Award No. 10639
Docket No. CL-10065

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

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

READING COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated and continues to violate the rules and understandings of the Clerical Agreement: —

1. When subsequent to the discontinuance of a clerical position, established for the purpose of performing duties and work known and described as "preparing and extending A.F.E. (authority for expenditure) Forms", in the Office of Division Engineer at Tamaqua, Pa., the Carrier subsequently assigned to a newly created position classified and designated as "Assistant Division Engineer", the duties and work which were previously and currently recognized and performed by employes under the scope and purview of the Clerical Agreement.

2. Clerk Earl W. Schoener, incumbent of clerical position in the Office of Division Engineer, Tamaqua, Pa. and/or his successor, be compensated an additional day's pay, beginning September 24, 1956 and continuing for each and every day subsequent thereto and until violation of claim outlined is discontinued and corrected.

3. The Carrier, through its representatives, enter into a joint check with the Clerks' System Committee for the purpose of determining and correcting the violation outlined in Claim No. 1.

EMPLOYES' STATEMENT OF FACTS: For years prior to the establishment of a new position on November 1, 1947, defined as Assistant Division Engineer in the Division Engineer's office at Tamaqua, Pa., clerical duties and work known as "preparation and extension of A.F.E. (authority for expenditure) Forms" had been and still is, in part, performed by the claimant Earl W. Schoener. Such duties and work had also been performed by other clerical employes in this office. This is confirmed by a verifax statement of the claimant, which is attached as "Employe's Exhibit "A" and will be further substantiated by correspondence quoted herein. The duties known as "preparing and extending of A.F.E. (authority for expenditure) Forms" has been recognized as clerical duties and performed by numerous other employes within and under the scope and purview of the Clerical Agreement, in many other departments and offices.

With respect to part 3 of the Brotherhood's claim, Carrier is not aware of the purpose of a request for a "joint check" inasmuch as this was not discussed on the property and further has no support under the rules of the Clerks' Agreement.

Under the facts and for reasons set forth hereinbefore and in Carrier's submissions and briefs in Third Division Dockets CL-8768 and CL-8769, Carrier maintains that the work involved is properly performed by an Assistant Division Engineer and is not exclusively clerical work. Carrier submits that the claim is without merit and not supported by the evidence, past practice, or rules of the Clerks' Agreement. Therefore, Carrier requests the Board to deny the claim in its entirety.

This claim has been discussed in conference and handled by correspondence with representatives of the Clerks' Brotherhood.

OPINION OF BOARD: The particular claim involved here is that Carrier violated the Agreement when it assigned to an Assistant Division Engineer, a person not covered by Clerks' Agreement, certain clerical duties, covered by Agreement.

The claim was filed in behalf of Clerk Earl W. Schoener, incumbent of clerical position in the Office of Division Engineer, Tamaqua, Pennsylvania, and/or his successor: that they be compensated an additional day's pay beginning September 24, 1956 and continuing for each and every day subsequent hereto and until violation of claim outlined is discontinued and corrected.

It is the contention of Organization that Earl W. Schoener joined the employ of Carrier May 16, 1916, as a clerk-stenographer and from about September, 1919, he prepared all of the A.E.F. forms coming under the jurisdiction of the Shamokin Division of Carrier, until about 1950, when Carrier appointed an Assistant Division Engineer to the Shamokin Division and assigned to the latter the duty of preparation of A.F.E. forms, which Claimant continued to type, as he previously had done. Claimant still continued to make some of the A.F.E. forms up to date of the filing of the claim. Claimant in his statement concerning the facts which is dated October 2, 1956, and is part of the Record on the property, sets forth the foregoing and further stated: "thinking this was of a temporary nature, I made no complaint".

Organization claims that the work of preparing A.F.E. forms, comes within the Scope Rule of the Agreement of the parties, as set forth in Rule 1, Group 1, hereinafter set forth:

"Group 1 — Clerks as defined in the following paragraph:

> "Clerical employes being those who regularly devote not less than four hours per day to 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 devices in connection with or in lieu of such duties and work.

"Group 1 includes such positions as:

> "Freight Claim Investigators, Salvage Agents, Car Agents, Car Distributors, Station Masters and Assistant Station Masters, Tele-

type Operators in performance of clerical work, Ticket Clerks, Information Clerks, Nurses, Collectors other than train collectors, Wharfmasters and Assistant Wharfmasters, Crew Dispatchers, Car Markers, Weighmasters and Weighers, Storekeepers, Section Stockmen and Stockmen, Shippers and Receivers, General Foremen, Foremen and Assistant Foremen, Freight, Material and Tie Checkers and Tallymen, Receiving and Delivery Clerks and others performing similar work."

It is claimed that this work is clerical work within the Scope Rule and that this was recognized by Carrier by bulletining positions for this particular work by Clerks, following agreement between the parties.

Organization claims Rule 13(b) of the Agreement has been violated, which Rule reads as follows:

"Rule 13 — Classification and Rating Positions:

"(b) Positions or work 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 except through negotiations."

and Organization claims the seniority rights of other clerical employes are affected.

Organization further claims that the statement of Division Superintendent in the Joint Statement of Facts proves that the Assistant Engineer at Tamaqua, Pennsylvania, is doing clerical work, said statement reading as follows:

"Assistant Division Engineer was assigned to staff of Division Engineer, Tamaqua, Pa., to assist with supervisory work in that department, including work of preparing and extending A.F.E. figures in pencil."

"The work of preparing A.F.E. figures is work associated with Division Engineer and proper for him or his Assistants to perform. The clerical work in connection therewith, such as typing and compiling finished report is performed by clerical positions established for this kind of work, therefore claim is denied."

Carrier denies the claims of Organization and in its Ex Parte submissions and its presentation here, relies in a major part, to portions of Dockets 8768 and 8769, being Awards 9578 and 9579, respectively, of this Board. Organization objected to the inclusion of these Dockets and exhibits contained therein on the ground that this question was not submitted on the property and that parties cannot in their Ex Parte submissions raise new issues and that Circular No. 1 of this Division is determinative of this question.

Carrier has cited nine Awards, 3130, 6228, 8008, 8300, 8105, 8106, 8107, 8215 and 8119 in support of its contention. We have carefully examined all of these Awards and the majority of them involved re-submission of the same facts: Award 8300 had only a brief quotation from evidence in another Award and was used by Referee in evaluating evidence in 8300: this Award does not

lend any support to Carrier's position. Award 8119 involved a case where one party, without objection, made previous Award and Docket a part of its submission and the other made files in other claims a part of its submission, both without objection.

A like situation has arisen in connection with the inclusion in Carrier's Ex Parte submission of an excerpt from letter from H. K. Modery. This was taken from Docket CL-8769, Award 9579, and is not being considered. Likewise, Organization has attached to one of its Ex Parte submissions letters which had not been considered on the property. None of these letters, nor Docket CL-8768, Award 9578 will be considered in a determination of the issues herein.

Carrier has also raised the point that claims are barred when not presented timely. An examination of the cases cited, discloses that, they involved delays in progressing cases after final determination by Carrier. In all of these, except Award 9189, this defense was raised on the property. Award 9189 involved failure to comply with Article V of National Agreement and is not in point.

Carrier has also raised question of unreasonable delay in progressing claims. Carrier cited Awards supposedly in support of this Claim: an examination of the Awards discloses that claims were denied on the merits or lack thereof.

In connection with these claims by the Carrier it has been noted herein that this was not raised on the property, but in addition it should be stated that such claim is in effect, an attempt to interpose a defense of laches. Notwithstanding the assertions of Carrier, it is a continuing claim and the delay in presenting it, has not been shown to have prejudiced the rights of Carrier. Award 6115.

Carrier asserts that in 1947, it established position of Assistant Division Engineers "for the purpose of assisting the Division Engineer with his supervisory work, which included work on A.F.E. forms previously performed by the Division Engineer." It is conceded by Organization that Clerks would not be required to leave their offices to secure data or other information necessary for the preparation, correction or extension of A.F.E. forms: that after such data has been compiled their duty then is to prepare, extend and complete the forms from data furnished.

Carrier further contends that the work on A.F.E. forms has not been exclusively performed by Clerks: and that for many years it has been part of the duties of Division Engineering officers to compile necessary data and prepare forms.

The record is not as complete as it might be. There is nothing in the Record to indicate just what Engineering officers have, in addition to compiling data, prepared the A.F.E. forms, outside of the statement of Claimant Schoener that commencing "about 1950, when an Assistant Division Engineer was appointed to the Shamokin District and to whom was assigned the duty of preparation of A.F.E. forms". Outside of this, the showing is practically conclusive that the Clerks, for years have performed this work.

There is little doubt in our mind that the Clerks' Organization for many years had performed the work in the preparation and extension of items, and typing required for completion of A.F.E. Forms. Now such work, according

to the Division Superintendent, as set forth in the Joint Statement of Facts, has been assigned to Assistant Engineer, Tamaqua, Pa., "to assist with supervisory work in that department, including work of preparing and extending A.F.E. figures in pencil", leaving to the Clerk the typing only of such forms.

Possibly the fact that Organization did not file claim until 1956, might lead to an inference that there might be some question in its mind as to the merit of the claim. Be that as it may, it could only be an inference and even that may be explained away by Claimant Schoener's statement in the October 2, 1956 letter, which is a part of the record, wherein he said "Thinking this was of a temporary nature, I made no complaint. However, I still make up some of the A.F.E. forms".

Carrier has raised the question of Memorandum of Agreement between the parties, dated August 19, 1946, which reads as follows:

"MEMORANDUM OF AGREEMENT
Between
READING COMPANY
And
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND
STATION EMPLOYES

* * * * * * *

"IT IS AGREED:

"When it becomes necessary through the reduction of work items or performances to reduce force or abolish positions, the following will apply:

"1. Employes whose positions are to be abolished shall be given as much advance notice as possible, in writing, and not less than forty-eight hours; at the same time, bulletin will be posted in the seniority district, listing the positions abolished, using form shown on Page 51 of the Clerks' Agreement.

2. Employing officer or supervising official will notify Local and Division Chairmen, in writing, at least five calendar days in advance of abolishing any position. If requested to do so by Local or Division Chairman, the employing officer or supervising official will furnish full details regarding the proposed re-assignment of the remaining duties, in accordance with the rules.

The full notice of five days, as provided in the foregoing, will not be required in instances where there is a temporary cessation of work caused by conditions beyond the control of the Management, and all work in such instances is temporarily abolished or discontinued, but the Division or Local Chairman will be notified promptly in order to avoid any violation of rules in effect.

3. **Any remaining duties of the position abolished will be re-assigned to other scope employes at that location or office.** In cases where there is no remaining position under the Clerks' agreement at the office or location where the work of the abolished position

is to be performed, the remaining duties of the scope position may be re-assigned to the remaining non-scope position or positions at that location or office; providing that less than four hours work per day of the abolished scope position remains to be performed, and that such work is related to the duties of the non-scope position.

4. If the employing officer or supervising official is notified by the Local or Division Chairman before the effective date of the abolishment of the position of any disagreement concerning the reassignment of the remaining work items, an immediate report will be made to the head of the department and prompt arrangements made for a joint check between a representative of the Management and the Organization. In such instances, the position will be continued until the joint check is completed and the Organization representative notified of the decision of the Management.

5. The absence of any such protest prior to the date the position is abolished will be indicative of concurrence by the Organization, **except:**

(a) If it later develops that the re-assignment of remaining duties or any other condition differs from that explained in advance by the employing officer or supervising official or as mutually agreed upon between Management and Organization representatives, claim may be filed and will be considered on its merits in accordance with the rules.

"This Memorandum of Agreement shall be effective as of August 19, 1946, and shall continue in effect in accordance with the provisions of the amended Railway Labor Act.

"For Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

/s/ **Judson Swan,**
General Chairman

For Reading Company:

/s/ **A. C. Tosh**
Assistant Vice President

"Signed at Philadelphia, Pa., August 12, 1946."

We have examined the Awards cited by Carrier and do not believe the claim here is affected thereby.

Carrier contends that this claim is not a continuing claim as originally presented to Carrier. We hold that it is. As it is presented to this Board, it is a continuing claim. The subject matter of the claim — the claimed violation of the Agreement has been the same throughout its handling. The relief demanded is ordinarily treated as no part of the claim, and consequently may be amended from time to time, without bringing about a variance that would deprive the Board of the authority to hear and determine it. No prejudice to the Carrier appears to have resulted in the present case. (Awards 3256, 6115).

The record lacks many things that might have been helpful: there is no evidence as to the amount of time consumed by Assistant Division Engineer in the preparing and extending A.F.E. figures in pencil. The statement by Claimant Schoener, dated October 25, 1956, states he was still making up A.F.E. forms and that he was continuing to type the forms prepared by Assistant Engineer.

We find no justification for allowing this claim for more than the three hour minimum, at pro rata rate, provided by Rule 9(a)(b) of the Agreement for regularly assigned employes notified or called to perform work between their regular work periods.

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, find 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 was violated.

AWARD

Claim sustained to extent set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of June 1962

DISSENT TO AWARD NO. 10639 (Docket CL-10065)

Here, the Referee has upheld the Clerks in their contention that Carrier in requiring its Assistant Division Engineer to perform incidental clerical work in connection with the technical duties involved in the preparation of engineering A.F.E. Forms, removed clerical work from a clerk-stenographer, despite the fact that said stenographer continued, without loss of time, to prepare these forms, including their typing, and awarded Claimant-Stenographer additional compensation under the Call Rule.

The basis of the alleged violation is dated November 1, 1947, when the Assistant Division Engineer's position was established, but protest was not made by the Organization for nine (9) years, or until September 24, 1956, that said position was in violation of the Agreement.

The Referee in this Award used an unconscionable solution to resolve this dispute, i.e., he simply refused to consider Carrier's argument and evidence.

While he recognized Carrier's reliance "in a major part" on its arguments in Dockets CL-8768 and 8769, then and now a matter of record with this

Board in Awards 9578 and 9579, he refused to consider them as requested by Carrier, notwithstanding the alleged rule violations in all three dockets involved the preparation of A.F.E. Forms by Engineers not under the Clerks' Agreement. He refused this request in the face of nine precedent awards of this Board upholding similar requests — some by Carriers and others by Organizations. It is significant to note that he cites no precedent in favor of his ruling; there is none.

His ruling is based on the allegation that these arguments were not handled on the property — notwithstanding that it was pointed out to him that the Carrier states and the Organization admits that the arguments were discussed in the handling of the dispute on the property. At page 93, record, the Carrier states:

> ". . . Carrier submits that the three Clerks' claims before the Board, viz., dockets CL-8768, CL-8769 and the instant docket CL-10065, are similar and while the facts in the three disputes vary slightly, discussions in connection with the schedule rules and practices are the same and Carrier does not wish to extend this already lengthy docket or overburden the already crowded schedule of the Third Division by reproducing pertinent material before the Board when it is already on record with the Board and is readily available to all parties concerned. Carrier submits that in the handling of the instant claim on the property Carrier pointed out the pertinency and applicability of its decision in similar claims involving the performance of AFE work in connection with track abandonments, etc., on the Philadelphia and Reading Divisions and **the Organization was fully cognizant of and aware and advised that Carrier considered the three claims related and having no support under the rules of the schedule agreement.**" (Emphasis ours.)

At page 7, record, the Employes state:

> "As there were two additional previous cases involving A.F.E. duties and work and which have been advanced before your Honorable Board, known as Dockets CL-8768 and CL-8769, **the Director of Personnel took relatively the same position as he previously had taken in these two dockets**; and will be outlined in subsequently quoted correspondence. . . ." (Emphasis ours.)

Furthermore, holding **Award 9189** as not being "in point" because it involved Article V of the National Agreement, the Referee committed another error. He was shown that both parties are signatory to Article V — but somehow concluded that Article V does not apply to the Parties in this dispute.

For these and other reasons, the undersigned dissent to the findings in this Award 10639.

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ T. F. Strunck

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 10639, DOCKET NO. CL-10065

Here again, we have the Dissenters' outworn cliche that unless Claimant has suffered a "loss of time" when work is removed from the scope of an Agreement, no violation results. This trivia has been rejected so many times by this Division that it is not necessary to cite authorities that have done so. On this subject, however, see Labor Member's Answer to Carrier Members' Reply to Labor Member's Answer to Carrier Members' Dissent to Award No. 9546, Docket No. CL-9218.

The Dissenters second untenable contention is based on the equitable doctrine of laches and displeasure that the Referee "simply refused to consider Carrier's argument and evidence." They are aware that this Board has no authority to decide cases on equity. Furthermore, it is a cardinal principle of contract interpretation that a past practice, or as in this case, a past violation, does not change a clear and unambiguous Agreement. What the Board was here concerned with was a violation which occurred on and subsequent to September 24, 1956.

While the Dissenters object to the Board's rejection of Article V, August 21, 1954 Agreement being pertinent to the issues raised by the parties on the property, they overlook Section 3 of that Agreement, which specifically rejects their contentions that the claim was barred by laches. This section provides that:

> "A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. * * *."

Furthermore, the same contention was made in Docket CL-8768 and rejected by the Board in Award 9578, involving a dispute between these same parties. That the instant Carrier attempted to include that Docket and Docket CL-8769 in its arguments in this dispute, in violation of the Board's Circular No. 1, is clear. It is rather inconsistent to contend, on the one hand, that the arguments presented by Carrier in Dockets CL-8768 and 8769 should be considered, while on the other, disregard Awards 9578 and 9579, which rejected their argument relating to issues not made a part of the dispute on the property.

Article V, August 21, 1954 Agreement, was not raised on the property and was not a proper subject for consideration by the Board. There is no merit to this argument as it was not raised on the property. Award 9189 was incorrect when adopted, as it failed to recognize the requirements of the Railway Labor Act and the Board's Circular No. 1 (see Award 9578), as well as a long line of Awards that have been contrary thereto. See my Dissent to Award 9189 and also Awards 10036, 10061, 10074, 10075, 10079, 10085, 10102, 10139, 10173, 10227, 10313, 10315, 10420, 10638, which have overruled Award 9189. In fact, the author of Award 9189 took a contrary view in Award 10069, when he ruled:

> "Carrier's contention that the request for hearing does not comply with prescribed time limits was not raised on the property and in line with the great majority of prior awards (among others, 8685, 8484, 8411, 6744), will be deemed waived since Petitioner was afforded no opportunity to explain or discuss the objection on the property and a question of this Board's fundamental jurisdiction is not involved."

Also, see Labor Member's Reply to Carrier Members' Dissent to Award No. 10069, Docket No. CL-9687.

Therefore, it was proper for the Board to reject the untimely presentation of laches and Article V, as they were not a part of the dispute that was handled on the property.

The Dissenters show displeasure because the Board refused to consider a considerable amount of irrelevant, immaterial and inadmissible matters presented by Carrier in Dockets CL-8768 and 8769 and claims that it is significant that the Referee did not cite a precedent in favor of his ruling, as "there were none". Apparently, they overlook the requirements of the Board's Circular No. 1, providing:

> "Position of Carrier: Under this caption the Carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of Carrier's position must affirmatively show the same to have been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute.
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> * * *
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> **GENERAL**
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> "To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner **that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.**
>
> **HEARINGS**
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> * * *
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> "The parties are, however, charged with the duty and responsibility of including in their original written submissions all known relevant, argumentative facts and documentary evidence."
> (Emphasis ours.)

It is, therefore, clear that if the Carrier had any "pertinent material" to present in Docket CL-10065, it was "charged with the duty and responsibility of including" it in its original written submission, which it failed to do. It could not include such therein by reference to other dockets. The Referee properly refused to consider such irrelevant and immaterial matters and thereby relieve Carrier of its obligation under the Board's Rules of Procedure (Circular No. 1). In view of the clear requirements of these Rules of Procedure, no precedent in favor of the Referee's ruling was necessary. It is rather absurd to contend that it is not desired to overburden the Third Division by not including certain "pertinent material" while, at the same time, expect the Division to read extraneous material in two other overburdened dockets. That the Dissent is not based on the facts of record, the Board's Rules of Procedure, or the governing rules of the Agreement, is obvious.

Award 10639 properly disposed of the dispute in accordance with the pertinent facts and governing rules.

/s/ **J. B. Haines**
J. B. Haines
Labor Member