

Award No. 11586

Docket No. CL-11213

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

**RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD COMPANY**

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

1. Carrier violated rules of the currently effective agreement dated September 1, 1951 when on May 15, 1958 it abolished position of Assistant Agent (Clerk) at Milford, Virginia and unilaterally assigned the work normally attached thereto to employees without the scope of the Brotherhood's agreement.

2. Carrier restore the work normally attached to the position of Assistant Agent (Clerk) as it existed prior to May 15, 1958 to one covered by the scope rule of the parties' agreement.

3. Carrier reimburse employees adversely affected by the rule violation by making them whole for wage losses they sustained, namely:

(a) T. B. Allen, the difference between that earned by him as clerk at Ashland, rate \$18.99 per day, and that he would have earned had he not been unilaterally removed from his regular assignment as Assistant Agent (Clerk) at Milford, retroactive to May 15, 1958 and continuing thereafter until the rule violation is corrected.

(b) J. E. Pepper, the difference between what he would have earned as clerk at Ashland since date of his displacement by T. B. Allen on or about May 15, 1958 and what he has earned retroactive to May 15, 1958, and continuing thereafter until the rule violation is corrected. Monies due Mr. Pepper to be determined by joint check of Carrier's payroll and other necessary records.

(c) R. A. Cowie, the difference between what he earned and what he would have earned had he not been displaced

by J. E. Pepper as vacation relief clerk on or about May 15, 1958 and thereafter until the rule violation is corrected. Monies due Mr. Cowie to be determined by joint check of Carrier's payroll and other necessary records.

(d) H. E. Dodd, the difference between what he earned and what he would have earned had he not been displaced by R. A. Cowie as a Station Hand on or about May 15, 1958 and thereafter until the rule violation is corrected. Monies due Mr. Dodd to be determined by joint check of Carrier's payroll and other necessary records.

EMPLOYEES' STATEMENT OF FACTS: May 19, 1958 Carrier issued Bulletin No. 1 abolishing position of Assistant Agent (clerk) at Milford, Virginia. The position was then occupied by T. B. Allen with the following duties assigned thereto and approximate time required to perform each unit of work:

Work	Approximate Time Per Day
Checking Yard	30 minutes
Issuing bills of lading, rating and billing CL and LCL freight	2 hours
Inbound CL and LCL—posting bills on freight bill book, making freight bills, mailing notices, notifying consignees by phone or carloads	2 hours
Posting inbound cars on car book, car service sheet, checking off car book when moved, release on service sheet when released, making demurrage bills	1 hour
Miscellaneous work such as making shifting list, bad order reports on damage or short freight, making freight claims, stationery and material requisitions, selling tickets, checking baggage and sealing cars	1 hour
Answering telephone, giving train schedules, quoting freight rates and ticket fares	1 hour
Handling express	30 minutes
Total	8 hours

All work heretofore assigned to the position of Assistant Agent (Clerk) was unilaterally assigned by management to the Agent and train service employees, positions without the scope of the Brotherhood's agreement with the Carrier.

On May 19, 1958, formal grievance was filed with Carrier protesting management's action and claims filed on behalf of employees affected. See Employees' Exhibit A.

The employees' protest and claim was denied by Superintendent, Mail, Express and Agencies, Mr. P. E. Wood on May 19, 1958. See Employees Exhibit B.

Employees have not proved that the Assistant-agent performed any duties to the exclusion of the Agent. The fact is clear that the Agent position was the source of all the work at Milford, and the Assistant-agent, as its title implies, merely assisted the Agent. The Clerks never gain the exclusive right to work which is incidental to the primary duties of an Agent. Especially is this true where, as here, the parties' Agreement specifically excludes such clerical work from the coverage thereof. The Carrier is free to abolish a position when sufficient work no longer exists to warrant the continuance thereof. Award 896.

The Carrier regrets the fact that the volume of business at Milford no longer requires a clerk. It wishes that the volume of business there required the use of many clerks; however, to a large extent the present economic plight of the railroad industry is the result of unrealistic labor practices that have been imposed through the guise of agreement interpretations. Award 7166. The Carrier trusts that the Division will respect the clear language of Rule 1(a) under which the parties excepted incidental clerical work from the coverage of the Clerks' Agreement. This claim is based upon erroneous reasoning and a false assumption, that the Assistant-agent performed duties other than those which were incidental to, and also performed by, the Agent. There was no violation of the Agreement, thus we submit that the Division should deny this claim as lacking in merit.

The Carrier affirmatively states that all matters referred to in the foregoing have been discussed with the Employees and made part of the particular issue in dispute.

OPINION OF BOARD: The issue is whether Carrier violated the Scope Rule of the Agreement when it unilaterally abolished the position of Assistant Agent (Clerk) and assigned the duties of that position to the Agent and train service employees which latter positions were not within the Scope of the Agreement. There is no material factual dispute.

CONTENTIONS OF PARTIES

Petitioner contends that "Positions or work coming within the scope of this agreement belong to the employees covered hereby and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules . . . except by agreement between the parties signatory hereto." Therefore, Carrier's unilateral actions, set forth above, violated the Agreement.

Carrier contends that the "ebb and flow" theory justified its unilateral actions.

PERTINENT PROVISIONS OF AGREEMENT

The following Rules of the Agreement are pertinent:

"Rule 1

"SCOPE AND WORK OF EMPLOYES AFFECTED

"(a) These rules shall govern the hours of service and working conditions of all employees engaged in the work of the craft or class of clerical, office and storehouse clerical employees. Positions or work coming within the scope of this agreement belong to the employees covered hereby and nothing in this agreement shall be construed to

permit the removal of positions or work from the application of these rules, nor shall any officer or employe not covered by this agreement be permitted to perform any clerical, office, station or storehouse clerical work which is not incidental to his regular duties, except by agreement between the parties signatory hereto."

* * *

"Rule 35

"EFFECTIVE DATE AND CHANGES

"This agreement shall become effective September 1st, 1951, superseding all former rules and agreements, and shall continue in effect thereafter subject to thirty (30) days written notice from either party to the other of its desire to change; said notice to contain the desired changes.

"When notice of desire to change is given, the matter shall be handled in accordance with the provisions of the Railway Labor Act, as Amended."

RESOLUTION OF ISSUE

The confronting Scope Rule deals with "positions" and "work" separately.

The record is clear that at the time the Scope Rule was agreed upon, Clerks were performing the work in question.

In prior Awards of this Board it has been established that when the Scope Rule provides that "positions or work" may not be removed from the Agreement except by negotiation, a Carrier's unilateral action abolishing a "position" and assigning the "work" to another class or craft is a violation of the Agreement. Awards Nos. 6937, 7129, 7168, 7349, 7478, 11563. The cited Awards support the finding that in those agreements in which: (1) the Scope Rule specifically includes "positions or work;" (2) the position was assigned to and the work was being performed by an employe covered by the agreement at the time it was executed by the parties; and, (3) the agreement provides that nothing therein shall be construed to permit the removal of the "positions or work" from its application, except by agreement between the parties — then — a carrier that unilaterally abolishes such a position and assigns the work to others, violates the agreement. Further, the cited Awards in effect hold that, under the circumstances enumerated in the preceding sentence, the "ebb and flow" theory is not applicable. We will, therefore, sustain paragraph 1 of the Claim.

The Remedy

For the reasons as stated in our recent Award No. 11489 we will not order Carrier to restore the position of Assistant Agent (Clerk) at Milford, Virginia. But, as in Award No. 11489 we will order that Carrier pay to Claimant T. B. Allen (see paragraph 3 (a) of the Claim) such amount as will make him whole for any loss of wages he has suffered, in the period from May 15, 1958 to the date of this Award, as a result of the violation of the Agreement.

We will dismiss paragraph 3(b), (c) and (d) of the Claim.

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 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 Carrier violated the Agreement.

AWARD

Paragraph 1 of the Claim is sustained.

Paragraph 2 of the Claim is denied.

Paragraph 3 (a) of the Claim is sustained to the extent prescribed in the Opinion under the caption "The Remedy".

Paragraph 3 (b), (c) and (d) is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 11th day of July 1963.