

Award No. 14588
Docket No. CL-12975

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Edward A. Lynch, 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-5098) that:

(1) Carrier violated and continues to violate rules of the current Clerical Agreement when, following transfer of the Ticket Agent-Operator at Cortland, New York, from the Passenger Station to a new location at the Freight Office on October 27, 1958, it assigned him routine clerical duties which theretofore had been performed by employees coming within the scope of the Agreement.

(2) The said clerical work shall be returned to the clerical employees entitled to perform it under the provisions of the Clerks' Agreement.

(3) Clerk John Burns and his successor or successors, if any, be reimbursed for all time lost as a result of the force reduction which followed this unilateral removal of work from the scope of the Clerks' Agreement. (Case 3102)

EMPLOYEES' STATEMENT OF FACTS: Prior to October 27, 1958, the force at Cortland Freight Station was listed as follows:

Agent	Earl Spicer	8 A. M.-5 P. M.
Chief Clerk	Peter Whitbeck	8 A. M.-5 P. M.
Cashier	Mrs. Griswold	8 A. M.-5 P. M.
Yard Clerk	George Lear	8 A. M.-5 P. M.
Foreman	O. Ryan	8 A. M.-5 P. M.
Checker	John Burns	8 A. M.-5 P. M.

Ticket Agent-Operator C. Kelley, hours 8 A. M.-5 P. M., was located at the Passenger Station across the road and some 75 yards distance from the Freight Station. Until approximately June or July of 1958, the Ticket

As result of this violation, force reduction was made at this point on December 1st, 1958, with resultant effect that Mr. John Burns was displaced and furloughed effective December 1st, 1958.

Due to rearrangement of forces covered by our working agreement and unilateral action taken by Management in doing so, the following duties of clerical positions were removed from our scope and assigned to Ticket Agent Operator C. Kelley in violation of Rule 1.

1. Typing all less than carload bills
2. Typing all carload bills
3. Filing delivery receipts
4. Making up carbons for expense bills
5. Handling phone calls formerly done by Clerks
6. Making up inbound and outbound load statement
7. Making up statements for consignees
8. Preparing and maintaining files for waybills, Bills of Lading, Cashier Stubs and all station records
9. All other office duties that may be required.

You will also please be advised that this newly created position which is entirely covered by the scope of our agreement was never advertised in accordance with provisions of our working agreement.

With due consideration to drastic violations of our working agreement in this instant case, I will appreciate your immediate cooperation to the extent that this position in question be immediately advertised to employes covered by our working agreement and that furloughed Checker John Burns be reimbursed for all monetary loss suffered retroactive to December 1st, 1959.

Please advise as to your decision on this matter.

Very truly yours,

/s/ Samuel Trepasso
Local Chairman

cc: L. A. Carlo
C. C. Osborne"

OPINION OF BOARD: We are here concerned with a Scope Rule which says quite clearly that "positions coming within the Scope of this Agreement belong to the employes covered thereby, and nothing in this Agreement shall be construed to permit the removal of positions from the application of these rules by transferring to another craft, except by agreement. . . ."

Basis of this claim is Carrier's action when "following transfer of the Ticket Agent-Operator at Cortland, New York, from the Passenger Station

to a new location at the Freight Office on October 27, 1958, it assigned him routine clerical duties which theretofore had been performed by employees coming within the scope of the Agreement."

According to the Organization, Claimant John Burns was assigned to the freight house, and his duties included the following items of work:

1. The usual Checking, Trucking and Loading Duties Required at Line Stations
2. Checking Inbound and Outbound Bills
3. Type OS&D Reports
4. Handle Papers Covering Claims
5. General Office Duties (Including Overflow from Chief Clerk Vacancy).

When Carrier moved the Ticket Agent-Operator over to the adjacent freight house, according to the Organization, this Ticket Agent-Operator was to have the title of his position changed to "Clerk-Operator", and he was to be assigned any clerical work deemed necessary." Passenger service had been discontinued September 15, 1958.

This transfer took place October 27, 1958. A rearrangement of work assignments followed "with the result that on or about December 1, 1958, John Burns' position was completely absorbed by the other positions from which, in turn, the Clerk-Operator absorbed some seven hours of general clerical work, consisting of the following duties:

1. Typing all Less Carload Bills
2. Typing all Carload Bills
3. Filing Delivery Receipts
4. Making up Carbons for Expense Bills
5. Handling Phone Calls Formerly Handled by Clerks
6. Making up Inbound and Outbound Load Statements
7. Making up Statements for Consignees
8. Preparing and Maintaining Files for Waybills, Bills of Lading, Cashier Stubs and All Station Records.

The Organization contends that the work formerly performed by Claimant John Burns was given to the Agent-Operator and Burns was displaced and furloughed December 1, 1958.

The Organization further charges—although it is not specifically mentioned in the claim—that Carrier's action created "an advertise a [sic] position which, in Organization's view should have been advertised for bids.

Organization claims that Carrier:

"... complying with Superintendent Jones' order to assign to Mr. Kelley (the ticket agent-operator) 'any duties he deemed necessary' Agent Spieer picked an assortment of work items . . . from the four clerical assignments and consolidated them into one position."

This position "was assigned to Mr. Kelley without bulletining October 27, 1958."

The Organization adds that to replace the work from their positions that had been given to the Clerk-Operator, Clerks Griswold, Lear and Ryan were then required to absorb what was left of the Burns' assignment.

Under the Scope Rule here obtaining, and previously quoted, John Burns owned the clerk position, and the work of that position on December 1, 1958 when Carrier assigned duties of his position to others in compliance with Superintendent Jones' order that "any duties he deemed necessary" should be assigned the Agent-Operator. The work thus removed from a clerk's job cannot here be held to be "work incident to and directly attached to the primary duties" of an Agent-Operator, within the meaning and intent of Rule 1(d).

In the absence of evidence to the contrary, it must be assumed that Claimant Burns was, prior to the changes here challenged, performing the duties of his job in an acceptable manner. Under the Scope Rule here obtaining, the Claimant owned the position and the work of the position.

When the Carrier assigned duties of that position to the Agent-Operator, the Agreement was violated. Awards 9416, 14088.

We shall sustain the claim of John Burns on the make-whole principle until the violation is corrected.

We will deny the claim of "his successor or successors" as such because it is too vague and indefinite.

Part 2 of the claim is dismissed, as we lack the authority to so order.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1966.

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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

**INTERPRETATION NO. 1 TO AWARD NO. 14588
DOCKET NO. CL-12975**

Name of Organization:

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

Name of Carrier:

ERIE-LACKAWANNA RAILROAD COMPANY

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

There is before us a request by the Organization Member for an Interpretation of Award 14588, Docket CL-12975; specifically with reference to this language of the Award:

"Claim sustained in accordance with Opinion;"

and more specifically this portion:

" 'We shall sustain the claim of John Burns on the make-whole principle until the violation is corrected.' "

It is here argued in behalf of the Organization that our Award "correctly held that what Carrier had done could not be done except by agreement and that there had been a violation of the Scope Rule." Part 2 was dismissed and Part 3, as to John Burns' "successor or successors" was denied; however, the Opinion stated:

" 'We shall sustain the claim of John Burns on the make-whole principle until the violation is corrected.' "

We are now asked what constitutes the "make whole principle" in the light of the record.

The Organization contends it should be construed to mean that we should pay John Burns "what he would have earned absent the violation less

what he actually earned at the vacation relief and other work, as set forth in the record until the violation ceased."

It is argued in behalf of the Carrier that many recent Awards of this Division have held that a man in the position of this Claimant is obligated to mitigate such damage "by seeking and accepting comparable employment." (Award 94 (without a Referee); First Division Award 15765 (Carter)).

In Award 11074 (Dorsey) this Board followed Carter and it stated:

"We will, therefore, order Carrier to pay to Claimant such wages as he would have earned as a waiter . . . absent the violation of the Agreement, . . . had he accepted the offer of employment set forth above."

We have also held in Award 13350 (Bailer), here cited in behalf of Carrier, that:

". . . a total of eleven positions were bulletined in the seniority district at locations other than Willard, Ohio. Claimant could have bid on these other positions but he did not do so. Since he did not seek to obtain any of these available jobs, we do not think he should be compensated for the wage loss which he could have avoided . . ."

It is argued in behalf of the Organization that

"just as Awards regarding the remedy, requested in item 2 have gone both ways, so, too, have the Awards and Interpretations regarding the 'make whole' principle gone both ways."

Be that as it may, the fact remains that a substantial number of Awards of this Board have firmly established the rule that a Claimant is obligated to mitigate alleged damage by seeking and accepting comparable employment to which entitled by his seniority.

Our Award, therefore

- (a) Sustained Part 1 of the Claim.
- (b) Dismissed Part 2 of the Claim.
- (c) Eliminated successor and successors from Part 3 of the Claim.

(d) Sustains the Claim in behalf of Clerk John Burns, within the limits of the make-whole theory as herein interpreted, until the violation is or was corrected.

Referee Edward A. Lynch, who sat with the Division as a neutral member when Award No. 14588 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of March 1967.

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