NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19650
Docket Number CL-18278

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline & Steamship Clerks,
(Freight Handlers, Express & Station Employes
(
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6583) that:

1. The Carrier violated and continues to violate the Clerks' Rules Agreement when effective May 15, 1967, at Harlingen, Texas, it established a position known as "Mobile Agent" and required employes not covered by the Clerks' Agreement, to perform routine clerical work eight (8) hours per day.

2. The Carrier shall now be required to return and assign all of the routine clerical work, involved in this dispute, to persons covered by the Clerks' Agreement.

3. The Carrier shall be required to compensate Clerk A. W. Garrett at the rate of $681.46 per month, beginning May 15, 1967 and to continue each month thereafter, until all of the routine clerical work now being performed by the "Mobile Agent" is assigned to persons covered by the Clerks' Agreement.

OPINION OF BOARD: This claim arises under Agreement between the parties effective September 1, 1949, as reprinted on November 1, 1955 including revisions. Third party notice has been given to the Transportation-Communication Division of the Brotherhood of Railway, Airline and Steamship Clerks; however, the T-C Division has not filed a submission in the case.

For many years prior to May 15, 1967, the Carrier maintained Agencies at San Benito, La Feria, Mercedes, and Weslaco, Texas. Though each Agency had a history of clerical positions, which were filled by employees under the Clerks' Agreement, in time the clerical positions were terminated and the Agencies were reduced to four "one man stations". The four Agents manning the stations were covered by the Telegrapher's Agreement. Although some clerical work was performed by the four Agents, the record does not show the relative proportions of clerical work and agency work.

On May 15, 1967, after obtaining the approval of the Texas Railroad Commission, the Carrier closed the four one-man-stations, abolished the four Agent's positions, and established two new positions known as "Mobile Agents" with duties involving travel by automobile in the daytime. The Clerks' Organization then filed this claim by General Chairman T. G. Brown's letter dated July 6, 1967, which in pertinent part, stated:

> "Effective May 15, 1967, the Carrier established a Mobile Agent position located at Harlingen, Texas, to perform the same type of clerical work during the hours of 8 AM to 5 PM., which the Transportation Clerk, who is covered by the Clerks' Agreement, is now performing during the night hours."

In denying the claim in a July 26, 1967 letter, Mr. R. H. Blassingame, Superintendent, stated:

> "Effective with the abolishment of the agency positions at San Benito, La Feria, Mercedes and Weslaco, which were subject to the Scope Rule of the Telegraphers' Agreement, we did establish a mobile agency position pursuant to the agreement with the Transportation-Communication Employees Union to continue to perform the same duties that had previously been performed by the agencies at those locations. The occupant of the position is headquartered at Harlingen but does not perform any of the work of the Harlingen station. The work performed by the mobile agency position is the same as formerly done by the agents at those on line locations."

In continuing to press the claim in an August 6, 1968 letter to Mr. O. B. Sayers, Director Labor Relations, the General Chairman, inter alia, stated:

> "The Carrier has closed and has made all the stations listed in item two (2), page one (1) of this letter non-agency stations and is now performing all clerical work of the stations involved at Harlingen, Texas.
>
> "The work being performed by the 'Mobile Agent' is pure and simple clerical work which is eight (8) hours per day.

"If you cannot agree with the statement made in the paragraph above we request that a joint check be made to determine the time involved."

The subsequent correspondence on the property makes no reference of any kind to Chairman Brown's above request for a joint check, but in an August 20, 1968 letter by Mr. Sayers the assertion was repeated that "The mobile agent provides the identical service as the four agents previously performed". The claim was further considered by the parties in conference discussion on September 25 and October 31, 1968.

The Agreement provisions pertinent to this dispute are Rule 1, Scope Rule, and a November 1, 1940 Memorandum of Agreement which latter, in pertinent part, reads as follows:

"NOVEMBER 1, 1940 MEMORANDUM OF AGREEMENT

* * * * *

"(a) It is recognized and agreed that all of the work referred to in Rule 1 of the Agreement dated November 1, 1940, between the Carrier and the Brotherhood belongs to and will be assigned to employes holding seniority rights and working under the Clerk's Agreement, except as provided below:

"(b) Due to the peculiar conditions existing in station service it is agreed that:

"(1) Where an Agent covered by an agreement other than the Clerks' Agreement is the only employe on duty not covered by the Clerks' Agreement the Carrier may assign such Agent any work covered by the Clerks' Agreement.

"(2) At stations where two employes not covered by the Clerks' Agreement are on duty at the same time and the work covered by the Clerks' Agreement is less than five hours the Carrier may assign such work to those two positions.

"(3) In all instances other than those set out in Items (1) and (2) above, it is agreed that where the work covered by the Clerks' Agreement is less than three hours on any shift of eight hours the Carrier may assign such work to station employes not covered by the Clerks' Agreement."

On these facts the Petitioner contends the Carrier has violated Rule 1 of the Clerks' Agreement, as amended by the November 1, 1940 Memorandum of Agreement between the parties. Petitioner also contends that the Carrier never denied that the Mobile Agent was performing eight hours of clerical work daily, adding in its rebuttal brief that "the Carrier did not enter into or agree to a joint check, even though we insisted **they** must do so according to the understanding reached in conference November 6, 1947.

Carrier's primary contention is that the mobile agent performs the same work that the four agents previously performed. Carrier also contends that Rule 1 is a general scope rule, requiring Petitioner to prove system-wide performance of the **disputed** work to the exclusion of other crafts and, in addition, the the November 1, 1940 Agreement is inapplicable because no work was removed from a clerk's position.

In support of its position that we are not dealing with a general scope rule, Petitioner cites Awards 2327 (Swaim), 2253 (Swaim), and 14650 (Brown). All of these Awards, including one involving these same parties and the same property (14650), dealt with the November 1, 1940 Memorandum of Agreement as applied to disputes between clerks and other crafts. From our review of these Awards we agree with Petitioner that the principles enunciated therein apply here to the extent that the Petitioner does not have to prove system-wide performance of the disputed work to the exclusion of all other crafts. Nonetheless, the Petitioner does have the burden to prove, by a preponderance of evidence of record, that the work performed by the mobile agent is in fact clerk's work as alleged in the claim. This burden, on the record before us, has not been carried by Petitioner.

Petitioner places **undue reliance on its assertions that the Carrier** has never denied that the mobile agent performs eight hours of clerical work daily and that the Carrier did not enter into or agree to a joint check "even though we insisted they must do so". By this position the Petitioner in effect contends that Carrier has conceded the disputed facts to be as alleged by Petitioner. We do not agree with this reasoning. Carrier's assertion that the mobile agent was performing the work that the four agents previously performed was an adequate denial of all assertions made by Petitioner on the property. That the Petitioner may have viewed Carrier's response as evasive or improper in form does not convert Petitioner's assertions into conclusively established facts. It is true that the stations had been closed and from that fact one could infer that the underlying facts, if established, would not square completely with Carrier's denial. This alone does not make out Petitioner's proof, however, and Petitioner was on clear notice that Carrier was not conceding any of the facts essential to Petitioner's proof of claim. We also

believe the Petitioner cannot sidestep its burden of proof by its argument about the joint check. In its rebuttal brief the Petitioner states that "The Carrier did not enter into or agree to a joint check even though we insisted they must do so according to the understanding reached in conference November 6, 1967". We acknowledge that if the record showed Carrier's refusal to make a joint check, in violation of an agreement to do so, the Petitioner would be in a position to contend that Carrier's refusal gave rise to inferences adverse to Carrier's position. However, the record on the property shows that the request by Petitioner for the joint check was mentioned in only one single instance. Thereafter, in the August 20, 1968 letter of Mr. Sayers, Carrier did not refer to the joint check but repeated its position that the disputed work was the same as that performed previously by the agents. Subsequently the claim was the subject of conference discussions on two occasions, on September 25, and October 31, 1968; however, the record discloses no indication that the joint check was mentioned by Petitioner at either of these conferences. The record does indicate that the Carrier exhibited no positive interest in the joint check, and we might presume that the check was thought to be of greater potential benefit to Petitioner than to Carrier. But this does not evidence a refusal by Carrier to make the check, and Petitioner's single request for a check cannot be converted either into a refusal by Carrier to make the check or into proof that the disputed facts are as alleged by Petitioner. Thus, in all the circumstances and on the whole record, we do not find evidence to support Petitioner's contention that it "insisted upon the joint check" and that Carrier improperly refused the check.

In addition, the documents in the proceeding before the Texas Railroad Commission are also barren of the evidence the Petitioner needs to make out its proof. The basic question in that proceeding was whether the public interest would be served as well by a mobile system as by a stationary system of service to the area patrons. The proceeding did not determine that a particular craft would perform the work of the prospective mobile system. And although some of the duties referred to in the documents are clearly clerk's duties, this would necessarily follow from the fact that the agents at the one-man-stations had performed clerical work. Moreover, while the documents also refer to the possibility of the mobile work being performed by either a clerk or an agent, the commission's order approved the prayer of the Carrier's application which stated that the abolished stations would be "served by radio-equipped mobile agencies..." (Emphasis supplied.) Thus if the commission documents provide any evidence at all on the disputed facts, the evidence would be as much or more in Carrier's favor as in support of Petitioner's case. But, as indicated, we believe the commission documents provide no probative evidence at all with which to resolve the disputed facts.

On the record as a whole the Petitioner has not shown by a preponderance of the evidence that the mobile agent was performing clerk's work as alleged and we shall accordingly dismiss 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 claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of March 1973.