Award No. 12790

Docket No. CL-12426

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

FLORIDA EAST COAST RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4916) that:

1. The Carrier violated Rules 1, 3 and 70, among others, of the January 1, 1938 Agreement in requiring and permitting the supervisory Agent at West Palm Beach to take over from employes covered by the agreement and perform routine clerical work connected with the handling of OS&D files, and that

2. The Carrier be required to pay to furloughed Clerk Ann L. Clayton and/or her successor or successors in interest, namely, any other employe or employes who may have stood in the same status as claimant and who were adversely affected, a day's pay at the pro rata rate of Utility Clerk position for the period May 17 to July 10, inclusive, 1960.

EMPLOYES' STATEMENT OF FACTS: On April 10, 1960, the District Chairman of the Brotherhood addressed the following letter to the Carrier's Superintendent:

"It is my understanding that with the abolition of Utility Clerk Position No. 49, West Palm Beach Agency, effective upon completion of tour of duty February 26, 1960, the work of the abolished position was assigned to Stenographer-Clerk Position No. 50.

Handling correspondence prior to and subsequent to February 26, 1960, is a duty assigned to Stenographer-Clerk Position No. 50; however, the Agent at West Palm Beach has taken over some of this work, particularly correspondence requesting copies of waybills, etc. The installation of a copying machine in the office at West Palm Beach does not give the agent the right to perform work covered by our agreement, even though the method of copying has been changed.

Please have the agent at West Palm Beach discontinue handling routine correspondence, advising."

established by this record that the work in question is covered by the Clerks' Agreement to the exclusion of the agent. Therefore, we find no violation of the Agreement."

These findings are equally pertinent to the instant dispute, and fully demonstrate its complete lack of merit.

For the reasons stated, the claim is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Scope provision of the Agreement before us, insofar as material herein, reads:

"ARTICLE 1. SCOPE.

Rule 1. (Revised June 12, 1946.)

These rules shall govern the hours of service and working conditions of the following employes subject to the exceptions noted below:

Group (1) Clerks. (a) Clerical workers,
(b) *Machine operators.*"

On December 30, 1946, the Carrier established in the West Palm Beach Freight Agency a temporary position, designated "Utility Clerk", with the following advertised duties.

"The duties of this position will consist of receiving and delivering freight, handling OS&D's, billing, and other duties assigned by Agent."

The position soon became permanent, but was ultimately abolished effective November 30, 1959, because of a decline in traffic. Duties of the former position were then transferred to other clerical positions in the Agency receiving comparable rates of pay. Further economies were instituted by the Carrier involving the abolishment of another Utility Clerk position effective February 26, 1960, and the procurement and operation of a Thermo-Fax copying machine by the Agency. Although not an issue between the parties in this dispute, the use of the copying machine by the Agent at West Palm Beach culminated in the series of protests filed with the Carrier by the Organization urging that said Agent discontinue handling routine correspondence, a duty assigned to clerk positions.

Carrier's investigation of the first protest received by the Organization disclosed that the Agent was making notations in response to inquiries from the Claims Department on the actual Forms received by the Agency, running copies of said Forms on the Thermo-Fax Machine and returning the original Forms with appropriate replies written thereon to the Claims Department. Prior to the acquisition of the labor saving device, the Agent made notations on the Form concerning Over, Short and Damaged Freight received from the Claims Department and then submitted such Forms with his pertinent notations to a Clerk-Stenographer who prepared appropriate replies in letter form. To remove the basis of the first protest the Agent was directed to have necessary copies of the Forms made by incumbents of positions falling within the scope of the Clerks' Agreement. However, the

Forms with the Agent's notations in response to inquiries were still returned to the correspondents as replies in lieu of letters prepared by clerical employes containing the same information.

Carrier so advised the Petitioner by letter dated May 3, 1960, in part stating as follows:

> "This matter has been given the necessary corrective handling and there should be no basis for further complaint."

Thereafter, a further protest was filed by the Organization alleging that the Agent had taken over the work in question "in wholesale lots". Specifically, Petitioner stated that the Agent had gathered up approximately fifty so-called OS&D files from the desk formerly occupied by the incumbent of the abolished position of Utility Clerk and performed all the necessary work previously assigned to the abolished position in violation of the Scope Rule of the Agreement.

Further investigation by the Carrier resulted in its finding that the work in question was being distributed to its employes within the scope of the Agreement, and that the Agent simply took charge of the accumulated Forms for the purpose of apportioning them among covered clerical positions to secure and furnish the information requested.

Petitioner then filed the instant claim which was ultimately denied by the Carrier after being duly processed through the various steps on the property. In his final letter denying the claim, the Carrier's Superintendent stated that although the method of operation at West Palm Beach had changed to some extent since the use of its copying machine, ". . . the Agent, except for a brief period prior to the first date of the claim, has not performed and is not now performing any work which has not been his prerogative to perform prior and subsequent to the reduction of clerical forces in West Palm Beach Agency."

Petitioner construes the language above quoted from the Superintendent's final letter denying the claim as a repudiation of his previous position concerning the work in question. Petitioner's contention is based upon its premise that the Superintendent agreed in earlier correspondence that it was not the prerogative of the Agent to perform such work. We have considered the prior letters to the Petitioner from the Superintendent and the action allegedly taken by him following the first protest from the Petitioner. We conclude that the Superintendent endeavored to cure any violations arising out of his investigation immediately following the first protest and was satisfied that the method of operation was in accordance with the Agreement between the parties during the period of time encompassed by Part 2 of the Claim.

Petitioner contends that the work here involved was clearly within the purview of the Scope Rule of the Agreement, and that the Carrier violated its rule when it allegedly removed and withheld the duties herein discussed and assigned such duties to a supervisory agent, an employe outside the scope of the agreement.

Carrier denies that the work in question was exclusively performed through custom and tradition by the Claimants under the Scope Rule of the Agreement, and asserts that the work performed by the Agent was no different than that which had been his prerogative to perform at West Palm Beach during his years of service as both Assistant Agent and Agent.

In support of its position Carrier submitted a statement from its Agent at West Palm Beach which was not available at the time its dispute was considered on the property. Petitioner also submitted untimely statements from employes as corroborating evidence to support its contention that the Agent was performing work within the scope of the Agreement between the parties. Carrier thereafter offered additional evidence in rebuttal to refute such statements. During the panel discussion before the Referee, Petitioner urged for the first time that all such material which was never placed in evidence or discussed on the property be disregarded in considering the merits of this dispute. It is well established that the Board will not consider new evidence or issues raised for the first time subsequent to the consideration of a dispute on the property by the parties. Therefore, we find that such evidence is not properly before us.

The Scope Rule in the Agreement does not classify or describe the work and merely sets forth the covered positions. In order for the Petitioner to prevail in a claim of this nature, it must prove by a preponderance of probative evidence that the employes involved have traditionally, customarily and exclusively performed the work in issue. Mere assertions are not sufficient to sustain such a claim. Here the Petitioner has asserted that the Carrier's Superintendent agreed with its contentions that the work involved during the period covered by the claim was improperly performed by the Carrier's Agent. We have found this assertion without merit, based upon the record before us. Furthermore, no credible evidence was offered by Petitioner refuting the denial of the Carrier that the work in dispute belonged exclusively to employes covered by the Agreement. Therefore, we must conclude that the Petitioner failed to sustain its burden of proof and 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 Carrier did not violate the Agreement.

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 July 1964.