Award No. 9244
Docket No. CL-8854

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope Rule, when Electricians' Helpers J. N. Yocum and E. A. Pietsch were required and permitted to perform clerical work in the drafting room, Maintenance of Equipment Department, 30th Street Station, Pennsylvania, former Philadelphia Terminal Division.

(b) Claimants, Clerks William J. Quigley, and Daniel F. Sweeney, should be allowed payment for all monetary loss at the time and one-half rate of pay caused by the violation commencing May 18, 1952, and continuing on all subsequent dates until corrected. (Docket E-846.)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimants in this case hold positions and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

pay of Electrician Helpers Yocum and Pietsch. Thus, by no stretch of the imagination could it be said that the Claimants here involved suffered any monetary loss, and it is obvious, therefore, that Item (b) of the Employes' claim is wholly without merit.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable Agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to the Agreement. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement in the instant case and that the Claimants are not entitled to the compensation which they claim.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimants, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same.

All data contained herein have been presented to the employes involved or to their duly authorized representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Here involved is the work of two employes with the payroll title "Electrician's Helper" in the Maintenance of Equipment Department. Claim was made by the Organization that they performed clerical work properly belonging to those covered by the Clerks' Agreement. Carrier denied on the ground that the work performed was not strictly or essentially clerical but incidental to related work belonging to other crafts and that no clerical employe had ever been assigned to it or employed in that office.

As noted in many awards, some clerical duties are inherent in most positions and may be performed by those outside the Clerks' Agreement,

except as restricted by rule. The applicable Scope Rule before us brings under the Agreement those employes who regularly devote not less than four hours per day to certain specified clerical duties and also those holding certain named positions.

A joint check showed that the work performed on the positions here in dispute consisted of six different classes or items of work. None of these items of work can plainly be identified with any named position of the Clerks' Agreement except 13⅓ hours per month of messenger work and it is stated that it was performed in connection with other duties. This would not establish a messenger position.

The most important item for our study is item No. 1 which showed that approximately one-half the time of the positions—84 hours per month—was spent to:

> "Maintain the files for blue prints. Number and files the prints received from the Mechanical Engineer's Office. Makes the necessary changes in print numbers as instructed from the Chief of Motive power."

This does not constitute "writing and calculating incident to keeping records and accounts" or "writing and transcribing letters", etc. or "operation of office mechanical equipment and devices", which are duties included in the Agreement. It is urged that it is included in the position of blue printers, who are named in the agreement. If it were incidental to the work of blue printing that might well be true, but it is shown that blue printers have not at any time been employed in the drafting room where claimants are employed and, more important, that the prints are not received from the blue printer but from the Mechanical Engineer's Office, and the instructions as to numbering are received from the Chief of Motive Power. Such filing appears to be incidental to the work of those offices rather than with that of the blue printer.

The other items listed in the joint check are even less explicit in identification of work performed and its relation to other work. From all the information presented it does not clearly appear that the work performed on these positions comes within the Scope Rule of the Clerks' Agreement.

The Organization shows no practice or custom to support its claim and the Carrier shows that the work here involved has never been performed by clerical employes and that no clerical employes have been assigned to the drafting room since it was first inaugurated prior to the effective date of the Clerks' Agreement in 1942.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 17th day of February, 1960.

DISSENT TO AWARD NO. 9244, DOCKET CL-8854

This Award was conceived in absurdities and inconsistencies, resulting in unsupportable and illogical conclusions.

The majority holds that: "The applicable Scope Rule before us brings under the Agreement those employes who regularly devote not less than four hours per day to certain specified clerical duties and also holding certain named positions" and then comes the false conclusion that a position performing 13⅓ hours messenger work and 84 hours of admitted clerical work, did not constitute "writing and calculating incident to keeping records and accounts", etc.; that "some clerical duties are inherent in most positions and may be performed by those outside the Clerks' Agreement"; that the Organization failed to show practice or custom in support of its claim; that "no clerical employes have ever been assigned to the drafting room", consequently, the work was not covered by the Agreement. This erroneous conclusion finds no support in the facts of record, or, the clear and unambiguous Scope Rule of the confronting agreement, reading in part, here pertinent, as follows:

"Scope"

> These Rules shall constitute an Agreement between the Pennsylvania Railroad Company and its employes of the classification herein set forth as represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and shall govern the hours of service, working conditions, and rates of pay of the following **positions** and **employes** of the Pennsylvania Company, * * *.
>
> Group 1 — Clerks as defined in the following paragraph:
>
> > Clerk—an employe who regularly devotes not less than four hours per day to the writing and calculating incident to keeping records and accounts, writing and transcribing letters, bills, reports, statements and similar work, and to the operation of office mechanical equipment and devises, except as provided in Rule 3-C-2. This definition also includes * * *, blue printers, * * *." (Emphasis added.)

It will be noted that "employes and positions" are covered by the Scope of this Agreement and governs the hours of service, working conditions, and rates of pay of all those defined as a Clerk under Group 1 and no exception is contained therein that allows "Electrician Helpers", or,

others to perform in excess of 4 hours clerical work daily, even if it could be ruled to be incidental to their primary duties, nor, are such positions or employes confined to any particular office of the Carrier.

In order to arrive at the correct rate of pay for a particular position covered by the Scope Rule of this Agreement, the parties have set up a questionnaire system for doing so. In respect thereto, Carrier's Oral Argument contained the following:

> "In this connection the Employes state as follows:
>
> 'There is a system of rating clerical positions provided under agreements and practices of over thirty years which have been included in an Agreement, effective August 1, 1951. This Agreement provides for a questionnaire system of rating clerical positions * * *. Suffice to say that the questionnaire provided under this agreement list various items of clerical work. The following is shown in the Maintenance of Equipment (Including office of Master Mechanic) Questionnaire Form.'
>
> "Item 64. Maintaining blue print file."

and

> "Common Item 43. Work ordinarily performed by employes coming within the scope of Miscellaneous Force Regulations, such as janitor work, **messenger** work, * * *."
>
> 'In the joint report made in connection with the work performed by the Electrician Helpers it is agreed that 84 hours of clerical work is devoted to maintaining the files for blue prints, etc., and 13⅓ hours is devoted to messenger work. * * *' "

Carrier then states:

> "It is true that the duties described in Item 64 and Common Item 43 of the clerical questionnaire form, quoted by the Employes, may be performed by Clerks. * * *. However, * * * such forms do not constitute agreements giving to clerical employes the exclusive rights to perform the duties that appear thereon."

It will be noted Carrier here admits that such clerical work had been assigned to Clerks for a period of thirty years, yet such employes did not have the "exclusive" right thereto. What better evidence could we find to prove past practice, custom and tradition than a form of this kind where the parties have agreed how to determine a rate for such duties?

It should be remembered that the above quoted Scope Rule covers all positions and/or employes who regularly devote not less than four hours per day to clerical work, regardless of whether it has been "exclusively" performed by scheduled employes. This conclusion was sustained by the following awards of this Division involving the same parties and agreement.

Award 3825, Referee Swaim:

"The Carrier, on the other hand, contends that the work done by the Yardmaster was incidental to his supervisory duties and was not work that belonged exclusively to the Clerks.

* * * * *

The Scope Rule of this Agreement covers all clerical work, as there defined, 'except as provided in Rule 3-C-2.'

Rule 3-C-2 clearly only provides that employes not covered by the Agreement may perform clerical work incident to their positions when it is work previously assigned to a clerical position which has been abolished.

* * * * *

While there have been some awards of this Board holding that the performance of some clerical duties by others than Clerks, where such duties were incidental to the positions of the persons performing them, did not constitute a violation of the Clerks' Agreement, such Awards were based on general Scope Rules which contained no exceptions. Here the Scope Rule has the one expressed exception—as to 'work previously assigned' to a position which has been abolished.

One expressed exception to a provision in a contract negatives the intention of the parties that there should be any other exceptions implied. This rule of construction was recognized by this Board in Award No. 2009."

Award 4664, Referee Connell, also involved the same parties and agreement. Referee Connell cites Award 3825 with approval and states:

"The Carrier further contends that since the clerical work in question has been performed for many years without complaint or protest, that Claimant can not now claim violation of the Agreement. This Board has held in many Awards that continued violations of an Agreement do not change or lessen the binding effect thereof. In Award 3696 it was stated, 'The fact that the Organization has never claimed coverage before 1946 must be dismissed. This Board many times has held that failure to prosecute a rightful claim in the past does not estop present action.' "

These Awards constitute binding and controlling precedents on this property in relation to the issue confronting the Board in this Award. The Referee was fully familiar with them before he wrote his proposed "Opinion". How anyone could hold that the work involved was incidental to that of an Electrician's Helper", who performed no work in his craft, is beyond my comprehension.

Carrier originally took the position that the claim represented a "jurisdictional dispute" between two classes or crafts of employes and that before proceeding it would be necessary for the Board to notify the Electricians of the pendency of the dispute. Although they were not involved, the Electricians were notified that they had the right to submit anything

they desired in connection with the dispute. President John W. Mellon, Jr., Local 2013, Transport Workers Union of America, AFL-CIO, advised the Board,

> "I am unable to attend this hearing but wish to make our position clear, our position is that J. N. Yocum and E. A. Pietsch were not doing work covered by our agreement. They were doing clerical work and not Electricians Helpers duties."

This Award disregards the relevant facts of record, the controlling rules and precedents of this Board disposing of similar disputes. It represents an utter failure of this Board to perform its statutory duty, and thus is not only patently erroneous, but will have the effect of creating disputes, which Congress sought to eliminate by the establishment of the Board.

For the reasons stated, I vigorously dissent thereto.

J. H. Haines
Labor Member

REPLY TO DISSENT TO AWARD NO. 9244, DOCKET NO. CL-8854

Labor Member Haines' dissent is primarily based upon the "unsupportable and illogical" conclusion that Carrier's admission that certain work "may be performed by Clerks" constitutes an admission by Carrier that "such clerical work had been assigned to Clerks for a period of thirty years", notwithstanding that, as stated in the Opinion of Board, the record shows that "no clerical employe had ever been assigned to it or employed in that office".

Obviously, the fact that a Carrier is not prohibited from assigning work to clerical employes does not create any contractual right thereto, exclusive or otherwise, and Award 9244 correctly holds that the work herein involved does not come within the Scope of the Clerks' Agreement.

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. F. Mullen