NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21583

THIRD DIVISION Docket Number CL-21251

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7852, that:

(a) Carrier violated the Rules Agreement effective February 1, 1968, particularly Rule 3-C-2 (a) (1), the Scope Rule and the Extra List Agreement by failing to properly assign the duties of Position G-341 which remained at Shire Oaks, Pennsylvania when transferring same position to West Brownsville as a Flexowriter position October 12, 1971,

(b) J. H. Branch be allowed one day of eight (8) hours at the appropriate pro rata rate of pay for October 12, 1971 and to continue for each consecutive date that the violation exists.

OPINION OF BOARD: Claimant herein was the incumbent of Position G-341 (Crew Dispatcher) at Shire Oaks, Pennsylvania. The position was transferred to West Brownsville, Pennsylvania, on October 12, 1971; the position was advertised in Bulletin No. 81 and awarded to Claimant. The circumstances herein are identical to those discussed in Award 21452 except that in that dispute the transferred position was that of Relief Crew Dispatcher.

This dispute is the fourth in a series of six cases arising from Carrier's changing patterns of work at Shire Oaks, Pennsylvania. It is most unfortunate that all of these cases were not assigned as a group in one docket rather than being dispersed and thus subject to varying arguments and interpretations and several 'bites of the apple" for the same dispute. The first three were resolved by Awards 21324, 21325 and 21452, all by the same referee as that herein. In Award 21452 we stated:

> ". . ..Further, this dispute, in principle has been the subject of well over 100 Awards of this Division and Public Law Boards, a number of them involving this Carrier. All previous awards on this subject have been submitted by the parties and have been reviewed by this Board....

"Even though the work involved in this matter is very minor in every respect, the principle appears to be of great concern to the parties as evidenced by their substantial briefs and citations. Hence, in support of our conclusion, a few comments are in order. In our judgment, with substantial authority to support our conclusion: 1. The Scope Rule of this Agreement is a general one which does not reserve work, per se, to any covered employes. 2. Rule 3-C-2 is a special rule, an exception to the Scope Rule, which provides for a detailed procedure in assignment of work when a position is abolished. While we do not agree with Petitioner that Rule 3-C-2 is a 'preservation of work' rule (but rather merely an 'Assignment of Work' as its caption indicates), we do not believe that its implementation is dependent on the 'exclusivity' doctrine. We view with favor the reasoning in Award 20535 which found that there is no conflict in the exclusivity theory as applied to general scope rules and rules such as 3-C-2. We support that award in its stat-t:

> 'While the 'exclusivity' doctrine may well be material to certain types of disputes, nonetheless, the various Awards which have interpreted rules dealing with abolishment of a position (and subsequent assignment of the work) have read the agreement language in specific terms and have applied it to the facts of each given case without regard to the restrictions suggested by Carrier herein....'

It is apparent that Rule 3-C-2 was negotiated and placed in the Agreement by the parties in good faith. It would be illogical and redundant to have done so if its implementation were dependent upon the covered employes having the exclusive right to the work in the first instance. At the same time, as indicated in Award 21324, we do not find that this Rule grants to covered employes any exclusive right to work which was not previously exclusively theirs."

In panel discussion, extensive and forceful argument was presented by Carrier suggesting that Award 21452 failed to give proper weight to Award 13921 (Dorsey) which is purported to have settled the issue on this property *since* 1965 and erred in relying upon Award 20535 (Sickles) involving a similar rule on a different carrier; it was also pointed out that the issue had been the subject of several score decisions on this property. These decisions, it is argued, "dealt exhaustively with this issue and. . ..held specifically that Petitioner was first required to show the work belonged exclusively to their craft before claiming it under a Rule 3-C-2 abolishment."

Award 21452 carefully examined and for several reasons rejected Award 13921 which superficially seems to be authoritative. It is noted that in that Award the Board placed paragraphs (1) and (2) of Rule 3-C-2 in effect as "sheer surplusage." Many of the forty awards cited in Award 13921 neither mention Rule 3-C-2 nor involve abolished positions. In addition, with the exceptions of Awards 13478 and 13480 (Kornblum), it does not mention awards such as 12901 (Coburn) that have held that Rule 3-C-2 does not depend upon the "exclusivity theory" to become operational. An examination of the thirty-seven awards cited by and relied on by Referee Dorsey in Award 13921 is relevant and essential in the resolution of this dispute.

In Award 8218, where yardmen performed work on Washington's Birthday, Rule 3-C-2 was not an issue. In Award 8331 there was no showing that a position had been abolished or that the disputed work had ever been assigned under the Clerks' Agreement. Award 9781, in addition to specifically distinguishing sustaining Award 3870, involving the application of Rule 3-C-2, fails to disclose that a position was abolished. Award 9822 relied on 9781 (moreover, no position was abolished).

In the fifth award cited, 10455, no position was abolished, nor was there in Award 10615. Rule 3-C-2 was not argued in Award 10762, and no position was abolished. Award 10989 involved a supervisor not covered by the Clerks' Agreement being required to prepare a special report; here, again, no position was abolished. In Award 11107 Rule 3-C-2 was joined; however, the Award held that the remaining work of the abolished position was properly assigned.

Awards 11963 and 12106 are two of the cited thirty-seven awards which appear to support the holding that before Rule 3-C-2 can be violated, the work must be exclusively assigned to the covered employes. Award 12175 holds that the disputed seasonal work had been performed simultaneously by two different crafts for some thirty years prior to the institution of the claim; not a relevant dispute to the issue at bar.

In Award 12177, the Petitioner stated in its submission that the claim "does not involve Rule 3-C-2 nor the abolishment of a position." Award 12219 did not involve Rule 3-C-2. Award 12238 does not disclose the abolishment of a position. The record in Award 12340 indicated that non clerical employes had handled baggage and mail for thirty-two years and that no clerical employes had ever been assigned to perform the work. Award 12341 reveals that all the disputed work was turned over to covered employes as required by Rule 3-C-2 (a)(l).

Award 12365 is the third of the thirty-seven awards cited in Award 13921 which ties exclusivity to the application of Rule 3-C-2. Award 12434 did not clearly involve a 3-C-2 argument and additionally the Board found that the clerical work involved was "de minimus." In

Award 12462 the Board found that there was no evidence establishing the removal of work from Agreement coverage. Award 12479 is the fourth which ties Rule 3-C-2 to exclusivity.

Awards 12512, 12513, 12514, and 12515 all arose from essentially the same transaction and collectively held that, of the work in question, some ceased to exist and some was properly reassigned to the first trick clerical position. Award 12556 concerned a Car Department employe unloading wheels; no clerical job was abolished. Award 12787 simply holds that Petitioner failed to meet its burden of proof. Award 12808 did not involve a Rule 3-C-2 job abolishment. Award 12823 deals with Rule 3-C-2; however, a study of that Award makes it apparent that it does not support the thesis set forth in Award 13921.

Award 12902 is the second of three consecutive awards by Referee Coburn and the only one of the three in which argument on Rule 3-C-2 was not joined, the Petitioner stating that "Rule 3-C-2 is not, directly involved in the present case". The other two awards, 12901 and 12903, both dealt with Rule 3-C-2 and both held that the exclusivity test is not applicable. Referee Dorsey's reliance on Award 12902 while ignoring the two companion awards is puzzling at very least. Award 12901 held:

> "From the foregoing facts, it appears this claim is bottomed on the premise that the Scope Rule of the Agreement, and, more particularly, Rule 3-C-2(a)(1) was violated. Rule 3-C-2 is entitled 'Assignment of Work.? It stipulates how the remaining work of an abolished clerical position shall be performed and by whom. Its language is clear, precise, unambiguous, and mandatory. It says, inter alia, that the work 'previously assigned' to an abolished position which 'remains to be performed' WILL BE ASSIGNED, under sub-paragraph (1), to another clerical position or positions remaining in existence 'at the location where the work of the abolished position is to be performed...."
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> The work of the two positions abolished in this case was 'preparation of classification sheets and chalking cars.' The classification work was assigned to those clerical positions remaining at the location but, says the Carrier, the work of chalking cars by clerks disappeared upon the abolishment of the positions. The employes deny the disappearance of such work and allege it was assigned to others not covered by the Clerks' Agreement, namely Brakemen and Conductors.

"Thus, the dispositive issue then turns on a question of fact. If the work of chalking cars remained to be performed but was done by others not covered by the Agreement, then clearly Rule 3-C-2 (a>(l) was violated. That being the case, the Board finds no necessity for exploring at length the much debated issue of proof of an exclusive right to the work by clerks under what has been characterized as a general, non-specific Scope Rule. There is nothing general or ambiguous in the language of Rule 3-G-2 applied to the facts of record here. The work was assigned by bulletin to the clerks and was performed by them. If it remained to be performed after abolishment of the clerical positions it had to be assigned to the remaining clerks' jobs at the location under Rule 3-C-2 (a)(l). There was no showing in the record that at the time the chalking of cars was being performed by clerks, others not belonging to that craft were performing the same work. Nor is this a case where, as in Board Award 8331 and others, the clerks are claiming, as their own, work which had been performed and was being performed by employes holding no rights under the Clerks' Agreement. The sole question here is whether the work remained to be performed...."

In Award 12903, the Board held, in part:

"It is too well established to require citation of authority that work once placed under the coverage of a valid and effective agreement may not be arbitrarily or unilaterally removed therefrom. Here the record supports the contention that the disputed work was placed under the coverage of the effective Agreement and performed by Clerks until November 6, 1959, when it was removed therefrom by assignment to employes of another class. Accordingly, the Agreement was violated."

In Awards 12905 and 12906, also among the group cited, the work had never been performed by clerks, no position had been abolished and there was no 3-C-2 argument; No 3-C-2 argument was joined in Award 12923. In Award 13273, the Board held that the work of the abolished position was properly assigned to other clerical positions. No showing was made in Award 13280 that a job was abolished. In Award 13454 clerical positions had never been assigned at the location at which the claim arose.

Thus, it may be concluded that of the thirty-seven awards relied on in Award 13921, only four tie the application of Rule 3-C-2 to exclusivity. Further, the reliance on Award 12902 is inexplicable in the light of 12901 and 12903, quoted above. Referee Dorsey did mention Awards 13478 and 13480 but suggested that they "deviated from precedent." It is interesting to note that in 13478, we held (in pertinent part):

> "It is plain that the work comprehended by Rule 3-C-2 (a) does not depend upon the operation of any 'exclusivity theory', i.e. proof that the work involved, either by past practice or Agreement, belonged to and could be performed solely and only by employes covered by the Clerical Rules Agreement. See Award 12903 (Coburn). It is enough that it be proved that the work which remains from the abolished position was 'previously assigned' to such positions. See Awards 12901 (Coburn), 4045 (Fox)."

In Award 13480, the Board quite effectively summed up the two antithetical positions with respect to Rule 3-C-2 in the following fashion:

> "The answer to this portion of the Petitioner's claim depends upon which one of the two antithetical interpretations of Rule 3-C-2 (a) the Board follows in this case. Under one it must be shown, in all events, that the remaining work in dispute belongs exclusively to the Clerks either in terms of their Agreement or by tradition, custom and practice, e.g. Awards 12479 (West), 11963 (Christian), 11107 (McGrath), 10455 (Wilson). In the other, the application of the Rule does not depend upon any 'exclusivity theory', but rather on a showing that the remaining work, as the Rule expressly provides was 'previously assigned' to the abolished position, e.g. Awards 12901, 12903 (Coburn), 7287 (Rader), 4043, 4044, 4045 (Fox), 3870 (Douglas).
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> It would certainly seem, especially in the context of the facts of this case, that the latter interpretation of Rule 3-C-2 (a) is the sounder one. Any other construction would make, for the most part, the language of sub-paragraphs (1) and (2) sheer surplusage. For example, under sub-paragraph '(2) any issue as to the amount of work remaining from an abolished clerical position and assigned to a supervisory employe would be entirely extraneous if, in the first place, it could not be shown that that work belonged exclusively to the Clerks. Moreover, the fact that there was a remaining clerical, employe under sub-paragraph (1) would be utterly meaningless if it could not likewise be shown that such work was in the exclusive domain of the Clerks' Agreement."

The awards discussed heretofore dealt with the same parties as those herein and the same rules. There have been many awards on other properties which have been cited to us by Petitioner, including some

written by Referee Dorsey. However, we are well aware of the point well articulated by Carrier in its panel argument that such awards generally involved Scope Rules which defined "positions or work" and thus are markedly different than the rules herein.

After considering the awards cited we must still consider the language of rule itself to be of paramount significance. We find the holding in Award 13480 (supra) to be persuasive in that the construction of exclusivity applied to Rule 3-C-2 would make the language of the rule "sheer surplusage"; such an interpretation, as indicated heretofore in Award 21452, would be illogical and redundant. This point of view is in accord with many early awards by many referees when the rule was first tested.

We do not regard precedents lightly; at the same time we have no compunctions or hesitation in reversing prior awards when convinced that they are in error. Further, we always must avoid deciding cases on the basis of the "box score," particularly when the language of the agreement is clear and unambiguous. It also should be noted that we are not fearful of reversing ourselves when we are persuaded that our prior conclusions were erroneous, following the dictum in Fourth Division Award 3131 (O'Brien). It must be emphasized that much of the confusion in the resolution of this dispute could well have been avoided, as noted at the beginning of this Opinion, had this group of cases been docketed together and heard jointly, as would have been more appropriate.

After a careful study of the awards cited by both parties, and for the reasons indicated as well as the reasoning expressed in Award 21452, we must reiterate the position that the application of Rule 3-C-2 does not require a finding of exclusivity as a condition precedent. In this case the rule has been violated for the reasons indicated and the claim will be sustained.

Inasmuch as we have already assessed as reparation in Award 21452 a nominal sum representing the totality of residual work remaining at Shire Oaks until November 22, 1971, on a 24-hour per day basis to account for the work in question, we will not sustain a claim for monetary payment in this award.

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 apprwed 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 to the extent indicated in the Opinion abwe.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1977.