Award No. 9416
Docket No. CL-8541

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

1. Carrier violated the Clerks' Rules Agreement when it abolished Clerical Position No. 56 at Lake City, Minnesota and rearranged the clerical duties of Clerical Position No. 34, assigning some of the duties of Position No. 56 to Position No. 34 and transferring duties of both positions No. 56 and No. 34 to the Agent, who is an employe not covered by the Clerks' Agreement.

2. Carrier shall compensate employe H. H. Vollmers at the time and one-half rate of his regular clerical position for an additional eight hours for each of the following days: January 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28 and 29, 1955.

3. Carrier shall be required to return the clerical work that has been transferred to the Agent at Lake City, Minnesota from positions covered by the Clerks' Rules Agreement to employes holding seniority in Seniority District No. 37 represented by the Brotherhood of Railway Clerks.

4. Carrier shall compensate all employes affected directly or indirectly by the abolishment of Clerical Position No. 56 at Lake City, Minnesota, which resulted in the Carrier transferring clerical work covered by the Clerks' Rules Agreement to the Agent who is an employe not covered thereby.

EMPLOYES' STATEMENT OF FACTS: Prior to January 12, 1954 the Carrier maintained a station force at Lake City, Minnesota consisting of the following:

Agent

Clerical Position No. 56

Clerical Position No. 34

Therefore, this claim for unnamed employes is not proper and should be dismissed. Further, employe L. Akeson, who occupied Position 56 at the time of its abolishment, exercised his seniority to another position in the seniority district and has since been employed. Furthermore, since January 12, 1955 it has been necessary to employ eleven or more new employes in that seniority district.

Prior to January 12, 1955 the station work at Lake City was handled by the Agent and two clerks. With the reduction in station earnings at that station, which amounted to $16,000 in January 1955 as compared with January 1954, and the corresponding reduction in the volume of station work, the second clerical position was abolished effective January 12, 1955 since which time the station work has been handled by the Agent and one clerk. The station work at Lake City is not specifically included within the scope of the Clerks' Agreement, the station work at that station has never been performed exclusively by clerks, the station work at that station has always been performed in whole or in part by the Agent and there can be no basis for any contention that there has occurred a violation of the Clerk's Rules Agreement. We should add that since the abolishment of the second clerical position the Agent has continued to work the same hours as before the abolishment, however, the remaining clerical position has been used quite extensively outside of his assigned hours to assist with the station work. As indicated above, he is regularly called on Saturday to assist with the station work and on many other occasions the clerk is used on an overtime basis to assist with the station work. During the period from January 12, 1955 to December 31, 1955 the remaining clerk at that station, Claimant Vollmers, in addition to filling his regular 8 hours assignment as before, was used to the extent of 278 hours and 10 minutes overtime. During their handling on the property the employes cited no rule in support of this claim.

As indicated above, there is no basis for this claim and we respectfully request that it be denied.

All data contained herein has been presented to the employes.

OPINION OF BOARD: The basic facts in this case are not in dispute. Prior to January 12, 1955 the station force at Lake City, Minnesota consisted of an Agent and two clerks. The Agent worked six days a week and each clerk worked five days a week.

On January 12, 1955 Clerical Position No. 56 was abolished. Thereafter a considerable portion of the remaining work was transferred to clerical Position No. 34, manned by Claimant Vollmers. Also, there is no dispute that a portion of the work remaining for Clerical Position No. 36 was transferred to the Agent.

Other facts are disputed, at least as to questions of degree. The Organization alleges that at the time of abolishment some five hours a day remained of Position No. 56, presumably for five days a week. The Carrier states that some two to three hours a day remained, most of which were assigned to the remaining clerical position. After mid-January Claimant worked an extra day a week and performed a total of 278 hours of overtime during 1955 (some fifty weeks), i.e., some 5½ hours a week. Taking Carrier's statement that some two to three hours a week remained of Clerical Position No. 56, it can be seen that Claimant Vollmer's overtime accounted for only about 50% to 35% of that remainder.

Carrier does not dispute that after the abolition of the job the Agent did some of the work formerly done by Clerical Position No. 56. But, the Carrier contends, the Agent "performs station work to no greater extent than before" because he still worked six days a week. The Carrier also stated:

> "Much of the station work [listed by the Organization as performed by the abolished clerical position] had been performed in whole or in part by the agent before any change was made in the station force and in fact, in connection with some of the items listed by the employes the agent performed the work almost exclusively."

The clear inference from this statement is that some of the listed work had been done exclusively by the abolished clerical position.

Summary of Facts

The station force had consisted of an Agent and two clerks. After the abolishment of the clerical position giving rise to this dispute the remaining clerical position performed from one-third to one-half of the work done by the abolished clerical position and the Agent did the rest. The Agent's hours were not increased and he took over work from the abolished position some of which he had performed almost exclusively, some of which he had shared with the abolished clerical position and some of which had been done exclusively by the abolished clerical position.

Contentions

The Claimant and Organization contend that the abolition of Clerical Position No. 56 and the transfer of some of its duties to the Agent, a person not covered by the Clerk's Agreement, violated the following paragraph of Rule 1 (e):

> "Positions 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 from the application of these rules, except in the manner provided in Rule 57."

Rule 57 provides that any change in the Agreement must be effected in conformity with the Railway Labor Act, i.e., by agreement or unilaterally only after exhaustion of the Act's procedures.

The Carrier contends that Rule 1(e):

(1) Covers "positions" but not "work";

(2) That the "ebb and flow" doctrine permits this kind of transfer;

(3) That the right to transfer clerical work to Agent-Telegraphers was confirmed by the August 21, 1954 Agreement.

In rebuttal, Claimant and the Organization contend that the interpretation of Rule 1(e) and similar rules affirm the contractual control over the "work" of "positions"; that the repeated construction of Rule 1(e) and similar rules establish that they prevent application of the "ebb and flow" doctrine; and that the 1954 Agreement could not confirm such a transfer right because it had not existed theretofore due to such awards.

Discussion of Contentions

None of the contentions in this case is new. Unfortunately the awards concerning them are not completely harmonious, although the ruling precedents seem reasonably clear.

(a) **Does Rule 1(e) govern "work" as well as "positions"?**

An early leading award on this issue is Award 1314 (Wolfe) which summarized the precedents of the Board in 1941. After a careful and exhaustive review of prior awards, it was concluded among other things, that ". . . work is the very life and content of a position". It is pertinent to note that Award 1314 spelled out limitations upon a Carrier's right to transfer the work of a clerical position to a non-clerical position even in the **absence** of a specific provision conferring positions within the scope of the Agreement to the Clerks and expressly prohibiting removal.

Award 1314 has been cited often and favorably, e.g., Awards 5785 (Wenke) same parties and contract language as here, and 7372 (Carter). Accord Awards 8234 (Lynch), 7047 (Wyckoff) and 3563 (Carter).

However, assertedly contrary precedent is cited. For example, Award 8256 (Bakke) held that the instant language covers only "positions" and not "work" relying upon the fact that the Organization had sought inclusion of the word "work" in the provision and the word had not been included. Such a factor, while relevant under certain circumstances, does not overcome the long interpretation of the same language in this and other contracts. While Award 8256 involved a different kind of dispute, there is no doubt that it attempted to overrule Award 5785 and others embodying the long-standing interpretation of this and similar contract language. In the absence of compelling reasons for such a departure from precedent, Award 8256 will not be followed here.

Award 9211 (Weston) is not in conflict with the "position-work" line of cases and involved a quite different kind of dispute: the abolition of a clerical position and the reassignment of its remaining work among clerical employes.

We, therefore hold, in line with the main line of precedent on the question in general and this contract provision in particular, that Rule 1(e) prohibits the transfer of the work of positions covered by the Agreement to employes outside that coverage.

(b) **Does Rule 1(e) prevent application of the "Ebb and Flow" Doctrine?**

The Carrier argues that the work done by the abolished clerical position is ordinary station work; that as extra station work it is properly transferable to clerical positions when the volume of work is high and is properly retransferable when the volume of work declines.

This is the "ebb and flow" described so well in Award 1314 (Wolfe).

However, it seems well settled that provisions such as Rule (1e) prevent the application of the "ebb and flow" doctrine, e.g., Award 8673 (Vokoun). Such was the holding in cases involving the very same parties and the very same contractural provision, Awards 8500 (Daugherty) and 5785 (Wenke).

Some opinions, such as that in Award 8500, stress the fact that some of the work involved was performed exclusively by the position abolished. In this case, as indicated under "Summary of Facts", **some** of the work had been performed only by the abolished clerical position and thereafter was performed by the Agent.

But, "exclusiveness" does not seem necessary. For the "ebb and flow" principle is an issue only where the abolished position and the one to which work is transferred have tasks in common.

It would seem to follow that provisions such as Rule 1(e) are not required and are not operative except where the duties in question are common to both positions and not exclusive to either.

Two recent Awards, Nos. 9219 and 9220 (Hornbeck) are said to reach a contrary conclusion involving similar fact situations and the same parties and agreement, thereby constituting binding precedents.

The facts there involved are somewhat similar. It was held that because the clerk's duties transferred to agents were not "exclusive" the provisions of Rule 1(e) were inapplicable. Such a conclusion is not supported by the precedents already described and the foregoing reasoning.

Nor is it supported by the awards cited as its basis. Those cases are distinguishable as follows: Award 8161 (Bailer)—an overtime assignment dispute; Awards 7784 (Lynch), 5867 (Douglass) and 5318 (Munro)—no provision comparable to Rule 1(e); Award 7387 (Cluster)—the scope rule did not describe the work covered; and Award 6393 (Elkouri)—a seniority dispute between two groups of clerks.

We hold, therefore, that Rule 1(e) prevents the operation of the "ebb and flow" doctrine both as to work which had been performed exclusively by the abolished clerical position and also that in common with it and the agent position.

(c) **Does the Agreement of August 21, 1954 confirm Carrier's right to transfer clerical work to Agent-Telegraphers?**

The Carrier also contends that "Article VIII—Carriers' Proposal No. 24" of the August 21, 1954 Agreement confirms its asserted power to make transfers of clerical duties to Agent-Telegraphers. It reads:

> "Establish a rule or amend existing rules to recognize the Carriers' rights to assign clerical duties to telegraph service employes and to assign communication duties to clerical employes.
>
> "This proposal is disposed of with the understanding that present rules and practices are undisturbed."

However, prior to August 1954, this Agreement and particularly Rule 1(e) had been held to prevent such transfers. See Award 5785 (Wenke), May 23, 1952.

Under these circumstances, the August 1954, Agreement confirmed "present rules and practices" as embodied in Awards which held that Rule 1(e) prohibited assignment of work performed by clerks to Agent-Telegraphers.

The Remedy

We hold that the Carrier violated Rules 1(e) and 57 by abolishing Clerical Position No. 56 and assigning a portion of its remaining duties to the Agent, thereby effecting "removal of positions from the application of [the] rules" without compliance with Rule 57.

The Organization asks for a three-fold remedy (as numbered in the "Statement of Claim"):

> (2) overtime payments to the remaining clerical employe for most of the remaining days in January 1955;
>
> (3) restoration of Clerical Position No. 56; and
>
> (4) compensation of "all employes affected directly or indirectly" by the abolishment of the position.

As to (2), the apparent theory of the claim is that the remaining clerical employe should have performed the work assigned to the Agent and therefore Mr. Vollmers should receive overtime pay for the work lost. This would be inconsistent with the disposition asked under (4) and would be repetitious.

As to (3), it seems so well established that the Board may not order the restoration of a position that we merely note that this claim is denied.

As to (4): the employe displaced is represented to have exercised his seniority rights and obtained another position. The employe who suffered from the chain of displacement is the one who is entitled to compensation. Therefore, we hold that the employe actually displaced by the "bumping" occasioned by the abolition should be paid the rate of the position he lost from the time of displacement less his actual earnings. See Award 8673 (Vokoun) which stands for the proposition that such a claimant is not unidentified but can be ascertained by a joint check of records.

Initially it was contended that the filing of the "appeal" to the Board was untimely; the holdings of the Board run contrary and we decide that the case was brought here in timely fashion.

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 to the extent indicated in the Opinion.

AWARD

Claims 1 and 4 sustained as indicated in the Opinion and Findings; claims 2 and 3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1960.

DISSENT TO AWARD NO. 9416, DOCKET NO. CL-8541

Here the majority first infers that some of the work listed by the Organization had been done exclusively by the abolished clerical position from Carrier's statement that much of such work had been performed, in whole or in part, by the Agent before the position was abolished, and that some of the items listed had been performed by the Agent almost exclusively. Such an inference is not only not well founded because obviously work could not have been exclusively performed by the abolished position which the Agent had been performing almost exclusively or which the Agent and Clerk previously had performed jointly, but what is more important, this Board is without authority to decide cases based upon inference or conjecture.

The majority next rules out the "ebb and flow" principle because of Rule 1 (e), but, notwithstanding, they then actually invoke and place a strained construction on the "ebb and flow" principle in an attempt to invalidate the "exclusiveness" feature under Rule 1 (e) in order to escape the effects of and to deviate from Awards which not only distinguish between rules like Rule 1 (e), which cover "positions" and rules which cover "positions or work", including Awards 8256, 9211, 9219 and 9220, involving the same parties and Agreement, in which latter Awards admittedly the facts are somewhat similar to the instant case, but also innumerable other Awards which make "exclusiveness" of work controlling.

For the foregoing reasons among others, Award 9416 is in harmful error and we dissent. An award such as this, based on such tenuous and devious inferences can only result in chaos and is repugnant to Awards which recognize that it is the duty of management to operate its railroad with efficiency and economy in the public interest.

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. F. Mullen

ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9416, DOCKET NO. CL-8541

Regardless of the contentions of the Dissenters, the record clearly shows that Carrier violated Rule 1(e) when it discontinued a full time position of Clerk and assigned clerical work to the Agent.

In an effort to evade the clear and concise provisions of Rule 1(e), Carrier Members attempt to confuse the issue by the introduction of the so-called "ebb and flow" theory and two irrelevant and two erroneous awards. This in

order to lead up to the untenable argument that work must be "exclusively" assigned under the Clerks' Agreement before it is covered thereby.

The Award places in their proper perspective Awards 8256, 9211, 9219 and 9220 in the light of the circumstances here involved and no further comment is necessary. However, the Dissenters' untenable and erroneous claim that "exclusiveness of work controlling" and "it is the duty of management to operate its railroad with efficiency and economy in the public interest", must be brought into their proper focus.

The theory of "exclusive" right to work must be proven before the work of a craft or class of employes can be considered as covered by the Scope Rule of their Agreement, is without support in law or logic. Referee Swacker in Award 615, upon which various Referees have relied in reaching their erroneous decisions, specifically refuted such conclusions, with the following:

> "* * *. Since by the patent facts such a contract must exist, as an elemental principle of law it must have a determinable subject matter; stated differently, there can be in law no such thing as a contract but that its subject matter is susceptible of definite determination. **It follows from this that in the absence of some definite exclusion, the contract must be deemed to embrace all of the field involved to be a valid contract at all. If it were purely optional with the Carrier to say how much or what of a definite kind of work was the subject matter of the contract, it could say none and the consequence would be in the absence of a subject matter that there would be no contract. Whatever if any exceptions exists will fall into one or the other of two classes—(a) those directly expressed in the exceptions to the scope rule of the schedule and (b) those which may be definitely demonstrable extraneously. The latter class might be shown by definite evidence such as clearly probable agreement of the parties or by implication arising from the conditions surrounding the making of the agreement; in the last class of cases, however, the Board should be extremely slow to find the existence of such exceptions and only upon unmistakable proof. Practice alone would be insufficient grounds because of the inequality of the relative status of the parties to make such practice. There must be definite evidence of actual acquiescence."** (Emphasis added.)

In Fourth Division Award 1343, Referee Coburn said:

> "The Carrier admits that yardmaster work was performed by 'various officers and clerks and other classes of employes' (ltr. Sept. 4, 1957. Supt. to Gen'l Chrm.). And in its Submission to this Board, Carrier says, 'The record shows that duties of this nature have been performed by others for many years'. Apparently these statements purport to show that yardmasters do not enjoy an exclusive right to yardmaster work because the custom and practice on this property was to permit others to perform that work.
>
> We do not agree with this theory. Here there is a contract between the Carrier and the representative of the yardmasters. It contains a Scope Rule which does not define the duties to be performed by yardmasters but must be construed to cover work belonging to that craft. To hold otherwise would render the whole agreement nugatory. As was said in Award No. 757 of the Third Division:

'It is well settled by many decisions of this and the First Division of this Board and predecessor Boards, that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. See awards of this Division, 180, 323, 521 and 615, of the First Division, 351 and 1257. This conclusion is reached not because of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, but the decisions likewise recognize that there may be other exceptions, very definite proof of which, however, is necessary to established their status as a limitation upon the agreement. Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it.'

(See also Fourth Division Award 445.)"

Also, see Third Division Awards 751, 1314, 3251, 4513, 5078.

No other than the Supreme Court of the United States has rejected Carriers' plea of efficiency and economy in a case involving the O.R.T. v. C.&N.W. The court said:

"We cannot agree with the Court of Appeals that the union's efforts to negotiate about the job security of its members 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.' The Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system. The Railway Labor Act safeguards an opportunity for employes to obtain contracts through collective rather than individualistic bargaining. * * *

"* * *. It (Congress) passed such Acts with knowledge that collective bargaining might sometimes increase the expense of railroad operations because of increased wages and better working conditions. It goes without saying, therefore, that added railroad expenditures for employes cannot always be classified as 'wasteful.' * * *."

Also, see Third Divisions Awards 180, 5369, 5388, 5483, 6284, 9193, 9419.

In view of the above, there is no merit to the contentions made by the Carrier Members in their Dissent.

/s/ J. B. Haines

Labor Member