

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23493
Docket Number CL-23029

James F. Searce, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
(
(Western Pacific Railroad Company

STATEMENT OF CLAIM: **Claim** of the System Committee of the Brotherhood
(GL-8812) that:

1. The Western Pacific **Railroad Company** violated Rules 1 and 64 of the Clerks' Agreement when it arbitrarily and capriciously **removed** the performance of janitorial work in the **Main Office** of the Western Pacific Building in San Francisco, California on January **13, 1978**.

2. The Western Pacific Railroad shall now be required to compensate Ms. **N. K. Shankel** eight (8) hours pay at the pro **rata** rate from January **13, 1978**, on a continuous basis until the violation ceases.

OPINION OF BOARD: The Carrier raises a defense that the Organization failed to file the claim in compliance with the **time** limits Rule (Article V) of the applicable Agreement. The record indicates that the issue was engaged by the Organization even prior to its **implementation and** supports the **Organization's** contention that the claim was submitted as it was on advice of Carrier officials. After submission of the claim, **some** two (2) **months** passed before the Organization was apprised that the claim was directed to the wrong official. We need not dwell on this point; we conclude that the **Organization** met its responsibility **under** the terms of the Agreement by the manner in which it filed this claim. Noting that the Carrier does not dispute the **Organization's contention** that it relied upon advice from the Carrier in **filing the initial** claim, we find that the Carrier **may not disavow** its **share of responsibility** in the technical violation **committed** by the **Organization**.

As to the merits of this claim, it is beyond dispute that the position of **janitor** existed, was filled by an **employee** represented **under this Agreement**. The record makes it equally clear that **numerous** other jobs of a **similar or identical** nature were held by individuals **beyond** the scope of the Agreement, doing such work in the **same** area as that of the past **incumbent employee**. The Carrier asserts, without refutation, that the past **incumbent employee** occupied that job as **a disabled employee unable to perform other work** and was permitted to hold such position until retirement; per the Carrier, it **did** so in an effort to meet the intent **and spirit** of Rule 56:

"INCAPACITATED EMPLOYES

Rule 56. The Railroad will endeavor to furnish employment (suited to their capacity) to **employees** who have become physically unable to continue in service in positions held by them."

While we find that the Carrier technically violated the Agreement at Rule 40 (F) by the abolishment of the position involved without consultation with the Organization beforehand, we likewise conclude that a compelling showing has been made that the job in dispute was reserved exclusively for the past **incumbent** as **an** alternative to his termination of employment prior to retirement. It is noted that the disputed job was the only one represented under the Agreement in the midst of a much larger custodial operation, **performed** by an outside contractor.

We are compelled to conclude that the circumstances of this **case** separates it from those which involve the much-travelled and disputed question of exclusivity; and, while the Carrier obviously abolished the job in question, • sufficient showing has been made that it was established to meet the intent of Rule 56.

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 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**.

A W A R D

Claim denied in **accordance** with the Opinion.



NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third** Division

Attest:

A. W. Paulson

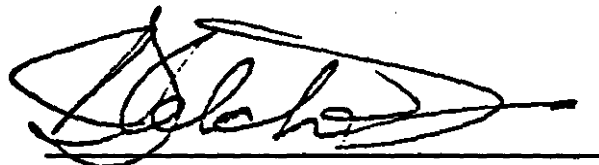
Executive Secretary

Dated at Chicago, Illinois, this 8th day of **January** 1982.

LABOR MEMBER'S DISSENT
TO
AWARD 23493, DOCKET CL-23029
(Referee **Scearce**)

Award 23493 **is** in palpable error. The **Award found** that an agreement violation occurred. Raving found an agreement. violation the claim should **have been** sustained. Instead the Award excuses the violation on the basis 'that the job improperly abolished had been established to meet the intent of Rule 56. Rule 40(f) does not exclude from its coverage any jobs -- it specifically does not exclude jobs that may have been established to meet the intent of Rule 56. Rule 40(f) requires that work of abolished jobs be distributed to other jobs working under the agreement. The "intent and **spirit**" as well as its literal application were violated when work of an **abolished** job was removed from the agreement.

Award 23493 requires vigorous dissent.

A handwritten signature in black ink, appearing to read 'J. C. Fletcher', written over a horizontal line.

J. C. Fletcher, Labor Member