Award No. 13977
Docket No. CL-14565

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

P. M. Williams, Referee

PARTIES TO DISPUTE:

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

MONON RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5474) that:

(a) The Carrier violated the Clerks' Agreement when it abolished clerical positions at South Hammond, Indiana, and assigned the work attached thereto to a newly established position of Telegrapher-Clerk and to other employes of the Carrier not covered by the Clerks' Agreement.

(b) As a rsult of the above violation the Carrier shall now be required to compensate A. Berthold for four (4) hours at penalty rate for August 20, 1962 and each Monday through Friday thereafter that the violation continues, also,

(c) The Carrier shall now be required to compensate M. E. Scherer for four (4) hours at penalty rate for August 25 and 26, 1962 and each Saturday and Sunday thereafter that the violation continues.

(d) In addition the following employes shall now be compensated for four (4) hours at penalty rate for each date listed:

H. Duncan —August 20, 21, 27, 28
September 5, 6, 7, 8, 9, 15, 16, 19 and 20, 1962

E. Morrisey —August 22, 23, 24, 25, 26, 29, 30, 31
September 1, 2, 14, 22
October 12 and 14, 1962

M. E. Scherer —September 3, 4, 10, 11, 12, 13, 17, 18, 23, 24, 25, 30
October 1, 2, 3, 4, 7, 8, 9, 10 and 15, 1962

E. Miller —September 21, 27, 28 and
October 5, 1962

A. Berthold —September 26, 29
October 6, 11 and 13, 1962

ployes of the Carrier not covered by the Clerks' Agreement," should be disregarded as indefinite and not sufficiently described to enable Carrier to make reply thereto.

4. These claims are not supported by Awards of the Third Division, but on the other hand such Awards support the position of the Carrier.

5. That the claims for penalty rate or for time in excess of that necessary to perform the work are in error and have been consistently denied by former Awards of the Third Division.

The above claims should, therefore, be denied in their entirety and Carrier so requests.

(Exhibits Not Reproduced)

OPINION OF BOARD: Effective August 4, 1962, Carrier employed but four clerks, equally divided between the First and Second shifts, at the South Hammond Yard Office. Previously, six positions, covered by the instant agreement, had been occupied.

Simultaneous with the change described, Carrier assigned the work of "booking of car records and typing train sheets" to Telegraphers and, a short time later, to a Telegrapher-Clerk. It is not disputed that at the time the work was re-assigned it was being performed by clerks who worked under the terms of the agreement before us.

It is Petitioner's contention that its agreement with Carrier provides for the disputed work to be performed by employes who fall under the terms of the instant agreement. Carrier, on the other hand, argues that no violation has occurred because, per Carrier, the work in question is not such that the Scope Rule would place it exclusively within the jurisdiction of employes working under this agreement. Additionally, Carrier states that in the past the work was performed by Telegrapher employes and that the change was a restoration of the work to that group of employes. Carrier's attempt at sustaining this latter assertion of past custom and practice must fail because the proof submitted, a statement and an affidavit from employes, was not shown to Petitioner prior to the filing of the initial submission to this Board. (c.f., Circular I).

It is not seriously disputed that the instant work was given to Telegraphers and the Telegrapher-Clerk to fill-out their regular eight hour shift. However, Petitioner does charge that the Telegrapher-Clerk position was created at the South Hammond Yard Office for the purpose of performing clerical, as opposed to telegraphic work. No proof on his latter charge is submitted in this record, therefore, we find, from Carrier's evidence, which is a work record of the position, that Petitioner's charge is without merit.

We are of the opinion that before we could make a sustaining award Petitioner must show (1) the Scope Rule of the agreement contains clear and unequivocal language to the effect that the disputed work was to be performed exclusively by covered employes; or, by reason herein of Carrier's failure to prove a past custom and practice that the work had been performed by Telegraphers, (2) by a showing that the instant work was being performed by covered employes on the effective date of the agreement, i.e., November 1, 1944. (c.f. Award No. 1209, involving the same parties).

Petitioner's evidence is not convincing on the requirement of (1) above, and no contention is made, nor proof submitted as to (2) above. We will deny the claim.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1965.

LABOR MEMBER'S DISSENT TO AWARD 13977, DOCKET CL-14565

Award 13977 is particularly repugnant for the reason that it abviously was denied on the basis of a defense which was never put in issue nor presented in a manner and at a time when the Petitioner could have responded thereto.

The basic question to be decided was whether or not Carrier's action in abolishing two clerical positions and assigning the remaining work thereof to existing Telegrapher positions and a newly created Telegrapher-Clerk position violated the Clerks' Agreement.

It could not be denied that such action was in violation of Rule 5 of the Clerks' Agreement. In other words, if the Carrier removed work from employes covered by the Clerks' Agreement they violated that Agreement. However, it seems there are ways to deny a claim other than by deciding the issue framed by the parties.

The fifth paragraph of the Award reads:

"We are of the opinion that before we could make a sustaining award Petitioner must show (1) the Scope Rule of the agreement contains clear and unequivocal language to the effect that the disputed work was to be performed exclusively by covered employes; or, by reason herein of Carrier's failure to prove a past custom and practice that the work had been performed by Telegraphers, (2) by a showing that the instant work was being performed by covered employes on the effective date of the agreement, i.e., November 1, 1944. (c.f. Award No. 1209, involving the same parties.)"

The Referee then concludes, in the sixth paragraph, that "Petitioner's evidence is not convincing on the requirement of (1) above, and no contention is made, nor proof submitted as to (2) above."

In the first place the reservation of work need not be confined to the "Scope Rule." In this issue there was in evidence Rule 5 which in pertinent part stated that:

> "* * * The positions and work within the respective seniority districts belong to the employes assigned therein. The positions, work and seniority districts as hereby established will not be changed unless by mutual agreement between the Management and the General Chairman."

Compare the clarity of the rule, the unequivocal language thereof, with paragraph 2 of the Award. Work was removed from some of the six previous clerical positions (2 of which were abolished) and assigned over to existing telegraphers and a newly created telegrapher-clerk position. Quite obviously Rule 5 was violated as charged.

As for Item (2) the Referee, of course, found that "* * * no contention is made, nor proof submited as to (2) above."

Insofar as that observation is concerned the plain fact of the matter is that no one but the Referee even mentioned the "test" shown as items (1) or (2). Therefore the conclusion as to (2), though correct, surely must often occur when the question is only raised in the Referee's private deliberations and not on the property where Petitioner could have had an opportunity to meet it.

On the basis of the facts, rules relied on, and prior Awards, this claim should have been sustained.

I therefore dissent to this erroneous decision and the impropriety of supplying defenses which the Petitioner had no opportunity to meet or challenge.

D. E. Watkins
Labor Member
12-23-65