# Award No. 13462
# Docket No. CL-13571

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**(Supplemental)**

**Arnold Zack, Referee**

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## PARTIES TO DISPUTE:

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

## MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5220) that:

1. Carrier violated the Clerks' Agreement when, effective June 10, 1961, at Paragould, Arkansas, it abolished position of Reconsigning Clerk, rate $19.20 per day; Bill Clerk, rate $19.20 per day; and Rest Day Relief Clerk, and reduced Cashier position, rate $19.80 per day, from a six-day per week assignment to a five-day per week assignment, and removed the clerical work from those positions from the scope and operation of the Clerks' Agreement, which consisted of checking of the yard, weighing of cars, writing up scale book, making reports on cars received from and delivered to the St. Louis Southwestern Railroad Company (Cotton Belt) over the interchange tracks, and calling train and engine crews, and, in violation of Rules 1, 2, 3, 5, 6, 25, 44, 45 and related rules of the Clerks' Agreement, required the Agent and Telegraph Operators, employes subject to another Agreement, to perform that clerical work which had theretofore been performed exclusively by employes subject to the Clerks' Agreement;

2. That claimant Robert E. Martin, Cashier, shall be compensated for seven and one-half hours per day at the punitive rate of $3.7125 per hour, amount $27.84, for Saturday, June 10, 1961, with claims continuing for the claimant, or his successor(s) for each subsequent calendar day, on the same basis, until April 10, 1962, or a total claim as follows:

| | | |
|---|---|---|
| June | 1961 | 21 days |
| July | 1961 | 31 days |
| August | 1961 | 31 days |
| September | 1961 | 30 days |
| October | 1961 | 31 days |
| November | 1961 | 30 days |

| | | |
|---|---|---|
| December | 1961 | 31 days |
| January | 1962 | 31 days |
| February | 1962 | 28 days |
| March | 1962 | 31 days |
| April | 1962 | 10 days |
| | Total | 305 days at $27.84 — Amount $8491.20 |

(NOTE: Claims from February 1, 1962 to April 10, 1962 to be increased by 6¢ per hour, or 45¢ per day, account National Wage Agreement of June 5, 1962, Article I, increasing all hourly, daily, weekly and monthly rates 4¢ per hour, retroactive to February 1, 1962.)

**EMPLOYES' STATEMENT OF FACTS:** Prior to June 10, 1961, the clerical force at Paragould, Arkansas, consisted of the following:

| Name | Seniority Date | Position | Rate | Assigned Hours | Meal Period | No. of Days Per Wk. | Rest Days |
|---|---|---|---|---|---|---|---|
| R.Martin | 6-28-19 | Cashier | $19.80 | 7am-4pm | 12N-1pm | 6 | Sat-Sun. |
| E.Thompson | 10-19-36-A<br>9- 1-35-B | Recon-signing Clerk | 19.20 | 12N-9pm | 5pm-6pm | 6 | Sun-Mon |
| F.Stage | 10-18-19 | Bill Clk. | 19.20 | 10pm-6am | 20 Min. | 7 | Tues-Wed |
| H.Cole | 9- 3-42-A<br>11- 3-41-B | Rest Day Relief Clerk | | | | 5 | Thurs-Fri |

Works as follows:

| | | | | Meal Period |
|---|---|---|---|---|
| Saturday | Cashier | $19.80 | 7am-4pm | 12N-1pm |
| Sunday | General Clerk | 18.60 | 10:30am-6:30 pm | 20 Min. |
| Monday | Reconsigning Clerk | 19.20 | 12N-9pm | 5pm-6pm |
| Tues. & Wed. | Bill Clerk | 19.20 | 10pm-6am | 20 Min. |

This clerical force was headquartered at the Local Freight Office, immediately adjacent to the business district of the city, which was one and one-half miles distance from the Yard Office. These clerical employes performed the clerical work at the station as well as the clerical work at the Yard Office, consisting of checking the yard tracks, weighing cars, writing up scale book and handling reports on cars received and delivered over the interchange tracks with the Cotton Belt Railroad, also the work of calling crews.

The Agent, Mr. T. O. Flippin, who was a "Star" Agent, was located at the Local Freight Office and had jurisdiction over the clerical forces and the Telegraph Operators who were located at the Yard Office (one and one-half miles from the Local Freight Office).

The Telegrapher force located at the Yard Office on and prior to June 10, 1961, consisted of —

which out of a total of 305 days amounted to 83 days. The Employes' claim is inflated to a total of $8,491.20; therefore, the Carrier's offer was evidently not attractive enough to the Employes and was refused by them. The offer is, of course, automatically withdrawn and the Carrier so advises your Board. The offer is not prejudicial to the Carrier's position in this dispute.

Without prejudice to the Carrier's position as expressed in the foregoing it is also the Carrier's position that the claim must be limited to the loss suffered, and there has been no showing in this claim that the Claimant suffered any loss. The Claimant continued to work his regular assignment five days per week throughout the claim period. Typical of the many awards adherring to the principle that Claimant must be made whole for such monetary loss suffered as a result of a violation is Award 8674 of your Board.

It is also the position of the Carrier, and supported by numerous awards from all divisions, that claims should be limited to the pro rata rate of pay when no work is performed. There have been many awards from all Divisions of the National Railroad Adjustment Board most of which have held to the principle that the overtime rate is for work performed, and not to be assessed as a penalty, which would be pyramiding.

Right to work is not the equivalent of work so far as the overtime rule is concerned. Award 3193, 3232, 3609, 4244, 4495, 4534, 4853, 5200.

Time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides. Awards 3193 and 3222.

One who claims compensation for having been deprived of work that he was entitled to perform has not done the thing that makes the higher rate applicable. Awards 4244, 4616 and 4853.

Whether the overtime rate be construed as a penalty against the employer or as a rate to be paid an employe who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. Awards 8568, 8766, 8776.

There are many more awards supporting this position; however, the Carrier will not burden the record further by citing such awards as it is felt the principle is well established and generally accepted by most Organizations.

It is clearly evident from the foregoing that there is no basis, merit or justification for the claim here presented. The Carrier has shown there was no violation of any rule of the Clerks' Agreement, and the position of the Carrier is fully supported by the several awards cited hereinabove. Therefore, consistent with the awards cited and the findings therein, claim should be denied.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Prior to June 10, 1961, the Carrier maintained a clerical force at the Local Freight Office at Paragould, Arkansas, composed of a Cashier, Reconsigning Clerk, Bill Clerk, and a Rest Day Relief Clerk. They worked at the freight office as well as the yard, one and one-half miles distant, where they checked yard tracks, weighed cars, wrote up the scale book, handled reports on cars received and delivered, and called crews. The Carrier also maintained a general Agent-Telegrapher at the freight office and two

telegraphers and a regularly assigned Relief Telegrapher at the yard. The yard based telegraphers did clerical work to fill out their tour of duty such as wheeling trains, handling crew boards, marking switch lists and the like.

Effective June 10, 1961 the Carrier abolished the positions of Reconsigning Clerk, Bill Clerk and Rest Day Relief Clerk and reduced the Cashiers position from a six-day a week to a five-day a week position. The work was absorbed by the telegraphers assigned to the Yard Office. On June 22, 1961 the Organization filed a claim on behalf of the Cashier for seven and one-half hours at the overtime rate of pay alleging that this constituted the extent to which telegraphers were performing clerical work to which he was entitled.

On July 4, 1961 the Agent moved to the Yard Office, the telegraphers' positions were adjusted to provide round the clock coverage, and the cashier was left alone at the freight office.

The Organization contends that the disputed work has been clerks work since before 1928 and is protected to them by the Scope Rule and Rules 2, 3, 5, 6, 25, 44 and 45. Except for handling the crew board and doing some writing up and marking of cars since 1954, this work has been reserved to clerks. It argues that since there is one clerical position remaining, the incumbent of that position has the right to perform all the clerical yard work that has been traditionally performed by employes subject to the Clerks' Agreement, or as in Rule 44 specifically reserved to it. This, it concludes consumes 7½ hours of work per day.

The Carrier takes the position that telegraphers may be assigned clerical work without limitation, except as to their capacity, to fill out their time, when not occupied with telegraphy. The Carrier claims that it acted properly in reducing clerical employes and in assigning their tasks to idle telegraphers under the awards of this Board. The work the telegraphers absorbed consumed no more than two hours daily on the average and was performed in the proximity of the Yard Office. It concludes by noting that there has been no showing that the Claimant has suffered any financial loss.

In this case the Carrier has transferred duties to telegraphers in order to release clerical employes following a reduction in business volume at Paragould. It is unquestioned, as the Carrier points out in citing a large number of awards of this Board, that the assignment of work in a general Scope Rule of the type in the clerical Agreement, does not constitute a guarantee of exclusive jurisdiction over all work performed by the classes of employes listed in that rule.

This Board has, in prior awards, held that telegraphers have the right to perform clerical duties. In Award 615, this Board stated:

> "It has always been the rule that telegraphers may be assigned clerical work without limit except their capacity to fill out their time when not occupied with telegraphy."

This holding emphasizes the primacy of the telegraphers own job responsibilities, and permits the performance of clerical tasks insofar as they may be carried on incidental to the telegraphers major duties. This standard has been consistently followed by the awards of later Referees. In Award 636 Referee Swacker modified his earlier ruling in Award 615 to prohibit a telegrapher from being

". . . detached from his post and sent a mile away to an entirely unrelated location to take over a half a day of straight clerical work to facilitate the abolition of a clerical position."

The prime consideration must be the telegraphers performance of his normal telegraphic responsibilities. The amount of time consumed in doing the clerical work is secondary. In this same award the Board held that:

". . . frequently a telegrapher, altho required to be available at his post all day, may be occupied intermittently at telegraphing and otherwise have idle time. To suppose such a principle might be applied to permit him to shut down and desert his instrument, when four hours of his assignment had elapsed, and go elsewhere to perform other work would not only be in direct contradiction of the reason of the rule, but would also amount to the establishment of short hour assignments in both crafts."

The concept of performance of clerical tasks in reasonable proximity of the telegraphers location has been adhered to validly in later rulings of this Board.

In Award 6293, Referee McMahon objected to departure from the telegraphers location:

"The clerical work assigned to the Agent-Telegrapher required him in checking the yard, to leave his instruments, and certainly the work required was not in close proximity to his regular post, and the duties required in performing his telegraphic duties."

Special Board of Adjustment No. 169 in Award No. 7 did permit the telegrapher to go outside his office for clerical tasks but noted the checking work required was "within reasonable proximity of his office."

In Award 7622, Referee Smith noted:

"While there was undoubtedly a substantial amount of clerical work that could have been assigned to the occupant of the position in question, we do not believe that they included all of the work of the abolished yard clerk position so assigned. Evidence of record indicates that the telegrapher left the proximity of his post and went a substantial distance into the yard to perform a part of the reassigned duties; thus was away from the said post on numerous occasions for different periods of time."

The facts presented in the instant case indicate that the clerical demands placed upon the telegrapher at Paragould would similarly require movement over considerable distance and time from his telegraphic post even to the extent of travel outside the yard. While an occasional ruling of this Board has permitted the telegrapher to do clerical work far from his post, most awards sustaining transfers of work of this nature were not confronted with the issue of widespread deployment of telegraphers. The overwhelming weight of precedent requires adherence to the concept of performance of incidental duties adjacent to, or within reasonable proximity of the telegraphers primary responsibility (9926). Accordingly we must hold that the transfer of clerical duties to the telegraphers in the instant case was improper.

In dealing with the question of remedy, we note that the claim is not filed on behalf of the various clerical employes who were removed from this

work, and who would have continued to do it had not the Carrier transferred their tasks to the telegraphers. Rather it was filed on behalf of the one clerical employe who remained at Paragould, the Cashier, who was fully employed throughout the period in question. Inasmuch as there has been no showing of damage to the Cashier Claimant in his daily regular earnings by virtue of the Carrier's improper action it follows that additional compensation is unwarranted and would in fact constitute double payment and a windfall to the Claimant. This Board has adopted the position that in such cases punitive damages are unjustified. Accordingly an award of $10 nominal damages is ordered.

Finally, on the Organizations claim for the Cashiers right to off duty weighing in work, we find that its burden of proving the Claimants eligibility had not been met when the matter was discussed on the property. It noted in its rebuttal brief that he lived within the distance specified in Rule 44 for eligibility, but it did so too late for response by the Carrier and too late for consideration by this Board. The Carrier's earlier offer of settlement on the basis of off duty weighing in work is neither evidence of the Claimants eligibility nor proof of its liability. Accordingly this Board is constrained to rule that this portion of the claim lacks merit.

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 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 to extent noted above.

AWARD

Claim sustained in accordance with the language of the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of April 1965.

CONCURRING OPINION
AWARD 13462, DOCKET CL-13571
Referee Zack

We concur with the award generally, but must dissent to it insofar as it restricts the telegrapher to the performance of duties within "reasonable proximity" of his primary responsibility.

The term "reasonable proximity" is not included in, nor defined by, the applicable agreement. The application of such a test without contract support will be the source of further confusion and is an invalid assumption of rule making power which this Board does not possess.

W. M. Roberts
G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian

## LABOR MEMBER'S DISSENT AND ANSWER TO CARRIER MEMBERS' CONCURRING OPINION IN AWARD 13462, DOCKET CL-13571

Although Carrier's representative told the Referee that this Award was worth "millions" to the Organization and piously accused me of cupidity when, "having been given the Lion's share", I was re-arguing the matter before the Referee and pointing out the error of his so-called "remedy" as well as his decision with respect to the timeliness of the proof of Claimant's eligibility, it is quite revealing to note that the same Carrier representative, who made such "tongue-in-cheek" arguments, secured the adoption of this Award on his own motion although reserving the right to "concur or dissent" thereto.

As I commenced preparing my dissent I felt that both reservations on behalf of Carrier could be readily anticipated — that the holding that the Agreement was violated would be declared to be entirely erroneous while the $10.00 "windfall" would be hailed.

Prior to completing my dissent Carrier Members' filed their "Concurring Opinion." They attacked the only correct holding in the Award which was based on the facts of record and prior well reasoned Awards.

I shall, therefore, proceed to present this answer to their concurring opinion and undertake to illustrate the total ineffectiveness and inappropriateness of the "remedy" here, as well as pointing out other errors which invariably tend to arise whenever a Referee, as here, undertakes to change the issues involved and decide questions not properly before him.

First, it seems quite obvious, in view of the Carrier Members' actions, both in moving adoption of and preparing a Concurring Opinion in this Award which he represented to the Referee as being "worth millions to the Organization", that the establishment of a pattern of awarding "nominal damages" must be priceless to the Carriers.

Application of common law damages, as attempted here, in disputes between the Organization and the Carrier is most inappropriate and quite ineffective for, in order to abrogate Agreement provisions, the Carrier here involved, as is true of most any Carrier, would gladly "buy" four clerical positions for the meager sum of $10.00 which, in view of this Award, is the effect here approved by the Referee. Such reasoning could only have come about by the Referee considering that the Agreement was a private contract be-

tween Claimant and Carrier and that Claimant was thereby entitled to payment for only (8) hours per day, 5 days per week, and no more. In other words, that Claimant had only an individual right and no collective rights.

The parties to this dispute were the Organization and the Carrier. That Claimant was named as the only readily available member of the craft and class claiming a right to the work is but an incident to the claim. Claimant was, as a member of the bargaining unit, entitled to rights collectively bargained for by the Organization in behalf of himself and other members of the bargaining unit. That work belonging to the bargaining unit was wrongfully removed therefrom has been proven and, in such a case, the Organization has made a prima facie case of damage to the extent of the work lost, and, until this and recent like Awards, it has been considered a general rule of case law at this Board that the proper measure of damages is the difference between what an employe earned, such as Claimant, and what he would have earned, under the contract, absent the violation.

The claim for compensation on behalf of Claimant was based on the theory that there was much more than eight (8) hours of clerical work to be performed at the station and, inasmuch as Claimant was the only available member of the craft entitled to perform such work and did work eight (8) hours each day, five days per week, it was obvious that, absent the restoration of one or more improperly abolished clerical positions, Claimant necessarily would have had to work in excess of his normal eight hour day.

The Referee purports to consider that some other Clerk should have done the work and, therefore, the wrong Claimant was named. Such reasoning completely ignores the fact that Claimant was the only "clerk employed" and available due to the fact that Carrier had improperly transferred the other clerks work to outsiders and thereby abolished all other clerical positions at the station! Nobody asked the Referee to resolve or even speak to that question. However, having raised and "resolved" the question himself, reargument was requested and the fact that Claimant, because of Carrier's violation of the Agreement, was the only clerical employe assigned and available at the point, was clearly pointed out, but to no avail. Moreover, even considering that there were arguable matters in the claim, it was pointed out that there was one which could not be intelligently argued and that was with respect to Rule 44, stipulating clearly that weighing belongs to clerks where a clerk is employed, and reading:

"RULE 44. WEIGHING CARS

> At points where clerical forces are employed, the duties of weighing cars is work properly coming within the scope of this Agreement.
>
> At points where clerical employes are employed but not on duty, the Carrier shall not be required to call a clerical employe for weighing unless he resides within one mile of the office where employed and has telephone facilities in his residence through which he may be called."

which was before the Referee together with a list, furnished by Carrier, of the times and dates of other employes, outside the Clerks' Agreement, weighed cars outside Claimant's regular assigned hours. And the fact remains that here, as the immediate, direct and proximate result of Carrier willfully violating the Clerks' Agreement, Claimant, a rightful Claimant damaged by

the breach, notwithstanding the Referee's erroneous conclusion to the contrary, was caused to suffer a loss the measure of which was readily determinable and which could not possibly have been less than the minimum "call" payment provided in the Agreement. In view of the above, inasmuch as there could be no argument with respect to the weighing belonging to Claimant as the only "clerk employed at the station", the Referee's interpretation of the damages he suffered falls miserably short of any realistic reasoning.

Thus "nominal damages" in such a case is entirely in error.

That said in the last paragraph of the Opinion, whether an attempt to support the "nominal damage" Award or a complete disavowal of the facts of record, is most certainly a perversion of sound doctrine. This is so for the reason that **at no time did Carrier question Claimant's eligibility under Rule 44 while the case was being handled on the property.** When Carrier submitted their first submission they then and there, for the first time, raised the fallacious (but effective) argument that Claimant did not meet the test set forth in the Rule. **Employes quite properly responded thereto at their first opportunity** which was seen, in the Referee's mind, as being too late.

On the property the Carrier offered to pay claims for the weighing of cars by others **while Claimant was off duty only** and the fact that Claimant lived within one mile of the office was thoroughly discussed and the proffered settlement of the claim was specified to be on the basis of Rule 44. Thereafter, the argument over the payment for weighing evolved into one only about the weighing work performed by others **while Claimant was on duty.** All of which is clearly shown in the record which the Referee had before him. Why he substituted his own theory especially on the weighing matter — concluding that Claimant was not damaged and, in effect, not even available under Rule 44, is unknown. The writer can only judge by his past experience with this particular Referee when faced with a decision as to whether or not Carrier should pay for breaching the Agreement. (See my Dissent to Award 13200.)

This case is a good example of how Agreements become unenforceable and a bad example of the true purpose of this Board. Carrier could not have been required to pay twice during the same period for the same violation under the Awards of this Board, but it should not so gratuitously have been relieved of paying at least the contract rate.

Moreover, this Board, and the Referees sitting with it are not in the merchandising business. There has lately been, as here, far too many "bargain basement" or "give away" Awards. Four positions were taken from employes rightfully entitled to them by virtue of the Carrier breaching the Agreement which it is obligated to properly apply in the first instance. Carrier violated the Agreement. The Organization lost four positions otherwise available to its members and yet the Carrier, by virtue of this "bargain basement" Award, is permitted to escape all but a measly $10.00 cost. Clearly, such Awards are an invitation for other to "go forth and do likewise" and thus invite countless other disputes. It is thus entirely at cross purposes and defeats the reason for the existence of this Board. The Board should resolve, not create, disputes, and its purpose is not to insure either tenure and/or full employment for all who may aspire to be a Referee. Neither is it a forum for development of personal brands of industrial justice. And, as for justice, under present law the Employes have no other forum and justice has not, and cannot, now be achieved in this case.

Moreover, and most important, the Referee's self-styled "remedy" **is not based on the Agreement he was charged with interpreting** for, under the

Agreement, as plainly stated in Rule 44, Claimant was entitled to be called to perform the weighing. A "call" payment is set out in the Agreement and, based only on the weighing of cars by others not entitled thereto, Claimant was entitled to at least the minimum payment under the Agreement.

In presenting this case to the Referee, after receipt of the Award in its present form and before adoption, one statement in the Employes brief was particularly called to mind. That statement was with regard to Carrier's arguments in the case and reads:

> "The Employes believe such efforts are for the purpose of creating confusion."

In view of the final disposition of their claim it is quite apparent that never will the Employes beliefs be more thoroughly vindicated, but nevertheless the Employes are left with an Award, actually containing no remedy, arrived at in error, with no hope of review, no recourse in law, and merely the right to dissent.

This Award, containing no "remedy" as such, is one of the prime examples which can be cited as to the reason why this Board's usefulness in the scheme of resolving disputes in the Railroad industry is rapidly diminishing.

For all the above and other reasons, I most vigorously dissent to this improper "nominal damage" Award.

D. E. Watkins
Labor Member

5-13-65