

Award No. 15461

Docket No. CL-15774

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

George S. Ives, Referee

PARTIES TO DISPUTE:**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES****UNION RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5796) that:

1. Carrier violated the Clerks' Agreement at its passenger station of the Union Railway Company, Memphis, Tennessee, when it permitted or required the Assistant Ticket-Baggage Agent to sell tickets, make ticket reports and perform other clerical work, April 1, 1964 through May 20, 1964, and continuing thereafter, all in violation of Rules 1, 2, 3, 5, 25, 45 and related rules of the Clerks' Agreement.

2. Carrier shall be required to pay Ticket Clerk-Accountant C. L. Harris for 3 hours at the punitive rate of \$4.0875 per hour, amount \$12.26, for each date, Monday through Friday, April 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30; May 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19 and 20, 1964, total of 36 dates, amount \$441.36; and for 8 hours at the punitive rate of \$4.0875 per hour, amount \$32.70, for each Saturday and Sunday, April 4, 5, 11, 12, 18, 19, 25, 26, May 2, 3, 9, 10, 16 and 17, 1964, a total of 14 dates, amount \$457.80, with claims continuing on the same basis for claimant or his successor(s) for each date subsequent to May 20, 1964, that is, for 3 hours at the punitive rate Monday through Friday, and 8 hours at the punitive rate on Saturdays and Sundays.

NOTE: All claims subject to increase on the basis of Mediation Agreement dated November 20, 1964, providing for —

- 9 cents per hour effective January 1, 1964
- 9 cents per hour effective January 1, 1965
- 9 cents per hour effective January 1, 1966

3. Carrier shall be required to place the ticket selling work and clerical work in connection therewith under the scope and subject to the provisions of the Clerks' Agreement.

The facts as we understand them are as follows: Claimant was assigned to a newly created position of Ticket Clerk-Accountant, Monday through Friday, relief days Saturday and Sunday, hours of service 1:30 P. M. to 9:30 P. M. His assigned duties consist of compiling reports, selling tickets, checking baggage, upon request furnishing train schedules, ticket rate information to passengers and certain other miscellaneous duties which are attached to the position. It is your contention that this work is reserved exclusively to clerks.

When passenger train service was initiated at Georgia Street Yard of the Union Railway Company at Memphis, Tennessee, effective April 1, 1964, it was, of course, necessary to establish positions of Agent and Assistant Agent. We discussed this subject with you in conference prior to the establishment of this service, and explained in detail the necessity for these positions. Since there was no passenger or ticket work being performed on the Union Railway prior to April 1, 1964, it was necessary that we secure qualified competent employees to handle this business. When the volume of such ticket selling and related work cannot be performed by the Agent or Assistant Agent, it is, of course, necessary to furnish assistance. But this does not give clerks an exclusive right to such work. I am sure you realize that ticket selling and related work is not reserved to clerical employees exclusively and that traditionally it is performed by Agents and/or Telegraphers, as well as employees not subject to any agreement.

For the reasons set forth above, the claim here presented is invalid. Furthermore, for the reasons stated herein, there has been no violation of the applicable agreement and this claim, therefore, is respectfully declined.

Yours truly,

/s/ B. W. Smith"

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute involves the manner in which the Union Railway Company handled ticket sales and related clerical work for the Missouri Pacific Railroad Company between April 1, 1964 and August 26, 1965. Effective April 1, 1964, Missouri Pacific Railroad Company initiated passenger service at the Georgia Street Yard of the Carrier, a wholly owned subsidiary. Since there was no passenger or ticket work being performed by Carrier prior to April 1, 1964, it was necessary to establish new positions. Carrier established only one five day per week Ticket Clerk-Accountant position despite the fact that it was necessary to maintain service seven days a week. An Assistant Agent, who was not subject to any wage Agreement, was assigned to sell tickets and perform related clerical work during the hours that the Ticket Clerk was not on duty, Monday through Friday, and when he was off on his rest days. Petitioner's General Chairman opposed the Carrier's plan from its inception as a violation of the applicable agreement between the parties. The instant claim was duly filed on behalf of the incumbent of the regularly assigned Ticket Clerk-Accountant position for designated dates at the punitive rate, with the claim continuing on the same basis for each date subsequent to May 20, 1964, for either the named Claimant or his successors.

In the first instance, Carrier contends that the question involved herein is moot, as the disputed work was discontinued on August 26, 1965. There-

fore, Carrier asserts that the Claim should be dismissed because the Claimant allegedly suffered no monetary loss. We do not agree, as the question of monetary relief is also in issue. The Claimant was available for overtime assignment and there is no probative evidence before us that Carrier would have chosen some other clerk to perform the disputed work. It is pure conjecture to presume who would have performed the disputed work had Carrier chosen a different plan.

The applicable Scope Rule in the instant dispute is general in nature, and would not afford an exclusive claim on behalf of clerks to ticket selling duties and related clerical work if the question before us involved the performance of such work by telegraphers or other employees subject to labor agreements. However, Carrier here assigned such routine clerical work which is normally performed by employees subject to the Clerks' Agreement to supervisory employees, who are not covered by any collective bargaining agreement. Petitioner vigorously protested Carrier's proposed plan to assign routine clerical work to occupants of official positions from its inception. The work involved was essentially new clerical work and was improperly assigned to supervisory personnel not subject to any labor agreement. Accordingly, we find that the Agreement was violated and that there is basis for claim, but at the pro rata rate only. Award 6160 and Award No. 7 of Special Board of Adjustment No. 239.

Carrier contends that paragraph (2) of the claim is defective because it is filed on behalf of the named Claimant "or his successor(s)." The National Disputes Committee has ruled that such identification of "successors" with a named Claimant adequately identifies additional Claimants even though they are not specifically named. NDC Decision 19. Therefore, we find Carrier's contention without merit.

Finally, paragraph 3 of the instant claim will be dismissed as the disputed work has been discontinued.

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 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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April 1967.

**CARRIER MEMBERS' DISSENT TO AWARD 15461,
DOCKET CL-15774 (Referee Ives)**

Obviously correct is the ruling in this Award that:

"The applicable Scope Rule in the instant dispute is general in nature and would not afford an exclusive claim on behalf of clerks to ticket selling duties and related clerical work if the question before us involved the performance of such work by telegraphers or other employees subject to labor agreements. . . ."

See Award 14925 (Brown), among many others.

This ruling properly rejects the Employees' basic contention that the involved work was reserved exclusively to Clerks by their agreement. Having made this correct ruling, the only logical decision possible on the record in this case was that the entire claim was invalid. The Referee's conclusion that the claim should be allowed merely because this routine clerical work was assigned to a supervisor who was not covered by any labor agreement instead of to an employee in another craft covered by a different agreement has no foundation in reason or fact. Nothing in the controlling agreement nor in the law supports this conclusion.

As sole authority for this conclusion, the Referee cites our Award 6160 and Award No. 7 of Special Board of Adjustment No. 239. As is clearly shown by Carrier in the record, each of those cases was based on established practice on the property of the respondent therein. Absent proof of a supporting practice, the only logical tendency of those two Awards is to defeat, rather than to support, the claim. In the instant case, there has been no past practice that supports the claim, and the Award clearly states this fact.

The monetary portion of the claim was manifestly invalid for the additional reason that Claimant did not sustain any loss. The Referee's conclusion that he could have done the work on overtime and, therefore, sustained a loss is wholly without support in the record. In stating its position, Carrier tells us that:

"... claimant did not suffer any loss as a result of the work performed by the Assistant Agent. Claimant had his 40 hours of work each week, and if it had been found necessary to have this work performed by a clerk, it would have been some other available clerk on the roster — not claimant — who would have been used. Absent a showing of loss suffered or penalty provision in the agreement, there can be no basis for a monetary claim. It is well recognized that absent any loss suffered, this Board has no authority to assess a penalty where none is provided in the Agreement."

The Employees do not even deny the portion of the statement of Carrier printed in dark type. They refer to this whole statement in their rebuttal, and simply assert that they disagree with Carrier's position. They make no attempt whatever to show that Claimant would have been entitled to the work on overtime and, thus, concede he would not.

Carrier's position is sound, and conforms fully with the well-established law which is followed by this Board. See Award 14693 (Ives), wherein it is ruled:

"... Inasmuch as no actual loss has been established flowing from Carrier's contract violation, this Board is without jurisdiction to award damages under Court decisions and prior awards of this Board. **Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R. Co.**, 338 F.2d 407, cert. den. 85 S. Ct. 1330 (1965); Awards 14204, 13958, 13390-4, 13334 and 13209. Accordingly, we must dismiss that part of the claim which relates to damages without prejudice. (Award 14205)"

The Employees did not even advance an argument that Claimant would have been entitled to do this work on overtime, much less offer proof that he would have been entitled and, therefore, sustained a loss.

We respectfully submit that this Award has no foundation in reason or fact, and, therefore, should not be enforced.

We dissent.

G. L. Naylor
R. E. Black
T. F. Strunck
P. C. Carter
G. C. White