

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated and continues to violate the effective Clerks' Agreement when on September 12, 1960 it created a new position of Assistant Supervisor Machine Applications-Car Control with headquarters at Gary, Indiana and failed to bulletin and award the position in accordance with the provisions of the Agreement;

(2) The position of Assistant Supervisor Machine Applications-Car Control be bulletined and awarded in accordance with the provisions of our agreement;

(3) The successful applicant to the position of Assistant Supervisor Machine Applications-Car Control and the successful applicants to all resulting vacancies be compensated the difference between the amount they earned and that which they should have earned if our agreement had been properly applied, such compensation to be retroactive to September 12, 1960 and continuing up to the time this violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: Effective September 12, 1960, the Carrier created a new position of Assistant Supervisor Machine Applications-Car Control with headquarters at Gary, Indiana.

The Carrier filled the position by appointing Mr. G. W. Ewing to it rather than by advertising for bids and awarding it in accordance with our rules.

Claim was filed on October 22, 1960 and was progressed up to and including the highest officer designated by the Carrier to handle such disputes.

Throughout the handling of this claim the Carrier has taken the position that the Assistant Supervisor Machine Applications-Car Control is a system supervisory position and for this reason should not be covered by the Agreement.

clerical position Rule 2 places definite limitations on the general references to clerical positions and work set forth in Rule 1. The Organization has not shown and cannot show that the disputed position normally and customarily performs any bona fide clerical functions. In a positional claim such as the instant one this is essential.

In handling the instant claim with the Carrier, the Organization based its argument on the contention that the position in issue is filled by a subordinate official of the Carrier, and therefore, under definitions of the Interstate Commerce Commission, the employee filling the position should be subject to the provisions of the Railway Labor Act. The Organization then contended that inasmuch as it represents employes and subordinate officials of the craft and class of clerical, office, station and storehouse employes the position of Assistant Supervisor Machine Applications-Car Control is covered by the scope rule of the Clerks' Agreement.

The Carrier submits that the Organization's argument is nothing but an uncorroborated self-serving conclusion. This is *not* the manner in which the Railway Labor Act provides for Organizations to obtain representation and control over classes and crafts of employes. It is obvious that if the Organization attains control over a position, it attains control over the person who fills it, and the Organization cannot do this merely by asserting that the position is a subordinate position. Further, under the Railway Labor Act, the Carrier is prohibited from forcing union membership and representation on a class of employes, subordinate officials or not, against their will. The Organization's remedies lie in Ex Parte proceedings before the Interstate Commerce Commission and then representation proceeding before the Mediation Board.

The Carrier also contends that the Board is without authority to include or exclude new employee classifications under the Scope Rule of the Agreement. The question of whether the position of Assistant Supervisor Machine Applications-Car Control is subject to the Scope Rule of the Agreement is a matter to be determined by Carrier, in the first instance, and, if Carrier is willing and the affected employes so desire, then and only then by negotiation between the parties. In any event, it is not a question for decision by the National Railroad Adjustment Board.

As to that part of the claim pertaining to "the successful applicants to all resulting vacancies", the Carrier requests that this be disregarded as too indefinite and uncertain to be considered.

In view of the foregoing, the Carrier respectfully requests a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier established a new position of "Supervisor Machine Applications - Car Control" on May 16, 1959, and another new position of Assistant Supervisor Machine Applications-Car Control on August 30, 1960. It is this latter position which is the subject of this dispute. The "Supervisor" position has from its inception been considered as an "official position", and as such outside the scope of the Collective Bargaining Agreement. The Organization however contends that the position of the "Assistant Supervisor" is within the purview of the Agreement and consequently should have been bulletined and awarded in accordance with the provisions of their contract with the Carrier.

The Organization in support of its claim, contends that this position, unless specifically excluded from the scope rule of the Agreement, must of necessity come within its purview. We cannot agree that this is sound reasoning because in our judgment such a principle if applied to a variety of factual situations, would inevitably lead to erroneous conclusions.

The positions of "Supervisor" and "Assistant Supervisor" have the same duties, authority and responsibility. Both are supervisory and do not involve the performance of routine, productive work. The incumbent of the assistant's position, is for all intents and purposes, when working on his assigned shift, the Supervisor. Rarely do the incumbents of both these positions perform their functions simultaneously. Both, in fulfilling their responsibilities are not restricted to the Gary, Indiana station, but as circumstances require must from time to time visit other installations to supervise the operation of the system.

This case is quite similar to Docket CL-12503, although the position in question was different. However, the reasoning and principles applied in that case are equally pertinent to the issue involved in this case. We are unable to make an adequately substantial distinction between the duties and responsibilities of the "Supervisor" and "Assistant Supervisor" position, which would warrant us finding the latter as coming within the scope of the agreement. It is true that the Assistant reports to the Supervisor but this alone would not place him in the category of a "subordinate official". In order for this Board to sustain the claim as filed, more evidence should properly have been presented. It goes without saying that the Organization has the burden of proving all essential elements of their claim. Since a review of the record fails to reveal a body of evidence commensurate with a justifiable sustaining of this claim, we must deny it. In so doing, we are not unmindful of other contentions raised by both parties in this case, but it is our judgment, that the decision as concluded on the foregoing grounds, is sound and any further discussion would properly be categorized as "obiter dicta".

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 Employee involved in this dispute are respectively Carrier and Employee 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 17th day of July 1964.