Award No. 13125

Docket No. CL-13472

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5152) that:

1. Carrier violated the Rules of the Clerks' Agreement at Franklin, Pa., when it abolished the position of Clerk-Warehouseman and assigned part of the remaining duties to the Agent, an employe not covered by the Clerks' Agreement, and required him to perform the duties that formerly attached to the position of Clerk-Warehouseman;

2. Carrier shall now be required to restore the work to employes covered by the Scope of the Clerks' Agreement;

3. Carrier shall now be required to compensate employe E. Conklin and/or his successors, if any, for two hours at time and one-half rate retroactive to January 24, 1961 and all subsequent dates forward until such time as violation complained of is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to January 23, 1961, there was in existence at Franklin, Pa., the following positions:

Agent
Chief Clerk
Clerk-Warehouseman

Effective January 24, 1961, the force was as follows:

Agent
Chief Clerk

Effective January 24, 1961, the position of Clerk-Warehouseman was abolished and the duties remaining to be performed were assigned in part to the Chief Clerk and a portion to the Agent, an employe not covered by the Clerks' Agreement.

The duties assigned to the Agent previously performed by the Clerk-Warehouseman are as follows:

that must be given consideration in determining the rights of the parties under the confronting facts as we have construed them. The first is that except in so far as it has restricted itself by the agreement the assignment of work necessary for its operation lies within the carrier's discretion. The second is that in the absence of any rules of the agreement precluding it from doing so it is the prerogative of management, so long as it actually intends to accomplish such a result, to abolish a position if a substantial part of the work thereof has disappeared. (See also Award 6839 and awards cited therein.)

The carrier may in the interests of efficiency and economy of its operations abolish positions and rearrange the work thereof unless it has limited its right to do so by the provisions of the collective agreement. However, when doing so the work of the positions abolished must be assigned to and performed by the class of employes entitled thereto under the agreement."

Carrier has not restricted itself either under the provisions of Rule 12(d) or any other rule of agreement to do exactly that which it did in this dispute. Accordingly, this claim should be denied as were the claims in Awards 6944 and 6945.

Without detraction from or prejudice to the foregoing, Carrier submits that Petitioner's claim for a penalty of two hours' time and one-half is totally unfounded. This Board is well aware of the fact that it has enunciated in over two hundred different awards that the right to perform work is not the equivalent of work performed insofar as the overtime rules are concerned. And, that the one making a claim for time and one-half for having allegedly been deprived of work, has not done that which makes the higher rate applicable. With this principle being so pronounced by this Board, Carrier does not deem it necessary to say anything further in this respect except to reiterate that claim is without merit in any event.

III. CONCLUSION

Based upon the foregoing facts and authorities cited, Carrier submits that this claim is most emphatically without merit and should be denied.

OPINION OF BOARD: Prior to January 23, 1961, the Agency force at Franklin, Pennsylvania, consisted of a Supervisory Agent, a Chief Clerk and a Warehouseman-Clerk, the last two positions being covered by the Clerks' Agreement.

Effective January 24, 1961, Carrier abolished the position of Warehouseman-Clerk. The duties of that position remaining to be performed were assigned in part to the Chief Clerk and in part to the Agent. The Agent is not covered by the Clerks' Agreement.

Clerks contend that Carrier violated the Agreement when it assigned part of the duties of the abolished position of Warehouseman-Clerk to the Agent.

Clerks contend that Rule 12(d) of the Agreement obligated Carrier to assign the duties of the abolished position to the position of Chief Clerk which remained in existence at the location were the remaining work of the abolished position continued to be performed. Clerks rely on Rule 12(d) of the Agreement which reads:

"Rule 12—Reducing Force

"(d) When a position covered by this agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

"1. To another position or other positions covered by this agreement when such other position or other positions remain in existence at the location where the work of the abolished position is to be performed.

"2. In the event no position under this agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yardmaster, Foreman, or other supervisory employe, provided that less than four (4) hours' work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of an Agent, Yardmaster, Foreman or other supervisory employe.

"3. Performance of work by employes other than those covered by this agreement in accordance with paragraphs (1) and (2) of this Rule 12 (Paragraph d) will not constitute a violation of any provision of this Agreement.

"4. Where the remaining work of an abolished position is reassigned to employes within this Agreement, Carrier will re-assign work of a similar kind to position or positions performing that particular kind of work, higher rated work to higher rated positions and lower rated work to lower rated positions."

Carrier defends with the arguments that: (1) the Agreement makes certain the right of Carrier to abolish positions; and (2) the Scope Rule of the Agreement is general in nature; therefore, to prevail, Clerks must prove the work has been performed exclusively by employes covered by the Clerks' Agreement.

We agree that the Agreement makes certain Carrier's right to abolish positions. We do not agree that the Clerks' must prove, in this case, that the work of the abolished position has been performed, exclusively, by employes covered by the Clerks' Agreement.

Specific provisions of an agreement prevail over general provisions. Therefore, Rule 12(d) of the Agreement, dealing with assignment of the work of an abolished position, prevails. It is unambiguous.

In Rule 12(d)(1) the Agreement unequivocally mandates that work of an abolished Clerks' position must be assigned to another position or positions covered by the Agreement when such other position or positions remain in existence at the location where the remaining work of the abolished position is to be performed. The position of Chief Clerk at Franklin, Pennsylvania, satisfies the conditions which make imperative the effectuation of the mandate. *Ergo*, Carrier violated the Agreement in assigning remaining duties of the abolished position to other than the Chief Clerk.

Paragraph 2 of the Statement of Claim prays that the Carrier be ordered to restore the work of the abolished position to employes covered by the

Clerks' Agreement. It has been held that such an order is beyond the power of this Board. Accordingly, we will deny paragraph 2 of the Claim.

This Board has usually held that for work not performed its award of monetary damages will be limited to the pro rata wage rate. We will adhere to those holdings in this case.

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 Carrier violated the Agreement.

AWARD

Paragraph 1 of the Claim is sustained.

Paragraph 2 of the Claim is denied.

Paragraph 3 of the Claim is sustained except that compensation shall be at pro rata rate instead of time and one-half rate as prayed for.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1964.

DISSENT TO PARAGRAPH 2 OF AWARD 13125, DOCKET CL-13472

We believe the Referee erred in denying Paragraph 2 of the Statement of Claim.

The complete Statement of Claim reads as follows:

1. Carrier violated the Rules of the Clerks' Agreement at Franklin, Pa., when it abolished the position of Clerk-Warehouseman and assigned part of the remaining duties to the Agent, an employe not covered by the Clerks Agreement, and required him to perform the duties that formerly attached to the position of Clerk-Warehouseman;

2. Carrier shall now be required to restore the work to employes covered by the Scope of the Clerks' Agreement;

3. Carrier shall now be required to compensate employe E. Conklin and/or his successors, if any, for two hours at time and one-half

rate retroactive to January 24, 1961 and all subsequent dates forward until such time as violation complained of is corrected.

The Award reads as follows:

"Paragraph 1 of the Claim is sustained.

Paragraph 2 of the Claim is denied.

Paragraph 3 of the Claim is sustained except that compensation shall be at pro rata rate instead of time and one-half rate as prayed for."

The Opinion with regard to Paragraph 2 reads as follows:

"Paragraph 2 of the Statement of Claim prays that the Carrier be ordered to restore the work of the abolished position to employes covered by the Clerks' Agreement. It has been held that such an order is beyond the power of this Board. Accordingly, we will deny paragraph 2 of the Claim."

From its inception this Division has taken the position that it does have the power to require the restoration of work to the scope and operation of the Agreement from which it was removed. In support of this contention, recent Awards so holding are as follows:

Awards 10736, 10743, 11511, 11554, 12414, 12422, 12822, 12959, 12960, 12981 and 13039.

If, as the referee contends, the restoration of such work is beyond his power, he is then also lacking the power to deny. However, we contend the Referee does have the power to restore work to the scope and operation of the Agreement from which it was removed and our contention is amply supported by the above-mentioned Awards, and; likewise, he has the power to deny if in his opinion the facts of record are the basis of his Award.

The Referee is grossly in error.

CEK/bjs

C. E. Kief,
Labor Member