Award No. 14746
Docket No. CL-12744

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

G. Dan Rambo, Referee

PARTIES TO DISPUTE:

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

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of The System Committee of the Brotherhood (GL-5004) that:

(a) The carrier violated and continues to violate the current Clerks' Agreement by unilaterally permitting the Agent at Port Henry, N.Y. Freight Station, an employe outside the scope of the Agreement, to perform clerical work previously performed by an abolished clerical position at that station.

(b) The following named extra board employes shall be compensated three hours pay at the pro rata rate of $370.04 per month plus cost-of-living and also necessary mileage allowance from headquarters point to point of assignment for the dates shown:

March 14, 1960 — Joseph V. Mormino
March 15, 1960 — Robert J. Wescott
March 16, 1960 — Robert J. Wescott
March 17, 1960 — Robert J. Wescott
March 18, 1960 — Joseph V. Mormino

(c) The above named claimants and all other extra board employes adversely affected shall be compensated per (b) above until the violation complained of is corrected. Names of the extra board employes involved to be determined by a joint check of the Carrier's records.

EMPLOYES' STATEMENT OF FACTS: For a number of years there existed at Port Henry Freight Station, two clerical positions, Machine Operator-Cashier, position No. 2 and Typist, position No. 4. These two positions were abolished due to steel strike on July 4, 1959 and when steel operations resumed on November 9, 1959, the former occupants of Machine Operator-

position of Machine Operator-Cashier was continued on at Port Henry until July 23, 1960 when, due to continuing declining shipments from and to that point, the position was once more abolished and the Agent-Telegrapher again performed all carrier's work at that station. It is an undeniable fact that during the period July 4 through November 9, 1959, the Agent-Telegrapher at Port Henry performed all necessary work at that point.

OPINION OF BOARD: Most of the business at Carrier's Port Henry, New York, station consists of shipments to and from the Republic Steel Corporation's mines in the area. On July 4, 1959, the mines were shut down and Carrier abolished the two clerical positions at Port Henry, and the remaining work was done by the Agent-Telegrapher. This work was so performed until November 10, 1959. On November 10, 1959, the mines were re-opened and Carrier advertised the two clerical positions by bulletin. One of the positions, No. 2, Machine Operator Cashier, was awarded to senior bidder effective November 22, 1959. The other position, No. 4, Typist, was filled on a temporary basis for six days and then the bulletin was withdrawn for lack of sufficient work. The No. 2 position continued until July 23, 1960, when it was abolished because of declining shipments to and from Port Henry. Again, the Agent-Telegrapher performed all the work at that station.

Some four months later the present claim was filed, being predicated on the theory that the Scope Rule was violated when the Agent-Telegrapher performed work which allegedly is reserved to Clerks, specifically the No. 4, Typist.

The Organization cites Rule 2 (c) and Rule 44 (a) of the Agreement, as follows:

> "2(c) Positions or work within the scope of this agreement belong to the employes covered thereby and shall not be removed therefrom without negotiations and agreement between the parties signatory hereto."
>
> "Rule 44. (a) When there is: —
>
> "(1) A sufficient increase or decrease in the duties or responsibilities of a position, or
>
> "(2) A change in the method of performing the service required, or
>
> "(3) A transfer or reassignment of work from one position to another,
>
> the compensation for such position shall be established by negotiation between the Management and the General Chairman, but established positions shall not be discontinued and new ones created under the same or different titles covering relatively the same class or grade of work, which will have the effect of reducing the rate of pay or evading the application of these rules. Should a position be abolished the remaining duties shall be reassigned and rated through negotiations between the Management and the General Chairman."

They argue that these rules are specific, exclusive and literal and not subject to interpretation in light of the general Scope Rule or any tests normally applied in determining scope.

The Carrier responds that to gain the protection of the above-quoted rules of the Agreement the work at issue must first be shown to be covered by the Scope Rule by applying the standard tests of practice, tradition or custom of performance by a given craft on a property wide basis. This Board is in agreement.

The wording of Rule 2 (c) itself, "work within the scope of this agreement", requires a determination of what work is within the scope of the agreement and the only source for that information is the Scope Rule. Since it is general in nature then it must be applied using standard, accepted tests.

As to the abolishment of the position of No. 4, Typist, such was done by negotiation or by agreement resulting from prior negotiation when it was abolished on July 4, 1959 upon shutdown of the mines. The mere bulletining of the position in November, 1959 did not re-establish the position since a bulletin is only an advertisement of the intent to establish a position; where the bulletin was withdrawn there was no requirement of further negotiation under the Agreement.

This Board has held on numerous occasions that where the work at a location decrease and there is telegrapher work remaining it is proper to retain the telegrapher and assign to him clerical work to fill out his tour of duty where he is not occupied with communications work. Such was done here without violation of the Agreement.

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 4th day of August 1966.

LABOR MEMBER'S DISSENT TO AWARD 14746, DOCKET CL-12744

Award 14746, Docket CL-12744, is in error and cannot be accepted as a proper interpretation of the Agreement here involved.

The abolishment of Position No. 4, Typist, said by the Referee to have been done "by negotiation or by agreement" simply cannot be supported by the record. In fact, the record clearly shows that a prior abolishment at this same station resulted, as it should have here, in the reassignment of the duties of the abolished position to remaining clerical positions. If any prior practice was to be followed it too would have sustained the position of the Employes.

The Award is in error for yet another reason. The introduction of the "so-called ebb and flow theory", in the face of special rules which clearly abrogate that theory, is clearly in error and contrary to many well reasoned prior Awards such as 5785, 7372, 8500, 8673, 9416, 11586, which are well summarized in Award 12414.

Award 12414, Coburn, considered the arguments presented herein by the Carrier and held:

> "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 employes 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).
>
> 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, employes 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.)

* * * * *.

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."** (Emphasis supplied).

Clearly, Carrier's sole argument here was that the work was not exclusive to Clerks and that argument was met and answered many times before the restrictive rules were written. Furthermore, nowhere in the record did Carrier allege that the abolishment was done by negotiation or by agreement. Clearly such an alleged defense should not have been supplied.

The Award is in complete error and cannot be accepted as a proper interpretation of the Agreement here involved and most certainly defenses not brought forth by Carrier should not be gratiously supplied by Referees.

/s/ D. E. Watkins
D. E. Watkins, Labor Member 8-10-66

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