Award No. 8669
Docket No. CL-8173

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the Clerks' Agreement:

(1) When on December 3, 1951, the Local Agent at Hutchinson, Kansas, instructed the Chief Clerk-Cashier to assign Freight Office clerical work to the Ticket Agent-Operator, and removed clerical work comprised of the regularly assigned duties of the Bill Clerk from under the Scope and operation of the Clerks' Agreement by utilizing an employe of another craft, and subject to the Agreement of another craft, to perform said work, in order to avoid the overtime rule of the Clerks' Agreement.

(2) That the clerical work of handling Freight Accounts, such as expensing, signing bills of lading, and other clerical work in connection with Freight Accounts, performed by the Ticket Agent-Operator, an employe of another craft, be returned to the clerical forces.

(3) That the Carrier be directed by appropriate Board Order to pay the claim filed by Nettie Seck, Bill Clerk, in accordance with claims filed, at Bill Clerk's rate of pay. (See Exhibit "A" attached.)

(4) That the Carrier be directed by appropriate Board Order to pay the claim filed by O. R. Reese, Yard Clerk, at Yard Clerk's rate of pay. (See Exhibit "B" attached.)

EMPLOYES' STATEMENT OF FACTS: The office force in the Local Freight Office, Hutchinson, Kansas, December 1, 1950 was as follows:

Chief Clerk—Cashier
Rate Clerk
O. S. & D. Claim Clerk
Bill Clerk
Demurrage Clerk

identical clauses of the Agreement unless our past ruling be clearly erroneous. For a concise recital of the ebb and flow doctrine see Award 4477."

As late as December, 1955, your Board upheld the position taken by the Carrier in this dispute. In rendering Award 7198 which denied a similar Clerks' claim on this property at Waterloo, Iowa, your Board referred to Awards 615 and 636, holding that:

". . . It has always been the rule that telegraphers may be assigned clerical work without limit except their capacity to fill out their time when not occupied with telegraphy."

In view of the long history of this issue before your Board and the determination of it under the applicable agreement in previously cited awards on this property and others, the Carrier has rejected the Organization's claim and we respectfully request your Board to do likewise.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Before July 21, 1951, Carrier had operated a local freight office separate and apart from its passenger station at Hutchinson, Kansas. At the latter there were no clerical positions; the work force consisted of a ticket agent and telegraph operators, all subject to the Telegraphers' Agreement. At the freight station the work force was composed of a chief clerk-cashier, a rate clerk, an O.S. & D. claim clerk, a bill clerk, and a demurrage or yard clerk, all subject to the Clerks' Agreement.

Effective July 21, 1951, Carrier moved the local freight office force into its recently constructed new passenger station. None of the previous positions was abolished following said move. On December 3, 1951, Carrier's local agent wrote to the chief clerk-cashier asking that, "when additional help needed" the agent and/or the operators be used to provide proper clerical service.

Beginning November 28, 1951, and ending November 29, 1954, the Agent-Operator expensed varying numbers of bills on various dates (121 dates in all). For said dates Claimant Bill Clerk Seck is asking varying amounts of punitive (overtime) pay, ranging from one-fourth hour to four hours.

Beginning December 8, 1951, and ending February 9, 1952, the Ticket Agent signed various numbers of bills of lading and diversions on nine different dates. For said dates Claimant Yard Clerk Reese is asking from one-fourth to one-half hours of punitive pay.

Both of these claims were originally filed in November-December, 1951. After due progression to the Carrier's highest officer handling such claims they were denied on May 23, 1952. Further conferences thereon resulted in final denial on April 13, 1954.

On December 19, 1955, the Organization representing the Claimants filed a notice of intention to submit an ex parte presentation in support of the claims. Said submission was received by this Division on January 20, 1956.

Three main issues confront the Board in this case. (1) Should the claims be barred by the Board because not timely filed under Article V, Section 2, of the Chicago Agreement of August 21, 1954? On this question the Carrier argues that the date of the actual filing of the Employes' ex parte submission with this Division—and not the date of their sending here a notice of intention to file same—is the critical date. Since the former exceeds the 12-month limit set for such claims, it is contended that the instant claims are barred. To hold otherwise, says the Carrier, would be to permit long delays and to defeat the intended application of said Agreement. The Organization of course takes the opposite view. (2) Should consideration of the instant claims on their merits be held in abeyance pending notice to another Organization, the Telegraphers? The Carrier's representatives request such notice on the grounds that the Telegraphers are an interested third party involved in the instant dispute. The Organization denies such interest in general, and, as regards this particular case, argues that (a) this issue, not having been raised on the property, is not properly before this Board now; and (b) in any case, the issue is moot because the violation, having ceased in 1954, is not a continuing one and does not presently concern the Telegraphers. (3) On the assumption that the instant claims are now properly before this Board on their merits, should they be sustained or denied? Did the Carrier's action violate the Parties' Agreement? The Organization seeks an affirmative award on the grounds that (a) Carrier gave work formerly done wholly by Clerks at this location to Telegraphers; (b) the ebb-and-flow principle does not apply here because (i) no clerical position was here abolished, (ii) the facts show that Carrier used Telegraphers to avoid overtime work for Clerks; and (iii) no work flowed out from the former to the latter and back again; and (c) the Scope Rule of the Clerks' Agreement was violated. The Carrier seeks a denial award on the grounds that (a) said Scope Rules does not give all clerical work exclusively to Clerks; (b) Telegraphers have always performed some clerical work, particularly when necessary to fill out their assignments; (c) the work here complained of was incidental to the Telegraphers' work and was in reasonable proximity thereo; and (d) when the Clerks were brought into the new passenger station, there was some ebb of their work back to the Telegraphers.

In the light of the facts of this particular case the Board is compelled to hold with the Organization's position on the first of the three issues set forth above, namely the question of bar because of lack of timely filing of the case with this Division. On said issue it is to be observed that (1) the effective date of Section 2 of Article V of the Chicago Agreement of August 21, 1954, was and is January 1, 1955; (2) the highest officer of Carrier designated to handle the grievances made his final denial before said date; (3) under Section 2 the Organization then had a period of 12 months after said effective date "for an appeal to be taken to" this Division; and (4) the Organization notified this Division of intention to take appeal 12 days before the expiration of said period of grace but did not send its ex parte submission until 19 days after the expiration of said period.

It is clear that the first issue thus comes down to an interpretation of "for an appeal to be taken." The Board finds these words to be ambiguous as written. True, Article V, Section 1 (c) says in another connection something about proceedings being "instituted" before an appropriate adjustment board; and this word might be interpreted to mean the sending of notice of intention to appeal rather than the sending of the appeal itself. It might then be argued that this is what the Parties meant when they used other words in Section 2; that is, it might be contended that "taking an appeal" in Section 2 means the institution of proceedings, which means the sending of notice of

intention to appeal. But it might just as well be argued that, when the Parties did not say "institution of proceedings," they deliberately refrained from meaning anything but the actual sending of the appeal (ex parte submission) itself.

It must, therefore, be concluded that the above-quoted words in Section 2 are ambiguous. In such cases it is customary to search the record for substantial evidence on the Parties' intent when they wrote the language. Such evidence might be (1) minutes or transcripts of their discussions in negotiation; and/or (2) mutually acceptable past practice.

The record in this case contains no such evidence. The Board is left with the ambiguous language of that sentence in Section 2. The Board is not empowered to rewrite the phrase in the interests of greater clarity, but the Board is authorized to interpret the ambiguous words as they apply to this particular case. Accordingly, the Board rules that the Organization's sending of notice of intention to appeal and its subsequent sending of the ex parte submission only one month later were reasonably within the 12-month limit set in Section 2 of Article V.

It is to be understood that this conclusion does not lay down a hard-and-fast rule applicable to all such cases. The Board will have to decide on a case-by-case basis what constitutes a reasonable and what constitutes an unreasonable gap between the timely filing of notice of intention to appeal and the later filing of the appeal itself. In other words, the Board has no thought here of excusing unreasonable gaps or delays.

As to the issue of third-party notice, the Board rules that such notice is required. It may be true that, because Carrier stopped the alleged violations years ago, the particular members of the Telegraphers here involved have no continuing or present monetary interest in the decision on this case. That is, they may stand to lose nothing no matter what the decision on the merits might be. But it is equally true that the Telegraphers, as an Organization have a continuing interest in all cases of this sort. This Carrier and other carriers may repeat at other locations the action taken by Carrier in the instant case. A principle is involved that concerns the Telegraphers as well as the Clerks.

Because of this fact, because of the reasoning set forth in Award No. 8408, and because of the possibility that a sustaining award might follow from a consideration of the merits of the instant case, the Board holds that said consideration must be deferred pending notice to the Telegraphers giving them opportunity to be heard.

FINDINGS: The Third Division of the Adjustment Board, 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, subject to the following finding as to notice:

That the Order of Railroad Telegraphers is involved in this dispute and is therefore entitled to notice of hearing pursuant to Section 3, First (j) of the Railway Labor Act, as amended;

That the merits of the instant dispute are not properly subject to decision until said notice is given.

AWARD

Hearing and decision on merits deferred pending due notice to the Order of Railroad Telegraphers to appear and be represented in this proceeding if it so desires.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of January, 1959.