NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19719
THIRD DIVISION Docket Number CL-19727

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Bangor and Aroostook Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7092) that:

(1) Carrier violated the rules of the current Clerks' Agreement dated September 21. 1950, as amended, particularly, scope Rule 1 (b) and Rule 3b, among others, when effective, at close of work, Friday, August 28, 1970 it abolished its last remaining clerical position at Searsport, Elaine, and unilaterally assigned all clerical duties. work and incidentals appurtenent thereto, that were performed by the Clerk at this point to employees, (Supervisory Agent and Assistant Agents) of another craft and class who held no seniority rights under said agreement for its performance.

(2) Carrier shall now compensate, Clerk, Mr. A. A. Ashey, Jr. for all wage losses commencing August 31, 1970 and everyday thereafter until said violations are corrected and the work returned to our craft and class.

OPINION OF BOARD: This claim arose when Carrier abolished its last remaining clerical position et Searsport, Maine, effective August 28, 1970, Claimant was the incumbent of the position.

Prior to August 28, 1970, the Carrier maintained the following station force at searsport.

TITLE OF POSITION	ASSIGNED HOURS	REST DAYS
Terminal Agent	8:00 A.M. - 12:00 Noon 1:00 P.M. - 5:00 P.M.	Sunday
Assistant Agent	6:30 A.M. - 2:30 P.M.	Sunday & Monday
Assistant Agent	8:00 A.M. - 12:00 Noon 1:00 P.M. - 5:00 P.M.	Sunday & Tuesday
Clerk	6:00 A.M. - 2:00 P.M.	Saturday & Sunday

After August 28, 1970, Searsport was staffed as follows:

TITLE OF POSITION	ASSIGNED HOURS	REST DAYS
Terminal Agent	8:00 A.M. - 12:00 Noon 1:00 P.M. - 5:00 P.M.	Sunday
Assistant Agent	6:30 A.M. - 2:30 P.M.	Sunday & Monday
Assistant Agent	6:30 A.M. - 2:30 P.M.	Saturday & Sunday

Before this dispute arose claimant spent approximately three hours daily in the yard with the switcher crew of a Local which ran between Northern Main Junction and Searsport on a six day basis. He also handled all work involving the weighing of cars. According to Carrier "The remainder of his day was spent in general station work as time permitted." As to what happened to the clerical duties after the abolishment of the position, we first note a statement made on the property by Carrier, to wit: "This claim concerns the abolishment of position occupied by Mr. Ashey because there was no. longer sufficient work to justify retaining a full-time clerk" (Emphasis supplied). This is an admission that some clerical work remained after the abolishment of the clerical position. We note also that, in refuting Petitioner's contention that almost all cars must be weighed, Carrier conceded that a "very small percentage " of the cars at Searsport must still be weighed. And since there is no dispute that claimant previously performed the car weighing work, this, too, constitutes an admission that some of the clerical duties remained after the position was abolished. It is also noteworthy that the starting time of the second assistant agent was changed from 8 am to 6:30 am, which placed both the agents on the common schedule of 6:30 am to 2 pm. This change is highly suggestive that the second assistant agent was needed at an earlier starting time to perform clerical work previously performed at that time by the claimant. In light of the foregoing, and on the whole record, we find that a preponderance of evidence of record shows that some of the duties of the clerical position remained after it was abolished and that thereafter such duties were performed by the remaining station force.

On these facts the Petitioner contends that Carrier unilaterally assigned the duties of the abolished clerk position to the Terminal Agent and Assistant Agents and that such action violated Rules l(b), 13(a), and 49 of the applicable Agreement. Carrier's position is that the duties of the abolished position did not belong to the clerks exclusively, that other crafts, as well as supervisory personnel, had performed these duties, that Agents and Operators were the first to perform the station work, that the Terminal Agent and members of another craft had, in fact, performed all of the work of claimant during the period of his employment and that because of the erosion of traffic at that terminal, the ebb and flow principle did, in fact, provide for the use of the craft of employees necessary to perform the station work.

The pertinent Rules are as follows:

"RULE 1 - SCOPE-MPLOYES AFFECTED

* * * * * * *

(b) Positions and work within the scope of this agreement belongs to the employes covered thereby, and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, except in the manner provided in Rule 49."

"RULE 13 - CHANGE IN TITLE, RATE OR CHARACTER OF WORK

(a) When there is a sufficient increase or decrease in the duties and responsibilities of a position, or change in the character of the service required, compensation for that position will be promptly adjusted with the General Chairman, but established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work, for the purpose of reducing the race of pay or evading the application of these rules."

"RULE 49 - DATE EFFECTIVE AND CHANGES

This agreement shall be effective as of September 1, 1949, and shall continue in effect until it is changed as provided herein or under the provisions of the Railway Labor Act as amended. Should either party to this agreement desire to revise or modify these rules, thirty (30) days' written advance notice, containing the proposed changes shall be given and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

Under prior Opinions of this Board the text of Rule l(b) above has been held to preserve to the Clerk's Organization all work being performed under the Clerks' Agreement, on the effective date thereof, until it is negotiated out in the manner provided by Rule 49. Also this preservation of work has been held to be paramount to the defenses asserted herein by Carrier, including the principle of ebb and flow. In commenting on a text similar to the instant Rule l(b) in Award 6357 (McMahon), this Board stated:

"It is true, as Carrier contends, that for many years prior to filing of these claims, approximately 35 years, that a portion of the crew calling duties was performed by Telegraphers, or other clerical employes, and such was the custom and practice on this particular railroad. But when the Agreement was amended by the parties,

"July 1, 1945, and the Scope Rule was rewritten, we must hold that the practice and custom of using employes other than regularly assigned Crew Callers, was completely abrogated by the parties when the Scope Rule 1 was rewritten, and, further, that the Scope Rule as rewritten is clear and concise and is in no way ambiguous. It is, therefore, the opinion of the Board that Carrier has violated the provisions of the Scope Rule as alleged. Nor can it be said that a continuance of the practice from the effective date of the rewritten Scope Rule to the time of filing the claims herein, on June 29, 1949, would reestablish the custom and practice as formerly under the original Scope Rule."

The same text was before us in Award 7129 (Carter), wherein this Board said:

"The record is clear that at the time the scope rule was agreed upon, Clerks were performing the work in question. The rule preserves the work for the Clerks. Awards 6141, 6357, 6444, 6937, 7047, 7040. While some of the scope rules in the foregoing cases provide in effect that positions may not be removed from the agreement except by negotiation, the rule here involved provides that positions or work may not be removed except by agreement. The use of the term 'work' in addition to the term 'positions' must be given meaning. We must presume that the propriety of the rule as written was fully considered by the parties before it was agreed upon. The work here involved was taken from Clerks and given to Telegraphers without negotiation. It is a violation of the rule."

This Board's rulings in Award 8500 (Daugherty) are also pertinent, since that Award dealt with a dispute quite similar to the instant dispute. In that Award we stated that:

"*** When the Carrier abolished Clerical Position No. 196, at least some of the work previously associated exclusively with said position remained to be performed; and after said abolition it was performed by the Agent. The work of the clerical position was not wholly abolished; at least some of it was transferred to the Agent's position, i.e., it was removed from the scope of the Clerks' Agreement and placed under the scope of the Telegraphers' Agreement. Then. under this Board's rulings in numerous Awards (e.g., 5785, 5790, and *7372)* interpreting this same Rule 1 (e) or similar rules and holding that work is the essence of positions, said Rule prohibited the Carrier from acting as it did in the instant case. In the absence of the language of this Rule as interpreted by this Division, the so-called 'ebb and flow' principle would apply and Carrier's behavior would be judged blameless. But said language and interpretation compels the conclusion that Carrier's abolition of Clerical Position No. 196 in the manner it did constituted violation of said Rule. ****"

See also Awards 11586 (Dorsey), 12414 (Coburn), and 11127 (Dolnick).

It is true that Award 13249 (Hamilton), cited by Carrier, did deny a claim involving these same parties and this same scope rule. However, that Award dealt with a dispute concerning unassigned work performed on the claimant's rest days by a telegrapher, and not with the abolishment of a position claimed to be preserved to the clerks by the scope rule. More important, Award 13249 did not discuss this Board's above cited rulings on the meaning of the term "positions and work" in the instant rule and, consequently, we believe it is not appropos to the issues raised by this record.

On the basis of the foregoing Awards, and on the whole record, we find that Carrier violated the Agreement. However, business at Searsport was on the decline when this claim was progressed on the property; the position of the second Assistant Agent was abolished on January 29, 1971, five months after this claim arose. We are therefore mindful that, while the instant record shows the continued existence of some of the duties of the abolished clerk position, the situation may have changed since this record was made. Consequently, we intend that our Award shall apply only to the period during which some portion of the duties of the clerical position was in fact performed by the retained station force and not otherwise. Accordingly, and upon the stated condition, we shall sustain the claim for the period August: 31, 1970 until the end of the violation.

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 Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion,

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1973.

CARRIER MEMBERS' DISSENT TO AWARD NO. 19719
DOCKET NO. CL-19727

This Award is palpably erroneous and we must vigorously dissent thereto.

The Neutral states:

> "* * * More important, Award 13249 aid not discuss this Board's above cited rulings on the meaning of the term 'positions and work' in the instant rule and, consequently, we believe it is not appropon to the issues raised by this record."

Award Co. 13249, cited by the Carrier, involved the same parties and involved the identical rule as in the dispute here. The organization listed the same Awards in that submission as were cited in the instant case. None of the Awards quoted in this Award (No. 19719) involved this Carrier, nor in fact did any of cited Awards.

In Award No. 13249 Referee Hamilton stated:

> "This Board has held on numerous occasions, that where the work at a particular location decreases, and there is telegrapher work remaining, it is proper to retain the telegrapher, and assign to him clerical work to fill out his tour of duty, when he is not occupied with telegraphy or communication duties.
>
> "In this particular case, the record shows that the work load decreased on Sundays, so that only one employe was required. Telegrapher duties remained to be performed. Therefore, in essence, the Carrier abolished the position of clerk, by failing to call him on Sunday, and assigned this work to the telegrapher. We are of the opinion that the Carrier had the prerogative to act in this manner.
>
> "There is no question that if the volume of work for the regular days of the position would have so diminished, the Carrier could have properly acted in the same manner, and assigned the remaining duties of the clerk to the telegrapher. We see no reason that this same procedure would not be applicable in the instant case."

To say that Award No. 13249 "is not cppropos to the issues raised in this record" is, to say the least, incredible.

This is truly a maverick Award and, assuch, is a nullity.

H. F. M. Braidwood

P. C. Carter

W. B. Jones

G. L. Naylor

G. M. Youhn

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT TO AWARD 19719 (DOCKET CL-19727)

Notwithstanding statements made by Carrier Members in their Dissent, Award 19719 is a sound decision. It correctly interprets Rule l(b) of the parties' Agreement reading:

> "Positions and work within the scope of this agreement belongs to the employes covered thereby, and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, except in the manner provided in Rule 49."

The clear literal language of Rule l(b) has been the subject of decision many times by this Board. Some of these decisions were cited by the Referee in support of his correct holdings in Award 19719. In addition to the Awards cited, the Referee could have also cited Award No. 1 of Public Law Board No. 954 adopted September 8, 1972. In that decision, Chairman and Neutral Member Mr. John H. Dorsey, decided a dispute containing an agreement provision identical to the language contained in Rule l(b), quoted above. Award No. 1 of Public Law Board 954, among other things, held:

> "The weight of authority of Third Division, National Railroad Adjustment Board case law compels a finding that when the Scope Rule of an agreement encompasses 'positions and work' that work once assigned by a carrier to employes within the collective bargaining unit thereby becomes vested in employes within the unit and may not be removed 'except by agreement between the parties.'
>
> * * *
>
> Carrier's alleged defense of past practice fails for the following reasons: (1) a Scope Rule such as

"paragraph (b) in the BRAC Agreement is not ambiguous in the light of the case law of the Third Division, National Railroad Adjustment Board; (2) parole evidence is admissible, material and relevant in the interpretation of an ambiguous provision of an agreement only to arrive at the intent of the parties; or, to find history, tradition,, custom exclusivity of contractual investment of right to work under 2 scope rule general in nature - paragraph (b) of thecon-fronting Scope Rule is specific;

* * *

The economic consequences of a bona fide contract are not material, relevant or of persuasive value before a forum charred with its interpretation and application. If a party to a collective bargaining agreement finds, by experience, that as to it the term(s) are economically onerous, the remedy is collective bargaining. This Board is without Jurisdiction to entertain such an argument and resolve it by fiat.

* * *

For the foregoing reasons we find and hold that Carrier violated and violates paragraph (b) of the Scope Rule when it assigned or assigns the work herein involved to an employe not within the collective bargaining unit of the BEAC Agreement. *** ." (Underscoring supplied)

Thus it is clear, notwithstanding what has been said in Carrier Members' Dissent, the clear unambiguous provisions of Rule l(b) vests in employes covered by the Clerks' Agreement work performed by Clerks until such time as it is negotiated out in the manner provided. by Rule 49.

Dissenters rely on the unsound and incorrect decision in Award 1.321:9. Award 13249 is wrong for at least three reasons.

This is vividly demonstrated by the Referee's language explaining that "it is not appropos to the issues raised by this record". Carrier Members' Dissent to Award 19719 opens with a partial quote of the explanation why Award 13249 is in error. The full paragraph from which this partial quote was extracted is repeated below:

> "It is true that Award 13249 (Hamilton), cited by Carrier, did deny 3 claim involving these same parties and this same scope rule. However, that Award dealt with a dispute concerning unassigned work performed on the claimant's rest days by a telegrapher, and not with the abolishment of a position claimed to be preserved to the clerks by the scope rule. More important, Award 13249 did not discuss this Board's above cited rulings on the meaning of the term 'positions and work' in the instant rule and, consequently, we believe it is not appropos to the issues raised by this record.

Award 13249 made several generalized and gratuitous statements not needed or connected with the issue in dispute. Even if such statements were necessary to decide the dispute, they, nonetheless, were still incorrect. Award 13249 does not cite a single Award as authority for its holding, and Referee Hamilton clearly ignored the body of law concerned with the Work on Unassigned Days issue, this, notwithstanding the fact that Work on Unassigned Days was covered by Decision No. 2 of the Forty-Hour Week Committee, wherein that Committee stated:

"***the intent of Section 3 (1) is that where work is required by the carrier to be performed on a day which is not a part of any assignment, either an available extra or unassigned employee who would otherwise not have 40 hours of work that week or the regular employee may be used; unless such work is performed by an available extra or unassigned employee who would otherwise not have 40 hours of work that week, the regular employee shall be used. Where work is required to be performed on a holiday which is not a part of any assignment the regular employee shall be used. * * * ."

and was also covered by prior Awards :

Award	Referee
7297	Edw. F. Carter
8204	Sidney A. Wolff
8303	il. Raymond Cluster
8414	Horace C. Vokoun
10290	Robt. J. Wilson
10533	Jerome A. Levinson
12957	Benjamin II. Wolf
13142	Daniel House

Decision No. 2, and the Awards cited immediately above, establish that even if the applicable Scope Rule was of the "general type" rule, Referee Hamilton's decision in Award 13249 was palpably erroneous. That this conclusion 13 correct is evidenced by the fact that numerous Awards, cubsequent to the adoption of Award 13249, have not followed Award 13249, and have reached correct conclusions. Such Awards show that Award 13249 is a nullity on the Work on Unassigned Days' issue:

Award	Referee
14137	Murray I:. Rohman
15615	John J. McGovern
16252	Milton Friedman
16571	Bill Heskett

Award	Referee
16672	John J. McGovern
17028	Daniel House
17425	Murray M. Rohman
17581	Paul C. Dugan
17619	Paul C. Dugan
17844	Arthur W. Devine
18092	David Dolnick
18245	Paul C. Dugan
18260	Arthur W. Devine
18346	John II. Dorsey
18549	Robert M. O'Brien
13356	Clement P. Cull
19039	Gene T. Ritter
19322	Gene T. Ritter
19364	Paul C. Dugan
19439	Robert M. O'Brien

Accordingly, the neutral deciding Award 19719 was left with no alternative but to hold that Award 13249 was palpably in error. The Majority in Award 13715 correctly stated:

> "Under prior Opinions of this Board the text of Rule 1(b) above has been held to preserve to the Clerks' Organization all work being performed under the Clerks' Agreement, on the effective date thereof, until it is negotiated out in the manner provided by Rule 49. *** ."

This statement is supported by the Awards cited in the Opinion of the Public Law Board cited above, in this Answer, and by Award 7168, Referee Carter, stating:

> "Under this portion of Rule 1, work may not be transferred from under the Agreement to employes under another agreement except by negotiation. The words of the rule are plain and the Intent is clear. In the confronting case no positions were transferred but that there was a transfer of work cannot be doubted. The Agreement was made by the Carrier and the Organization and, its meaning being clear, it is the function of this Board to enforce it as made."

Referee Coffey held in Award 7349:

"We have it on good authority that the Enployes were compelled to resort to arbitration to get the protection they see in a rule that embraces both positions and work. They stress what is now stated in clear and unambiguous terms, as an obligation of contract, that ' * * * nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, * * * except by agreement between the parties signatory hereto.' ."

Referee Dorsey held in Award 11586:

"In prior Awards of this Board it has been established that when the Scope Rule provides that 'positions or work' may not be removed from the Agreement except by negotiation, a Carrier's unilateral action abolishing a 'position' and assigning the 'work' to another class or craft is a violation of the Agreement. ***."

In Award 11127, Referee Dolnick stated:

"The facts in Award 7372 (Carter) are comparable to the facts in the dispute before us. The Rule involved was also comparable to Rule 1(e) of the Clerks' Agreement. We said:

'Several awards of this Division have held that rules similar to Rule 1 (b) require that the work of a position may not be removed from the application of the agreement except by agreement or mediation.' "

Referee Coburn held in Award 12414:

"As has been stated, the effective date of the Agreement before us is January 1, 1957. The evidence establishes that from and after that date until the second trick clerical positions at Newtonville were abolished and the ticket-selling work divided between the Agent and the remaining Ticket Clerk in September and October

"of that year, employes covered by the Agreement were engaged in the work of handling ticket sales and in duties related thereto. They were so engaged when the restrictive provisions of the rule became applicable. Thereafter, the position of Ticket Clerk and the work of selling tickets appertaining thereto could not be removed under the clear and explicit language of the rule except by negotiation and agreement of the parties. Awards 3653, 5785, 8500, 8673 and 9416 are directly in point and controlling.

As to Award 11495 (Third Supplemental), also relied on by the Carrier and involving these same parties and the identical Scope Rule, apparently there the Referee was persuaded to apply the test of exclusive work performance and found that the evidence to meet it was insufficient. Our position is, as has been stated, that the special Scope Rule provisions of the Agreement in evidence here obviate the necessity of showing such exclusive performance by the moving party."

And, Referee House stated in Award 16126:

"###From the record, however, we find that the work as described above was covered by the Scope Rule and under Paragraph (b) of that Rule, may not be removed from coverage of the Agreement except by agreement of the parties."

Also, see Awards:

Award	Referee
6357	Donald F. McMahon
6937	A. Langley Coffey
7129	Edw. F. Carter
8236	Edw. A, Lynch
11983	Jim A. Rinehart
14884	John H. Dorsey
17609	Gene T. Ritter
17934	Chas. W. Ellis

Examination of the abundance of authorities, the literal language of the rule, and the record, clearly establishes that

it is Carrier Members' Dissent to Award 19719 that is a nullity - not Award 19719.

J. C. Fletcher, Labor Member
5-2-73