Award No. 8289
Docket No. CL-7759

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

KANSAS, OKLAHOMA & GULF RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that the Carrier violated the Clerks' Agreement at Denison, Texas beginning May 16, 1954, when,

(a) It assigned the calling of the T&P Crew each day to the Agent, and,

(b) That the senior available Yard Clerk shall now be allowed a call each day so long as this violation continues.

EMPLOYES' STATEMENT OF FACTS: Effective May 15, 1954 a new agreement was entered into between the parties. Included in the Scope Rule in Group 2 of this new contract is "Train and Engine Crew Calling." The agreement in effect prior to May 15, 1954 made no mention of Train and Engine Crew Callers.

Prior to and since May 15, 1954 the calling of the T&P Crew between 8:00 A. M. and 10:30 A. M. each day has been performed by the Agent at Denison, an employe outside the Scope of the Clerks' Agreement.

POSITION OF EMPLOYES: The material facts in this case are not in dispute and involved the failure and refusal of the Carrier to assign work coming under the scope of the Clerks' Agreement to employes holding rights under such Agreement.

There is in evidence an agreement between the parties bearing effective date May 15, 1954 in which the following rules appear and which the Employes cite as being in violation:

Rule 1 of the Agreement provides:

"(a) These rules shall govern the hours of service and working conditions of employes engaged in the work of the craft or class of clerical, office, station and storehouse employes. Positions or work coming within the scope of this agreement belong to the employes covered thereby and nothing in this agreement shall be construed to permit the removal of positions or work from the

10. In order to clarify the record we wish to state that the Texas and Pacific Railway Company use the Kansas, Oklahoma and Gulf station facility and yard at Denison, Texas.

POSITION OF CARRIER: As stated in the Statement of Facts, the calling of the T&P crew has been handled exclusively by the Agent and only in rare instances the clerk or others have been used to call this crew.

The Agent has been handling the calling of this crew since the run was established in 1947. The T&P train is scheduled to depart Denison at 12:30 P. M. In some cases some members of the T&P crew are at Denison at the call time and the Agent calls them by telephone. Part of the crew is at Bonham, Texas, the home terminal for the run (30 miles distant). In those cases the Agent notifies the T&P dispatcher at Fort Worth, who in turn calls the crew at Bonham.

A new agreement with the Clerks' organization was negotiated and became effective May 15, 1954; train and engine crew callers are shown in Group 2 of the scope rule. The agreement in effect prior to that date did not show such class of employes. During the negotiation of this agreement, and particularly the scope rule, it was known by the General Chairman and other representatives of the organization that the Agent at Denison was handling all matters incident to the calling of the crew of T&P train which was scheduled to depart Denison at 12:30 P. M. No mention was made of this matter and on and after the effective date of the new agreement the Agent continued to handle the calling of this crew in the same manner as he had handled for the previous seven years. This fact alone proves conclusively that the claim is without merit and should be denied.

We believe that the history outlined in the foregoing paragraph is significant, for it shows that the work incident to the calling of this crew for at least seven years prior to the date of the new agreement and seven and one-half years prior to the date of the filing of the claim has never been handled by employes within the scope of the Clerks' agreement. Further and more important, it shows that said work was not exclusively within the scope of the Clerks' agreement, since custom, tradition and practice are the decisive factors in determining what work accrues to the classes of employes listed in the Scope Rule.

It can only be concluded that the work here in question was not the exclusive work of clerks on this carrier.

Since this is an ex parte case, this submission has been prepared without seeing the employes' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission.

All data submitted herewith in support of the carrier's position has been presented to the employes or their duly authorized representative and is hereby made a part of the matter in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: The Texas and Pacific Railway Company uses the subject Carrier's station facility and yard at Denison, Texas. In 1947 Texas and Pacific established a run out of Denison which necessitated calling the T&P Crew each day between 8:00 A. M. and 10:30 A. M. for scheduled departure at 12:30 P. M. The Carrier's Agent at Denison, an employe outside the Clerks' Agreement, has called this Crew ever since 1947. The Organization contends the continuation of this practice beyond the effective date of the applicable Agreement (May 15, 1954) is a violation thereof on the asserted ground that the Carrier has permitted the Agent to perform

work expressly reserved to employes subject to said Agreement. While no Clerk was on duty during the stated hours subsequent to May 15, 1954, two regular and one relief clerical positions have been maintained at this location since that date.

The contract in effect prior to May 15, 1954 covered only Clerks or Group 1 employes. The scope rule of the new Agreement was expanded, however, to include classes of employes designated as Group 2 and Group 3. Among the positions listed in Group 2 are "Train and Engine Crew Callers." The new scope rule was rewritten in other respects to state, in pertinent part:

> "These rules shall govern the hours of service and working conditions of employes engaged in the work of the craft or class of clerical, office, station and storehouse employes. Positions or work coming within the scope of this agreement belong to the employes covered thereby and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, nor shall any officer or employe not covered by this agreement be permitted to perform any clerical, office, station or storehouse work which is not incident to his regular duties, except by agreement between the parties signatory hereto."

In contrast to the Scope Rule provision just quoted the corresponding provision in the previous agreement stated only: "These rules shall govern the rates of pay, hours of service and working conditions of all Clerks- - except Chief Clerks to heads of Departments . . ."

The Carrier points out that the practice in dispute had been in effect since 1947 and was not protested by the Organization until December 1954, or seven months after the new agreement had become effective. It is urged that the present contract did not abrogate this practice and that the Organization was aware of said practice at the time the contract was executed. The Organization denies any such knowledge. It further contends it did not agree to permit the Agent to perform the work in question. Finally, Petitioner urges that the work in question "cannot be held" to be incident to the Agent's regular duties. The Carrier does not seek to refute this last contention.

In our opinion, the new contract reserved to the employes covered thereby the work of Train and Engine Crew Calling. The fact that this function was performed at Denison by the Agent prior to May 15, 1954 does not support the Carrier's position in this case, since before the present Agreement became effective Management had the unilateral right to assign this duty to persons not covered by the Clerk's contract. This unilateral right was surrendered with the execution of the new contract, however, which assumed jurisdiction over the work of Train and Engine Crew Calling. The fact that the Organization did not protest the subject practice until seven months later does not have the effect of removing this work from the coverage of the contract. Award 6357.

The Carrier Members of this Division have raised the question of third party notice under the Railway Labor Act as applied to this proceeding. We are of the opinion that such notice is not required in this instance.

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 28th day of March, 1958.