and related rules of the Clerks' Agreement.

EMPLOYEES' STATEMENT OF FACTS: The station force subject to the scope and operation of the Clerks' Agreement at Forrest City, Arkansas, during the period when the claims here involved arose, was:

Cashier	R. E. Akers, hours 8 A. M.—12 Noon; 1 P. M.—5 P. M., Monday through Friday, unassigned days, Saturday and Sunday, rate \$14.78 per day.
---------	---

(e) that the Board does not have authority to render a valid award unless the Order of Railroad Telegraphers is called in to participate as an interested party, and

(f) that in any eventuality punitive call payments as claimed cannot be justified when no work was performed.

OPINION OF BOARD: Claimant was regularly assigned to the position of general clerk at Forrest City, Arkansas, Monday through Friday, rest days Saturday and Sunday. It is not disputed that the work normally and regularly performed by claimant on this assignment included the signing of bills of lading and the billing of carload freight.

It appears from the record that from September 1, 1949 until July 17, 1954 the carrier did not require this type of work to be done on Saturdays. However, on Saturday, July 17, 1954, the agent-telegrapher, regularly on duty at the time, billed 14 cars of gravel; on Saturday, July 31, 1954, he billed 19 cars of gravel; and on August 7, 1954, he billed 15 cars of gravel. In addition, he signed bills of lading on these dates.

Claimant's contention is that this was work belonging to him under the Clerks' Agreement, and that he is entitled to be paid a call for the dates specified and all subsequent Saturdays on which similar work was performed by the agent-telegrapher. Claimant relies on the scope rule of the agreement and also on Rule 24—Work on Unassigned Days and Rule 25—Overtime and Calls. In brief, the argument is that the work in question belongs to clerks under the scope rule, that this work is part of Claimant's regular assignment and if Carrier requires it to be done on a rest day of that assignment, Claimant, the "regular employe" or "incumbent" of the position, is entitled to it under the rules cited.

Carrier maintains that the issue is whether under the scope rule of the agreement, the work in question belongs **exclusively** to clerical employes. According to Carrier, the agent-telegrapher has performed this work in the past while Claimant was on duty and therefore may just as properly do the work on Saturdays.

There is a dispute of fact in the record as to whether the agent-telegrapher actually did such work while clerical help was on duty on Monday through Friday. After considering all of the conflicting evidence, it is our conclusion that the situation existing at this location was that the work of signing bills of lading and of billing carload freight was done by clerks as a regular part of their assignments, on the same basis as other duties which were regularly assigned to them. However, on occasions when the clerks were engaged in other duties of their assignments so that it was inconvenient or impracticable for them to sign particular bills of lading or to bill particular carloads of freight, and it was convenient for the agent-telegrapher to do so, the agent-telegrapher performed these functions.

The proper division of work between clerks and telegraphers is a problem of long standing before this Division. Many awards have been rendered in a variety of factual situations, and have been cited in the argument in this case. The application of these awards must be limited to factual situations similar to those out of which they arose. Thus, the awards dealing with ebb and flow, and those dealing with the physical location of the work, are not controlling here. Similarly, the question before us is not simply whether occasional clerical work may be done by the agent-telegrapher while a clerk is on duty during his regular assignment, so that awards rendered in such situations are not necessarily controlling. Here, there are two problems involved and the principles applicable to both problems must be accommodated. The Board has had occasion in the past to consider similar cases where the question of the right to certain work under the scope rule has been complicated

by the question of the proper application of the rules dealing with rest day work normally performed as part of a regular five-day assignment. Some of the cases involved the very parties to the instant dispute. In Awards 5579, 5622, 5623 and 5772, work which was part of a clerk's regular assignment during his work week was assigned to an employe other than a clerk on the regularly assigned clerk's rest day. Each of these awards sustained a claim on behalf of the regularly assigned clerk for the rest day work. Award 5772, in particular, involved facts similar to those in the present case.

Carrier would distinguish Awards 5622, 5623 and 5772 from this case on the basis that the conclusions in those cases were reached by reason of the ~~exclusive~~ assignment of the work involved to clerks for five days per week. In this case, the Carrier argues, the assignment was not exclusive because of the occasions on which, for the sake of convenience, the agent-telegrapher did this kind of work during Claimant's regular assignment. However, we do not think that the use of the phrase "exclusively assigned" in those cases has the restricted meaning which Carrier would give to it; namely, that the clerk did every bit of the work. Rather, we think the meaning intended was that the work was regularly, ordinarily and customarily accomplished by the clerks as part of the regular duties of their assignments—a state of facts which is admitted to be so in this case. We think that the work in question was "exclusively" assigned to Claimant within the meaning of that phrase as used in Awards Nos. 5622, 5623 and 5772 and that the principles and findings of those awards, involving the same parties as here, require that the claim be sustained in this case. We think it is not inconsistent to hold that an agent-telegrapher may perform certain occasional clerical work as a matter of convenience during the clerk's regular assignment, but that such work may not be assigned entirely to the telegrapher in lieu of calling a clerk on the rest day of the clerk's position.

Awards were cited to the effect that there are areas of work which do not belong exclusively either to clerks or to telegraphers, and that in such cases, the telegrapher may be assigned to do such work on the clerk's rest day. Examples of such cases are Awards Nos. 7133 and 7189. We do not dispute the validity of those awards and others like them. But they are distinguishable on their facts. We merely find that here the occasional performance of the clerical duties by the agent-telegrapher did not create an equal right to such work in the telegrapher, as did the much more substantial performance of such work by telegraphers in Awards 7133 and 7189.

In this case, we are convinced that the amount of clerical work shown to have been done by the agent-telegrapher while the Claimant was on duty is not sufficient to preclude a finding that the work belongs to the Claimant under the scope rule and is part of his regular assignment; and a further finding that since the work is part of his regular assignment Monday through Friday, he is entitled to a call when such work is necessary to be performed on Saturday.

The question of third-party notice, raised by Carrier, is disposed of in accordance with the Opinion in Award 7387.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 1st day of October, 1956.

DISSENT TO AWARD NO. 7427—DOCKET NO. CL-7496

For the reasons outlined in our Dissents to Award No. 7311, Docket No. CL-7214 and Award No. 7372, Docket No. CL-7519, and in our Special Concurrence to Award No. 7387, Docket No. MW-5883, on the question of third-party notice—

We likewise dissent here.

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