

Award No. 7622
Docket No. CL-7046

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

**THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated and continues to violate the Clerk's Agreement:

(1) When, effective March 17, 1952, it discontinued the position of Yard Clerk at Norwich, N. Y., held by Harry A. Wilcox and, concurrent therewith, assigned the duties attached to said position to two employes outside the Scope of the Clerks' Agreement, as herein described.

(2) The Carrier shall be required to restore the position and work, which was improperly removed from the scope of the current Clerks' Agreement, to employes covered thereby, and that Harry A. Wilcox and any other employes who may have been adversely affected by this violation of the Clerks' Agreement shall be reimbursed for all monetary losses sustained as a result thereof, retroactive to March 17, 1952, and until the condition is corrected.

EMPLOYES' STATEMENT OF FACTS: The Carrier maintains a freight station at Norwich, N. Y., and on the date prior to the improper abolishment of a clerical position held by Harry A. Wilcox, the relevant forces consisted of the following:

NORWICH FREIGHT STATION

Supervisory Agent

Foreman—

Monday thru Friday—8 AM to 5 PM Rate \$326.08—Mo.

R&D Clerk—

Monday thru Friday—8 AM to 5 PM Rate 13.18—Day

Cashier—

Monday thru Friday—8 AM to 5 PM Rate 306.08—Mo.

Agreement and performed by the occupant thereof, then, if it decreases, Carrier may abolish the position and return the remaining work to the position from whence it came and to which it is incident. That is, clerical work incident to a position outside of a Clerks' Agreement may flow from such position to positions under the Clerks' Agreement and then, if it decreases, back to the position to which it is incident. See Awards 806, 1405, 1418, 2138, 2334, 3211, 3735 and 3989 of this Division.

"Ticket selling is clerical work and this Board has said that a Telegrapher with telegraphic duties to perform may properly perform clerical work, which is incident to or in proximity of his telegraphic work, to such an extent as to fill out the telegraphic assignment. See Awards 4288, 4355 and 4477 of this Division. As stated in Award 4477:

'When the work of clerks exceeds that which the telegrapher can perform and it becomes necessary to increase forces, the excess clerical work belongs to clerks and must be assigned to them. If the work recedes to the point where the telegraphers can perform it all, it is the clerks and not the telegraphers which must be cut off when telegraphic work remains to be performed.' "

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The kind of work in question here has been performed by telegraphers for as long as we have had agreements with that Organization on this property. Work being performed by the telegrapher is incident to his telegraphic work. It has been recognized for many years that, with well understood limitations, the employees covered by the Telegraphers' Agreement may perform station work in conjunction with their exclusive telegrapher's work and, likewise, clerical employees may perform certain types of station work but under no circumstances or conditions, or at no time, has either had the exclusive right or monopoly in the performance of such work. The telegrapher in this case is available to perform, and may perform, this work in connection with his telegraphic duties.

There is no rule, precedent or practice to support the employees' position in this claim which should be denied. All data in connection with this case have been handled with the employees on the property.

OPINION OF BOARD: This claim involves the propriety of the Carrier's action in abolishing the position of Yard Clerk on March 17, 1952. The locale of this dispute is Norwich, N. Y. For many years both a passenger station and a freight station was in operation. Some time prior to the date in question, the forces at the passenger station consisted of a Clerk-Operator, assigned hours 7:00 A. M. to 4:00 P. M., Monday through Friday. The freight station forces consisted of five employees covered by the Clerks' Agreement, one of which was the position of Yard Clerk, occupied by the Claimant, Harry A. Wilcox when the same was abolished. In addition, there is a Supervisory Agent not covered by any Collective Agreement.

On, or just prior to March 17, 1952, the Carrier moved the post of the Clerk-Operator from the passenger station to the freight station, and it was from this point that all telegraphic work was then done. In addition to the telegraphic duties so performed, work previously assigned to, and performed by this abolished Yard Clerk position was re-assigned to and performed by the Clerk-Operator.

It is the re-assignment of this work, together with the act of abolishing the Yard Clerk's position, that forms the basis of this claim.

The Organization asserts that the clerical work at the Freight Station had historically been performed by employees covered by the Clerks' Agree-

ment, to the exclusion of all other crafts. It was further asserted that while a Carrier has the right to abolish clerical positions, any work remaining to this or any position should be re-assigned to an employe coming within the Scope of the Agreement and in no event assigned to a telegrapher to perform, when such performance can not be accomplished in the proximity of his (telegrapher's) post.

The Respondent took the position that this work here in question was properly assignable to the Telegrapher position here, as, and since, it could be performed by him in connection with his communication work to the end of filling out his day. It was further asserted that the work here belonged to the Telegrapher position under the "ebb and flow" doctrine, enunciated in a long line of awards of this Division; for which reason the Clerks never acquired the exclusive right to perform any particular work at this station.

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. (Award 7197.)

This Board has held in prior awards, legion in number, that a Telegrapher might, (with certain limitations) fill out the hours of his assignment by performing clerical work when not actually performing communication duties. A brief summary of these awards reveals: That the amount of clerical work which can properly be assigned to a telegrapher to fill out his assignment is limited only by his (the telegrapher's) capacity to perform same during the hours of his assignment. Award 615. Award 636 modified the extent of Award 615 to rule that the telegrapher was required to perform such clerical work in the proximity of his post of duty, and to the further extent that such clerical work could not be brought to him at his post to perform.

Thus the question is raised here as to whether or not the clerical work and the manner of its performance was properly assigned to the employe to whom it was here assigned. We think not. While there was undoubtedly a substantial amount of clerical work that could have been assigned to the occupant of the position in question, we do not believe that they included all of the work of the abolished Yard Clerk position so assigned. Evidence of record indicates that the telegrapher left the proximity of his post and went a substantial distance into the yard to perform a part of the reassigned duties; thus was away from the said post on numerous occasions for different periods of time. A telegrapher cannot properly be detached from his post and sent to an unrelated location to perform clerical work to fill out his assignment.

Since this work and the required manner of its performance belong in this category, a finding that this claim is meritorious is required.

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 Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January, 1957.

DISSENT TO AWARD No. 7622, DOCKET No. CL-7046

In Dissent to Award 7311, Docket No. CL-7214, we showed that the United States District Courts uniformly hold that awards rendered without regard to the mandatory provisions of Section 3, First (j) of the Railway Labor Act, are illegal and void. For the reasons stated therein, the majority in the present dispute have again violated their statutory duty by sustaining this claim without affording the Telegraphers "due notice" and an opportunity to be heard.

In addition, the majority's conclusions on the merits are not supported by the collective bargaining agreement, and are in direct conflict with well-established awards of this Division.

Award 615 recognized there had always been a nation-wide general practice for telegraphers to be assigned clerical work without limit except their capacity to fill out their time when not occupied with telegraphy, and that such work was always excepted from the scope of the clerical agreements. Award 615 commanded the denial of this claim, however the majority have attempted to overcome that hurdle by holding that the author of Award 615 modified the extent thereof in Award 636 by ruling "that the telegrapher was required to perform such clerical duties in the proximity of his post of duty, and to the further extent that such clerical work could not be brought to him at his post to perform."

Contrary to what the majority have stated, Award 636 did not even mention bringing clerical work to the telegrapher's post to be performed. Award 636, merely held that a telegrapher at a yard office could not be detached from his post and sent a mile away to a freight and passenger station "to take over a half of a day of straight clerical work to facilitate the abolition of a clerical position."

Actually, Award 636 commanded the denial of this claim because Referee Swacker reaffirmed his holding in Award 615 that a telegrapher could perform clerical work existing or arising at or immediately adjacent to his post—which was the exact situation involved here, because the telegrapher was simply part of their freight house force.

The factual situation in Award 636, and the principle contained therein, have absolutely no similarity to the instant dispute, and the majority committed grave error in using it as a vehicle to arrive at an erroneous award. The error is magnified by the fact that Referee was handed Award 635, which was rendered on the same day as Award 636, and dealt with the exact factual situation involved here, viz., a telegrapher leaving his post to go "out in the yard checking cars" which work was found to be "similar in principle" to Award 615, and claim there was denied on the "conclusions there reached."

Even if the conclusion reached by the majority were correct, which we do not concede, nevertheless they had no authority to sustain the claim for any amount in excess of the time that the telegrapher was actually away from his post, for the Employees submitted a sworn statement from a clerical employe at Norwich which showed that the Clerk-Operator, who

was part of the Agent's force at the freight station, spent only from 20 minutes to 50 minutes a day taking yard-checks, line-ups of cars, and seal records of inbound cars, which work formerly attached to the abolished yard clerk position.

The majority here well knew that this Division does not possess the power to order the restoration of the position abolished. The Carrier may avoid future penalties by a compliance with the Agreement in other ways than the restoration of the abolished position. See Awards 7222 and 7478 by this same Referee.

For the reasons stated we dissent.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen