Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29093
THIRD DIVISION Docket No. CL-29285
92-3-90-3-208

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10428) that:

1. Carrier violated the provisions of the current Agreement, particularly Rule 1 - Scope, when on January 15, 1986, it removed the work and duties connected with finalization of claims from Position #702, a 7B position, and thereafter had the work performed by officers and individuals not covered by the Scope of the Agreement, and

2. Carrier shall now be required to pay Mr. M. J. Ciacco eight (8) hours additional pay at the time and one-half rate, each workday commencing January 1, 1986, and continuing until the violation of which we complain ceases and the work connected with finalizing claims be returned to employes subject to the Scope Rule of the Agreement."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

During all times relevant to this Claim, the Claimant was assigned to Position #702, 7B Special Accountant, in the Contract Rates Section of the Revenue Accounting Department. This is a position to which the Carrier has the right of appointment. According to the Carrier, the Claimant's duties consist of processing and auditing contract rate allowance claims and reviewing similar work performed by the General Clerks in the Department. The Carrier states it added further duties to the Claimant's position during 1984 and 1985 because of a greatly increased level of Claim activity. These duties, which involved finalizing claims, had previously been performed exclusively by

officers in the Contract Rate Section, but were given to the Claimant as well during this period of time. On January 15, 1986, the Carrier removed this work from the Claimant's responsibility, thereby giving rise to the Claim herein.

Prior to addressing the merits of this dispute, we must consider the Carrier's contention the Organization has not complied with Rule 35 of the Agreement, which governs time limits for handling claims and grievances. This is one of several claims for which the Carrier agreed to extend the time limit for appeal to the Manager of Labor Relations. The extension letter, however, contained the disclaimer that any claims referred to therein which were already in violation of applicable time limit Rules as of the date of the letter would not be considered extended. According to the Carrier, the time limit for appeal of this Claim had expired by the date of the extension letter. When the Claim was appealed to the Manager of Labor Relations, this objection was raised in her letter of denial. In subsequent correspondence, however, the Carrier makes no reference to its time limit objection. By its failure to preserve this position in later handling, we must conclude the Carrier has waived the objection.

The Organization characterizes its Scope Rule as being a specific "position and work" Scope Rule rather than a General Rule. For this reason, the Organization asserts work performed by employees under the Agreement cannot be removed therefrom and completed by individuals outside the Agreement. Relying upon Third Division Award 21581, the Organization argues it need not prove exclusivity of the work to prevail. The Organization refers to the Claimant's performance appraisals, which indicate Claim finalizing was a significant part of the Claimant's duties during this period.

Without refuting the Organization's characterization of the Scope Rule, the Carrier insists the Claim must be denied because there is no proof the work has been performed by employees under the Agreement, to the exclusion of all others. The Carrier explains it has appointive rights on the Claimant's position so it could be assured the incumbent of the position can assist officers in the Department when necessary in order to complete assignments as required.

Based upon the record before the Board, we find the Scope Rule in this case to be a "position and work" Rule, as argued by the Organization. As such, when work is added to a position, as was the case herein, it may not be removed from that position and transferred to an employee outside the scope of the Agreement without mutual concurrence. Our review of Rule 7(b) indicates the Claimant's position is exempt from the bulletin and displacement rules. It says nothing about the type of work which may be performed by the incumbents of such positions. If the Carrier chooses to take advantage of the skills of the incumbent by having him perform duties otherwise performed by officers, it must recognize such additional duties will accrete to the position.

Finding the Agreement was violated, we will sustain the Claim, but at the pro rata rate.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1992.

CARRIER MEMBERS' DISSENT
TO
AWARD 29093, DOCKET CL-29285
(Referee McAllister)

The decision rendered in this case is grievously in error in that it has ignored the facts of record in its eagerness to find the Carrier at fault. The disposition is spurious on both procedural and substantive grounds.

In the record submitted to this Board, the Organization filed a claim dated March 10, 1986 and the Carrier timely denied the claim on its merits on June 5, 1986. No appeal of the Carrier's denial was made within the next sixty (60) days and the claim died pursuant to Rule 35(a)(2):

> "If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance...Failing to comply with this provision, the matter shall be considered closed,..." (Emphasis added)

The Organization, according to the record before this Board, took no action in this matter at all during the balance of 1986.

By a letter dated March 16, 1987, eight months after this claim died under the time limit rule, the Organization sought extension of time limits in 208 separate cases that had last been denied by the Carrier in 1985 and 1986. By a letter dated March 26, 1987, Carrier agreed to the extension of time, "on account of the personnel changes in your office and the additional time needed to appeal the claims." However, Carrier did impose a number of conditions on its granting the extension of time. Applicable here is condition No. 3 stating:

> "That any of the claims referred to which are in violation of any applicable time limit rule or rules on

the date of this letter, will not be considered extended;"

On May 1, 1987, that is, just under eleven (11) months after Carrier denied the claim, the Organization appealed the claim to the Manager Labor Relations, asserting that numerous time limit extensions had been granted. However, Carrier in its response dated June 24, 1987, clearly advised the Organization "that this claim is in violation of the time limits." Carrier indicated that it had no record of any timely extension of time in this matter. Carrier also restated why the claim had no merit support under the rules and concluded that the claim was denied, "for lack of support from schedule rules and agreements."

Nothing more was heard from the Organization until they sought a conference on this matter which was held on June 1, 1989, that is three (3) years after it was last timely handled on June 5, 1986. In the Carrier's letter of August 14, 1989, Carrier again pointed out that the claim was "totally without merit" and "remains denied for lack of support from schedule rules and agreements." This is the "subsequent correspondence" referred to by the Majority on which it contends that the time limits argument was not preserved and was waived.

Such a position is fallacious! The claim died in 1986, pursuant to Rule 35(a)(2), when the Organization failed to progress their claim timely. Nothing more was needed! When the Organization attempted to revive this moribund matter in 1987 Carrier reported that this claim was not viable. Organization

never produced evidence for the Carrier or to this Board to the effect that Carrier's conclusion was in error. The Organization simply ignored its failure. And the Majority here has simply ignored the clear language of the rule as well as the chronology of this record.

In Third Division Award 12953, this Board, dealing with allegations not restated in rebuttal submissions, noted what is also applicable in this case:

> "Once an allegation has been denied, there is no need to repeat the denial because the allegation is repeated. As between an actual denial and an inferred denial, it would be to fly in the face of common sense to prefer the inference merely because it came later."

In Award 28196, involving this same Majority, the following was stated:

> "Clearly, the Carrier raised a specific objection to this procedural violation. Accordingly we cannot consider the merits of the Claim because it is procedurally defective." (Emphasis added)

Award 28918:

> "After careful review of the record in its entirety, it is our view that Carrier's timeliness objection is indeed dispositive of the instant case." (Emphasis added)

This claim died under the contract in 1986; the Carrier specifically advised the Organization at least twice in 1987 that the claim was in violation of the time limit rule; the Organization never attempted to rebut the Carrier's conclusion; but this Majority has on its own assumption here, raised the dead!

In this record, there was no dispute that Claimant did assist in the preparation and did supervise the clerical staff in the review of shipper claims.

It is also not disputed that this activity had increased in 1984-1985. However, the "finalization of claims," the subject of this claim, was always the duty of Carrier's management. While Claimant's participation in the process was a function of the increase in volume, the record did not include any evidence that he "...performed duties otherwise performed by officers..." As such, even under a "position and work" scope rule, one cannot accrete what is not being done. No evidence, as opposed to the Organization's assertions, was ever put into the record that Claimant fully concluded, i.e., finalized claims. As such the Majority's conclusion is unsupported in this regard as well.

We dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost

LABOR MEMBER'S RESPONSE

TO

CARRIER MEMBER'S DISSENT

AWARD 29093, DOCKET CL-29285

(REFEREE McALLISTER)

The right of Dissent remains valuable only when it is exercised with due regard for the facts and constructive criticism of opinion. The Dissent here has neither of these redeeming features, and is, therefore, valueless.

The Minority continues to extol an unsupported argument that the time limits were violated in the handling of the subject claim and that somehow the Majority has raised the claim from the dead. Contrary to the Minority Opinion the Majority did not stand at the alleged tomb of the claim and do as Jesus Christ did at the tomb of Lazaurs and say "Lazarus Come forth". The inference that supernatural power was needed to resurrect the claim is nonsense. The record is clear <u>the claim never died,</u> but was mutually extended by the parties.

After spending three pages of their Dissent attempting to bury a live claim the Minority decides to take a half page to discuss the merits. In the second paragraph on page 4 they state:

> "No <u>evidence</u>, as opposed to the Organization's assertions, was ever put into the record that Claimant fully concluded, i.e., <u>finalized claims.</u>"

The aforementioned Minority allegation simply refuses to

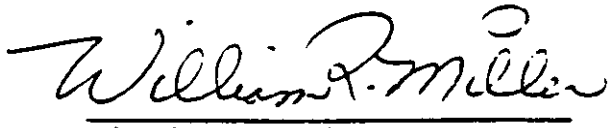
recognize that the record clearly shows that the Organization offered far more than assertions. Conclusive proof was provided with statements by Carrier Officers as well as various other exhibits that attest to the fact that the Claimant finalized claims. See for just a few examples T.C.U. Exhibit 1 pages 5,6,7, and 8, T.C.U. Exhibit 2 pages 1 and 3.

The Minority Opinion does not detract from the Award as it is clear that the Organization has proven to the Board that the Scope Rule was violated when the Carrier removed protected work and transferred it to an employee outside the Scope of the Agreement without mutual concurrence.

The Neutral in Third Division Award 29093, properly and correctly analyzed the parties's positions, the applicable rules and found the Carrier's actions were improper and not consistent with existing rules, agreements and practices. The Award is correct and is precedential for any future disputes involving the same subject.

The Dissent, therefore , registers only the disagreement of the Minority and serves no other useful propose.

Respectfully submitted



William R. Miller
Labor Member N.R.A.B.

DATE: February 25, 1992

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 29093, DOCKET CL-29285
(Referee McAllister)

If the claim had been, "mutually extended by the parties" then the Carrier's letters of March 26, May 1 and June 24, 1987 would have had no meaning. Further, there would have been no need for the Majority to consider the "subsequent correspondence" on which it relied to conclude that the time limit obligation had been "waived" in 1989. To assert otherwise is to ignore the record. The Organization has succeeded not just in raising Lazarus but in reviving a decomposed three year old skeleton; a much greater miracle!

While the Organization's cited exhibits showed that claimant did participate in the process, it was the Carrier's consistent on-the-property position that the Claimant did not "finalize" claims. Our objection to Award 29093 was and is that the Majority mistook the process for the concluding action. Its disposition was an erroneous enlargement.

The Labor Member's Response does not change these facts.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost

LABOR MEMBER'S FINAL RESPONSE
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Apparently the Minority Opinion cannot accept the fact that their arguments and assertions were wrong. Continued unproven allegations do not change the fact that the Award is correct and precedential.

In an effort to offer some finality to this Award we will state that this response is our final word on the case, but if the Minority still feels compelled to offer more "sour grapes" then please do so. Otherwise we would suggest that since the Dissent and subsequent Responses have taken on a biblical nature we conclude by merely saying the Referee was right and *AMEN.*

Respectfully submitted,

William R. Miller
Labor Member N.R.A.B.

Date: March 4, 1992