

**Award No. 10989**

**Docket No. CL-10622**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Levi M. Hall, Referee**

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**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 it required and permitted Painter Foreman V. C. Sternquist to perform clerical work accruing to clerks in the joint office of Supervisors of Structures, and Communications and Signals, Union Station, Chicago, Illinois, Northwestern Region.

(b) The Claimant, Cora Del Cerro, should be allowed eight hours' pay a day, as a penalty, for July 24, 25, 26, 27, 30, 31 and August 1, 2 and 3, 1956, the dates on which the violation occurred.  
[Docket 201]

**EMPLOYEES' STATEMENT OF FACTS:** This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representatives of the class or craft of employees in which the Claimant in this case held a position 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, covering Clerical, Other Office, Station and Storehouse Employees 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.

The Claimant, Cora Del Cerro, is the incumbent of clerical position, Symbol No. H-3-D, located in the joint office of Supervisors of Structures, and Communications and Signals, Union Station, Chicago, Ill., Northwestern Region. She has a seniority date on the seniority roster of the Northwestern Region in Group 1.

Other Awards holding firmly to the principle that in the absence of such provisions in the Agreement penalties cannot be inflicted upon a carrier for a breach of the Agreement, include Third Division Awards 8228, 7577, 7110, 5186, 4730 and 3659, and First Division Award 15865 and Interpretation No. 1 to Award 7287, recently handed down by this Board.

It is submitted, therefore, that the Claimant is not entitled to the penalty compensation which she claims in Item (b) of the Employees' Statement of Claim.

**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 shown that the work here in dispute does not accrue exclusively to clerical employees coming under the scope of the Clerical Agreement, and that the Claimant is not entitled to the compensation which she claims.

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

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, 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 employee involved or to her duly authorized representative.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Parties involved in this dispute have agreed on the ensuing facts:

"During the period in question the claimant was regularly assigned and working as a Clerk in the joint office of Supervisors of Structures and Communications and Signals, Union Station, Chicago, Illinois, 7:00 A.M. to 11:00 A.M. and 12:00 noon to 4:00 P.M., Monday to Friday with relief days of Saturday and Sunday.

On July 24, 25, 26, 27, 30, 31, August 1, 2, and 3, 1956, the regularly assigned Painter Foreman of the M. of W. Department of the Chicago District worked in the office of the Supervisor of Structures to assist the Supervisor in compiling a list of repairs made to buildings such as passenger stations, freight stations, towers, yard offices, etc., on the Chicago District from January 1 to May 15, 1956.

This list, which was prepared for the Chief Engineer, M. of W., was to include a brief description of work completed and approximate cost. The information was compiled from the labor distribution cards which are prepared by the various Foremen in the course of the building and repair work."

Petitioner contends that on May 25, 1956, the Supervisor of Structures was requested to work up a report of repairs to buildings in the Chicago area. This report was worked up by Painter Foreman V. C. Sternquist from Daily Distribution Cards made out by other various Foremen which are normally handled by the Clerk, Cora Del Cerro; the Petitioner further contends that what the Paint Foreman was doing was just a matter of copying the information and consolidating the information, that he had to consult the Clerk in order to determine the proper facts; the Petitioner further contends that included in the duties of a Clerk under the Scope Rule are writing and calculating incident to keeping records and accounts, writing and transcribing letters, bills, reports, statements and similar work. It is the contention of the Petitioner that the work done by the Painter Foreman was work within the comprehension of the Scope Rule which was reserved to the Clerks and the claim should be allowed.

Conversely, the Carrier maintains that the very nature of the report, a special one, requested by the Chief Engineer, Maintenance of Way, is sufficient, of itself, to prove that the actual compiling of the data and the preparation of the report did not accrue to the Clerk under the Scope Rule; that the duty was a purely supervisory one and could properly be performed by the Supervisor of Structures who in turn could delegate such work to another in a supervisory capacity; Carrier further maintains that in view of the foregoing and of the fact that when the report was compiled, the Claimant Clerk in turn typed the report, the claim is without merit and should be denied.

Carrier argues the duties required were supervisory duties involving the exercise of personal judgment and the application of particular knowledge and skill; that the Supervisor of Structures could have prepared this report, personally had he felt so inclined and, if so, it cannot be said that such work accrued exclusively to the Clerks; that the primary duties of the Clerks' position do not include any reference to the preparation of special reports which required something more than a mere ministerial function.

The question to be determined in the instant case is not whether the work performed was incident to that of a painter foreman but is —

whether or not it was incident to work normally performed by a Supervisor of Structures; nor, is it our purpose to conclude in arriving at a decision in this matter that such work was incident to that of a painter foreman.

Carrier has the right, undoubtedly, to require its supervisory employees to furnish special written reports covering the operation in their various departments. If the duties require independent judgment, in the exercise of managerial discretion they are properly assignable by the Carrier for preparation to supervisory employees.

Though some of the work performed by the Painter Foreman included some type of work which might be regarded as clerical in general character, such work was incident to the supervisory function of the Supervisor of Structures.

Petitioner has urged that the Claimant Clerk was in a much better position to and better qualified to perform this work that was being done by the Foreman than he was, that he had no personal knowledge of the work he was assigned to do and had to rely on reports that had been submitted by other Foremen.

The request for special reports from those in a supervisory capacity being a proper function of management and the preparation of such reports being incident to the duties of a Supervisor, it is not work that has accrued to the Clerks. It is therefore, within the prerogative of the Supervisor of Structures to select someone other than a Clerk to assist him in the preparation of the report, if he finds it necessary to secure such assistance. It is within his province to determine whether or not the one he has selected to assist him possesses the necessary qualifications and proficiency to carry out the assignment.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 19th day of December 1962.

**LABOR MEMBER'S DISSENT TO AWARD 10989,  
DOCKET CL-10622**

The Author of this Award has exercised that privilege of absurdity, to which no living creature is subject but man alone. It is crystal clear that the decision is based on fantasy and not upon the pertinent facts of record and the clear and unambiguous language of the confronting Scope Rule.

The pertinent facts, which the Referee was careful to avoid, are:

During the period in dispute, Painter-Foreman Sternquist had no supervisory duties to perform because his gang of painters had been abolished due to a force reduction. Consequently, he was brought into the office of Supervisor of Structures and required to perform exclusively clerical work in compiling a report of repairs made to station building, offices, etc., for eight hours each day for nine days. It is clear that this work was not incidental to his primary duties of supervising a painter gang and Referee so admits. Through a subterfuge, however, the Referee made a feeble attempt to evade the force and effect of the violation by a misleading and erroneous statement of the issue, as follows:

"The question to be determined in the instant case is not whether the work performed was incident to that of a painter foreman but is — whether or not it was incident to work normally performed by a Supervisor of Structures; nor, is it our purpose to conclude in arriving at a decision in this matter that such work was incident to that of a painter foreman."

It is a truism that a stream cannot rise above its source. It is also a universal principle of contract construction that where conditions or exceptions are set forth specifically, no other, or further exceptions, will be implied. Awards 2009, 3825 and 4551. The confronting Scope Rule has only one exception and reads as follows:

**"SCOPE**

\* \* \*

"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 devices, except as provided in Rule 3-C-2. \* \* \*." (Emphasis ours.)

Rule 3-C-2, here pertinent, reads as follows:

"(a) When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

(1) To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed.

(2) In the event no position under this Agreement exists at the location where the work of the abolished

position or positions is to be performed, then it may be performed by an Agent, Yard Master, Foreman, or other supervisory employe, provided that less than 4 hours' work per day of the abolished position or positions remains to be performed; **and further provided that such work is incident to the duties of an Agent, Yard Master, Foreman, or other supervisory employe.**" (Emphasis ours.)

It is interesting to note that the only exception to the removal of clerical work in the rendition of reports and assignment thereof to a Foreman, is where a clerical position is abolished and, in the absence of another scheduled position remaining at the location, the involved work is less than four hours per day and that such work is incident to the primary duties of the foreman or supervisor. In the instant case, no clerical position was abolished and neither can it be truthfully said that the involved report was **incident** to the duties of Painter-Foreman Sternquist. Therefore, the Referee's attempt to apply a non-existent exception, or to enlarge upon a clear and specifically stated exception, is inconsistent with the plain dictates of common sense, it is nonsensical and ridiculous.

In Award 3825, *supra*, Referee Rudolph, involving same parties and rules, under similar circumstances, ruled:

"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.**

The parties agree that the work done by the Yardmaster here was not 'work previously assigned to' a clerical position which had 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."

The record showed that Claimant prepared all reports and maintained all clerical records required in the office of the Supervisor of Structures. Therefore, the work in dispute could not be performed by the Supervisor of Structures, much less a subordinate supervisor, even though incident to his duties as a Supervisor under the above quoted Rules, and this Board has so ruled on a number of occasions involving these very same parties. Awards 3870, 3871, 3877, 4043, 4044, 4664, 5559. Also, see Awards 2506, 3195 and 3375.

The instant Referee was presented with these controlling precedents, but refused to follow them, nor does he find that they were palpably erroneous. In fact, he insults our intelligence by introducing the untenable contention that:

"\* \* \*. It is therefore, within the prerogative of the Supervisor of Structures to select someone other than a clerk to assist him in the preparation of the report, if he finds it necessary to secure such assistance. \* \* \*."

There is nothing in the record to show that the Supervisor of Structures ever prepared any reports. In fact, the record is clear that the report in question was prepared wholly by the Painter-Foreman, he did not assist the Supervisor of Structures in the preparation thereof. Hench, the confronting Award is based entirely upon conjecture, speculation and irrational thinking. It is interesting to note that nowhere in the "Opinion" is there any awards cited in support of the illogical conclusions reached. No doubt the Referee was unable to find any support therefore, although he was furnished a large number of awards which held to the contrary.

There is no support in law or logic, that an exception to the scope of an agreement can be expanded to include something else, even though such exception applied in the first instance, which is not the case here. See Labor Member's Dissent to Award 10903, Docket CL-10571, and Awards 3988, 5199, 5559.

In Award 3988, Referee Fox, under a less restricted Scope Rule, ruled as follows:

"While an employe may do clerical work incident to his regular assignment, **such work should be strictly confined thereto, and should not be permitted when done outside of, and in addition to, his regular work.** The rule established is a necessary one, because there is some clerical work in almost every line of employment, and being necessary, should not be abused. The weekly check on the track leading to the Creosote Plant, involving work outside of the station agent's office, can hardly be said to be incidental to his regular job, but if done by a switch foreman, might be so classified. However, when the Carrier set up a system of daily inspections, it became a regular and separate job, and, being clerks' work, should have been assigned to a clerk. When the Carrier assigned this work to the agent, it violated the Clerks' Agreement. The fact that the agent did this work after the end of his regular tour of duty, and on an overtime basis, only magnifies the violation. He should not have been assigned this work, even if it was to be performed within the hours covered by his regular assignment, **for it would have been an undue expansion of the rule that station agent may do clerical work in line with his regular assignment, but not beyond the scope of such assignment.**" (Emphasis ours.)

In Award 5199, Referee Wenke said:

"To take advantage of the interpretation agreed to Carrier must show that the work was incident to and arose from the Warehouse Foreman's work and that either he has always per-

formed it or, if now being returned to the position, that it had previously flowed out therefrom."

Apparently the Referee is of the opinion that extra or additional clerical work is excluded from the scope because a "special report" is involved. Such a conclusion is unrealistic in view of the fluctuating nature of the work of a craft. If the craft is suffering because of a reduction in work, it is entitled to profit from an increase. In Award 1314, Referee Wolfe held:

"The development of new positions may arise by reason of work of an entirely different nature or by the growth of the same kind of work requiring greater personnel. The expansion and contraction of the latter by increase or reduction of force permits work to be distributed within the limits of the craft."

That the report work here involved was of the kind and class of work which claimant had usually and customarily performed during his regular assignment and that which had been included within the Scope of the confronting Agreement at the time of its negotiation and execution thereof, is crystal clear. Consequently, the Agreement was violated when a Painter-Foreman was used to prepare it. Awards 360, 1300, 1647, 4313, 4513, 6101 among others.

In attempting to expand upon a stated exception to the confronting Scope Rule, the Referee has exceeded his authority under law and as a consequence, has rendered an Award that is palpably erroneous.

It should also be noted that he engaged in two standards on the admissibility of evidence. In Award 10924, he held that a statement by eight employees could not be considered because it had not been presented on the property to the Carrier. However, in the instant case he does not reject Carrier's untimely Exhibit "C", although it was dated subsequent to the submission of the dispute to the Board and this was brought to his attention on two different occasions.

Under these circumstances, I vehemently dissent to Award 10989.

**J. B. Haines**  
**Labor Member**