

Award No. 12414

Docket No. CL-10362

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

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

**NEW YORK CENTRAL RAILROAD
(Eastern District, Boston & Albany Division)**

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

(1) Carrier violated the rules of the current Clerks' Agreement when effective with the close of business on September 26, 1957, it abolished the Second Trick Ticket Clerks' position at Newtonville, Mass., hours 12:30 P.M.-8:30 P.M., Tues. thru Sat., days of rest Sun. and Mon., and concurrently therewith, rearranged the remaining Ticket Clerks' hours and Agents' hours, and assigned the work of selling tickets of the abolished position to the Agent between the hour 4:30 P.M.-5:30 P.M., he being an employe not covered by the scope of the Clerks' Agreement, and also, assigned the selling of tickets between the hours 7:30 A.M.-11:30 A.M. to the Agent on Saturdays, and carrier continued to violate rules of the current Clerks' Agreement when it subsequently, on Oct. 4, 1957, further re-arranged the hours of the remaining Ticket Clerk and Agent and thereafter assigned ticket selling to the Agent, an employe not covered by the scope of the Clerks' Agreement, between the hours 7:30 A.M.-11:30 A.M. on each subsequent Monday, Tuesday, Wednesday, Thursday, Friday and Saturday and continues to permit the Agent, who is not covered by the scope of the Clerks' Agreement, to perform ticket selling which was formerly performed by employes under the scope of the Clerks' Agreement prior to the aforementioned abolishment of the Second Trick Ticket Clerks' position, that

(2) Mrs. H. E. Powers shall be additionally compensated a day's pay at the pro rata rate of Ticket Clerk on each day during the period Sept. 27, 1957-Oct. 3, 1957, that the Agent sold tickets, and

(3) Mrs. H. E. Powers shall be additionally compensated a day's pay at the pro rata rate of Ticket Clerk on each day during the period Oct. 4, 1957-Oct. 28, 1957, that the Agent sold tickets, and

(4) That Mr. E. G. Seibert and/or the senior qualified furloughed Ticket Clerk shall be compensated a day's pay at the pro rata rate of Ticket Clerk effective Oct. 29, 1957, and continuing thereafter on each day, Mon. thru Fri., that the Agent sells tickets and until such time as this work is returned to the scope of the Clerks' Agreement, and

(5) Effective Sept. 28, 1957, and on each Saturday thereafter, until the work is returned to the scope of the Clerks' Agreement, Mrs. H. E. Powers shall be additionally compensated 4 hrs. pay at the pro rata rate of Ticket Clerk due to the Agent selling tickets from 7:30 A.M.-11:30 A.M., and that

(6) Carrier shall be required to immediately return this work to the scope of the Clerks' Agreement.

EMPLOYEES' STATEMENT OF FACTS: On and prior to Sept. 26, 1957, the force at the Passenger Station, Newtonville, Mass. consisted of the following employees:

Position	Assigned Hours	Days of Rest	Days Position Worked
1 Agent	8:00 A.M. - 5:00 P.M. Mon. thru Fri.	Sat. & Sun.	5
1 Ticket Clerk	6:30 A.M. - 2:30 P.M. Mon. thru Fri.	Sat. & Sun.	6
1 Ticket Clerk	12:30 P.M. - 8:30 P.M. Tues. thru Sat.	Sat. & Mon.	7

Of the above listed positions, the Ticket Clerks are covered by the scope of the Clerks' Agreement, and the Agent is not covered by the scope of the Clerks' Agreement and he does not hold seniority rights to any work under the scope of the Clerks' Agreement.

Effective with the close of business Thursday, September 26, 1957, carrier abolished the second trick Ticket Clerks' position at Newtonville (Employees' Exhibit A). Concurrent with the abolishment of the second trick Ticket Clerks' position and continuing through Oct. 4, 1957, the Agent's hours were changed from 8:00 A.M.-5:00 P.M. to 7:30 A.M.-4:30 P.M., and the remaining Clerks' hours were changed from 6:30 A.M.-2:30 P.M. to 6:30 A.M.-3:30 P.M. Between the hour 3:30 P.M.-4:30 P.M. the work of selling tickets, which had previously been performed by employees under the scope of the Clerks' Agreement, was assigned to the Agent who is not so covered by the scope of the Clerks' Agreement.

Effective Oct. 5, 1957, the hours of the Agent and Clerk were again changed as follows:

Position	Assigned Hours	Days of Rest	Days Position Worked
1 Agent	6:30 A.M. - 3:30 P.M. Mon. thru Fri.	Sat. & Sun.	5 and 4 hrs. on Sat.
1 Ticket Clerk	10:30 A.M. - 7:20 P.M. Mon. thru Fri.	Sat. & Sun.	5

to leave nothing for the employe to do for a substantial part of his time and for a reasonably sustained period, the position may be abolished."

AWARD 896

"It is too well settled by numerous decisions of the Board to be longer open to doubt, that carriers are free to abolish a position when sufficient work no longer exists to warrant continuance of the position."

CONCLUSION

Summarizing, Carrier maintains that the basic issue in dispute is one of jurisdiction, and that the claim should be dismissed by your Board in that all parties with a vested interest in the work at issue have not been accorded an opportunity to protect their individual interests. Nonetheless, the claim is also without merit. There has been no violation of the Clerks' Agreement as to the manner in which Carrier's Agent at Newtonville handled ticket sales. This is merely a continuation of an arrangement which has long been in effect. The force reduction and subsequent reassignment of hours of service,—each a prerogative of the Carrier, were the necessary result of Carrier's efforts to efficiently meet the materially reduced traffic requirements of Newtonville. In addition, past practice and the Awards of your Board substantiate the Carrier's contention and action.

Accordingly, the Carrier requests that if the claim be not dismissed for lack of jurisdiction, your Board deny it in its entirety for lack of merit or agreement support.

(Exhibits not reproduced.)

OPINION OF BOARD: This is another in a long line of similar disputes where employes other than those covered by the Clerks' Agreement performed clerical work (here the handling and sale of tickets) in alleged violation of that Agreement. (See Award 615, Referee Swacker, 1938.)

The facts giving rise to this controversy are set forth in sufficient detail in the first paragraph of the Statement of Claim, and need not, therefore, be repeated here.

The Scope Rule in evidence became effective on the property on January 1, 1957. It includes within its coverage employes listed as "ticket sellers or ticket clerks" and contains the following language:

"Positions or work within the scope of this agreement belong to the employes covered thereby and shall not be removed therefrom without negotiation and agreement between the parties signatory thereto.

The classification or title of a position shall be determined by the preponderance of work that is assigned such position."

The Carrier has raised a procedural matter which must be dealt with before proceeding to a consideration of the merits. It appears that on October 14, 1957, the Carrier offered to re-classify the Baggageman's position as Ticket-Seller-Baggageman with an appropriate wage adjustment, so that the occupant could perform ticket-selling as well as whatever baggage work was required to be performed. The offer was not accepted by the Brotherhood. The Carrier's representative now suggests that the Board remand this dispute to

the property for further negotiation by the parties on the offer of settlement. We find no evidence here of the failure or refusal of either party to bargain in good faith on the aforesaid offer. We cannot compel either party to agree to anything, nor is there any provision, express or implied, in either the Railway Labor Act or the Agreement in evidence here which would compel them to do so. Accordingly, we decline to follow the suggested procedure.

The only other procedural point raised is that of third party notice. The record shows that such notice was formally served on the Order of Railway Telegraphers; that a hearing was scheduled; that the Telegraphers declined to participate. This satisfies the procedural requirements of Section 3, First (j) of The Railway Labor Act, and, therefore, the Board may now consider the merits of this dispute.

It seems the Carrier's primary defense in this matter is that the work of selling tickets historically has been shared by clerks and agents on this and other railroad properties; that, therefore, it cannot be held that such work belongs exclusively to clerical employees performing such work under the Scope Rule of the Clerks' Agreement. Absent such showing of exclusive performance of work by the clerks, it is the Carrier's position that the claim must be denied, citing many Awards where failure to meet this test has been the grounds for denial of similar claims. (Awards 9329, 9330, 9685, 9690 are typical.)

The Brotherhood relies principally upon the Scope Rule provision quoted herein which forbids the removal from Agreement coverage of either positions or work. It calls attention to numerous Awards sustaining claims under similar rules and circumstances, even where the rules spoke only of "Positions" and not "Positions or work" as is the case here. (See Award 5785) (Emphasis ours.)

As has been stated, the effective date of the Agreement before us is January 1, 1957. The evidence establishes that from and after that date until the second trick clerical positions at Newtonville were abolished and the ticket-selling work divided between the Agent and the remaining Ticket Clerk in September and October of that year, employees covered by the Agreement were engaged in the work of handling ticket sales and in duties related thereto. They were so engaged when the restrictive provisions of the rule became applicable. Thereafter, the position of Ticket Clerk and the work of selling tickets appertaining thereto could not be removed under the clear and explicit language of the rule except by negotiation and agreement of the parties. Awards 3653, 5785, 8500, 8673 and 9416 are directly in point and controlling.

The Board has not ignored the evidence submitted by the Carrier purporting to show that during the period January-October 1957 the Agent at Newtonville from time to time may have sold tickets. Nor are we unaware that on this and other properties, agents have also handled ticket sales. What we do say is that the general rule requiring a showing of exclusive performance of the work claimed based on historic practice and custom, does not apply where, as here, a special rule clearly and expressly forbids the removal of positions or work without agreement. (Cf. Award 9416 *supra*.)

This finding is not in conflict with those Awards cited and relied on by the Carrier where the scope rules merely list positions, classifications and rates of pay and nothing more. Nor is it a reversal of this Referee's conclusions in Award 11621 where the denial decision was based squarely on a finding of fact that the work claimed by clerks had originally been performed exclusively by agents who had thus established a prior right to perform it; that "there was no transfer of clerical duties as a result of the abolishment of a clerical position" but a transfer of agents' duties.

As to Award 11495 (Third Supplemental), also relied on by the Carrier and involving these same parties and the identical Scope Rule, apparently there the Referee was persuaded to apply the test of exclusive work performance and found that the evidence to meet it was insufficient. Our position is, as has been stated, that the special Scope Rule provisions of the Agreement in evidence here obviate the necessity of showing such exclusive performance by the moving party.

Accordingly, the claim will be sustained but only to the extent of the actual losses sustained by the named Claimants. (Cf. Awards 7168, 7478, 8079, 8234 and 11604.)

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 Agreement was violated.

AWARD

Claim sustained to extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April 1964.

CARRIER MEMBERS' DISSENT TO AWARD NO. 12414 DOCKET NO. CL-10362

After concluding that the agreement was violated, Award 12414 correctly limits the damages to "actual losses sustained by the named Claimants". However the Award is in error by concluding in the first place that the agreement was violated.

The majority ostensibly confirms, and correctly so, the propriety of "those Awards cited and relied on by the Carrier where the scope rules merely list positions, classifications and rates of pay and nothing more", but it errs in holding that, by its failure to follow those Awards in the instant case, Award 12414 is not in conflict therewith because of an additional provision in a comparable scope rule here which relates to "Positions or work within the scope of this agreement". Obviously, a stream cannot rise higher than its source. Accordingly, the work covered by this additional provision can only be co-extensive with the work covered by the key paragraph of the scope rule itself,

viz., as we held in Award 11495, involving the same parties, agreement and issues as in the instant case, and also as we held in the other Awards cited and relied on in behalf of the Carrier herein, work which by custom and practice systemwide is shown to belong exclusively to clerks. The Organization made no such showing in respect of the work involved in the instant case.

For the foregoing reason Award 12414 is in error in failing to follow Award 11495, supra, and deny the instant claim in its entirety.

W. H. Castle
D. S. Dugan
P. C. Carter
T. F. Strunck
G. C. White