NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29612
Docket No. CL-29450
92-3-90-3-379

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Transportation Communication
(International Union
(
(CSX Transportation, Inc. (formerly
(The Louisville and Nashville
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10477) that:

1. Carrier is in violation of the Clerical Agreement at Decatur, Alabama on November 18, 1988 by requiring and/or permitting Yardmaster Phillips to sign bills of lading.

2. Claimant, Senior Clerk Available, Extra Clerk in preference, shall now be compensated eight (8) hours' pay at the pro-rata rate of Utility Clerk, Position No. 204, Decatur, Alabama on November 18, 1988, in addition to any other compensation this Claimant may have already received for this date, returning this work to the clerical employes covered by this 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 employe 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 waived right of appearance at hearing thereon.

As Third Party in Interest, the United Transportation Union

Yardmasters Department was advised of the pendency of this dispute, but did not file a Submission with the Division.

This is the first and lead case of a number of identical Claims alleging Carrier violated the Scope Rule of the Agreement, when a Yardmaster at Decatur, Alabama, signed a bill of lading for a customer in the office, at a time when the on-duty Clerk was away from the office doing other work of his position. The contractual premise and positions of the Parties are virtually identical in each of these Claims, although the individuals and dates differ from case to case.

In this particular case, on November 18, 1988, a Utility Clerk was away from the yard office, picking up a train crew, and no other Clerk was on duty. In the absence of a clerical employee, a customer from the Denbo Iron and Metal Company appeared at the office with a shipping document which required a signature. Rather than keep the customer waiting for the return of the Utility Clerk, an Extra Yardmaster signed the bill of lading for the customer.

The District Chairman filed the Claim and a number of other identical Claims, alleging that the signing of bills of lading by Yardmasters at various locations on the Carrier's system, in the absence of an on-duty Clerk, violated the Scope Rule. All of these Claims deadlocked in handling on the property, and eventually all were appealed separately to the Third Division for arbitration.

The relevant Rules which apply to this case read as follows.

"MEMORANDUM OF AGREEMENT
BETWEEN THE LOUISVILLE AND
NASHVILLE RAILROAD COMPANY
AND ITS EMPLOYEES
REPRESENTED BY
BROTHERHOOD OF RAILWAY, AIRLINE
AND STEAMSHIP CLERKS

> The following understanding was reached in conference on May 22, 1981, dealing with the adoption of the revised Scope Rule effective June 1, 1981.
>
> With respect to the present performance of work by outside parties or employees of other crafts which is covered by the revised Scope Rule, the Carrier and the Organization agree that any dispute at any location where such work is presently being performed by

outside parties, or employees of other crafts, the dispute will be processed under the provisions of the Louisville and Nashville Railroad Agreement effective January 1, 1973, with the understanding that the Scope Rule, as revised and effective on June 1, 1981, will not be applicable nor will it be introduced by either party during the process of such dispute.

This will not be construed as license to remove work from the coverage of the agreement on or after June 1, 1981 (effective date of the agreement) except in accordance with the rule or rules of the Louisville and Nashville Railroad Agreement. Further, it is not intended that the rule will be expanded to cover work now performed by outside parties or employees of other crafts.

This understanding shall become effective as of June 1, 1981, and remain in effect until changed in accordance with the Railway Labor Act as amended"

"RULE 1 - SCOPE

(a) This agreement shall govern the hours of service and working conditions of employees engaged in the work of the craft or class of Clerical, Office, Station, Tower, Telegraph Service and Storehouse Employees, subject to exceptions noted herein.

(b) Positions within the scope of this agreement belong to employees herein covered and nothing in this agreement shall be construed to permit the removal of such positions from the application of these rules, except as provided in Rule 66.

* * *

(d) This agreement does not apply to employees engaged in classes of service which are properly to be included in agreements reached with other organizations; or to those in the Police Department; or to those in

service on any docks or wharves covered by other agreements; or to those paid $75.00 per month or less for limited or special service which requires only a portion of their working time; or others performing personal service which the railroad is not obligated to provide."

The May 22, 1981 Memorandum of Agreement and its application, was confirmed by a letter dated May 29, 1981, from the former Director of Labor Relations (of the L&N Railroad) to Division Superintendents, which provided:

"* * *

Agreement was executed with representatives of the BRAC Organization on May 22, 1981 disposing of part of the issues involved in the Organization's attached, and you will note it is effective June 1, 1981.

We suggest that the following items be noted carefully:

RULE 1 - SCOPE

This rule is amended with a revised paragraph (b) to provide that positions or work now under coverage of the Scope Rule will not be removed therefrom except by agreement. This does not mean that we may not abolish unneeded positions; however, any work remaining from an abolished position must be reassigned to another contract position.

The amendment should be reviewed in light of the Memorandum of Agreement dated May 22, 1981 attached to the main agreement. This agreement interprets the new amendment and provides that work will not be removed from contract positions now performing such work. Similarly, it provides that the new amendment will not be expanded to cover work now performed by other crafts or outside parties. For example, we have other employees transporting crews, transporting mail, performing janitorial work, using IBM equipment, etc. This may be continued as well

as work now being performed by outside contractors such as taxi companies and bus companies which transport crews and mail.

We strongly urge, in order to avoid disputes with BRAC in the future, that a written record be established as of May 22, 1981 covering any unusual situation involving work which might be considered as falling under the BRAC Scope Rule which is and has been performed in the past by outside parties, other employees and supervisors. Please furnish copy to this office to be kept with the agreement for future reference.

* * *"

At the threshold, Carrier asserts procedural deficiencies in the Claim and moves for dismissal without determination of the merits. Specifically, Carrier urges that the Claimant is not properly identified and the damages alleged are excessive. Review of the record shows that these issues were never raised on the property and may not now be considered de novo at the Board level.

Turning to the merits of the dispute, both Parties recognize that proper determination of this case is governed by the express language of the May 22, 1981 Memorandum of Agreement. That Agreement dictates whether we apply the old "general" Scope Rule of the January 1, 1973 Agreement or the new "positions and work" Scope Rule of the June 1, 1981 Agreement. If, as Carrier insists, Yardmasters, Conductors and non-contract employees, as well as Clerks, were "presently performing" the work of signing bills of lading as of June 1, 1981 (the effective date of the new "positions and work" Scope Rule), then this dispute is governed by the old "general" Scope Rule. See Public Law Board No. 2807, Award 55 and Third Division Award 21437.

On the other hand, if the Organization is correct and no Yardmaster ever performed the work of signing bills of lading under any circumstances until late 1988, then the case is governed by the new "positions and work" Scope Rule. Under such Rules, the traditional burden of showing "exclusivity" and "system wide performance" are no longer applicable. See Third Division Award 21933; Public Law Board No. 2668, Award 120.

The principles governing proper application of the May 22, 1981 Memorandum of Agreement are not matters of first impression, but, rather, were decided authoritatively by Public Law Board No.

2807 in Award 55 as follows:

> "The Board agrees with Carrier's position that the Organization has the burden of proof in the present case. We agree with Third Division Award 19833, holding that 'This Board is fully aware of the very serious consequences of a Scope Clause...a Carrier must not be found guilty of... a violation without more than a conclusionary allegation... The burden of proof rests with the Organization. That burden exists for the protection of both parties as well as the Board and it is incumbent upon the Claimant to provide sufficient evidence to support the version of facts upon which it relies. (Underscoring added.)
>
> The crux of this dispute concerns the proper application of the Scope Rule. Were we to follow the Rule (1981) cited by the Organization, we would conclude that the Claim has merit. However, a review of the Agreement indicates that the controlling provision is under the 1973 Agreement. Addendum 1-B, cited earlier indicates that 'the dispute will be processed under the provisions of the... Agreement effective January 1, 1973, with the understanding that the Scope Rule, as revised and effective on June 1, 1981, will not be applicable...' (Underscoring added.)
>
> The provision, cited by the Carrier, indicates that 'Positions within the scope of this agreement belong to employees herein covered....' The 1973 Rule does not specify any duties that are reserved for any particular group of employees. Therefore, unless the Organization establishes that the Carrier had a system-wide practice of exclusively assigning the duties in question to certain groups, it cannot meet its requisite burden. The Organization must show that the Claimant's employee group was exclusively entitled to perform the duties created by the abolishment. The Organization has failed to meet that burden."

The May 22, 1981 Memorandum of Agreement appears to be enigmatic, in that it plainly diminishes the full impact of the "positions and work" Scope Rule which the Parties adopted effective June 1, 1981. Yet, these are both solemn contractual undertakings, drafted and executed by experienced negotiators. An interpretation is required, therefore, which reasonably reconciles these respective contractual provisions, without negating or rendering meaningless the commitments contained in each. Such an interpretation is set forth in Public Law Board No. 2807, Award 55 which authoritatively holds that the May 22, 1981 Memorandum of Agreement somewhat blunted the "freeze-frame" effect of the new "positions and work" Scope Rule with respect to work "presently being performed by outside parties or employees of other crafts" as of June 1, 1981. In short, the May 22, 1981 Memorandum of Agreement "grandfathers" such "presently performed" work by requiring that disputes over such work be governed by the old "general" Scope Rule of the January 1, 1973 Agreement.

For reasons not apparent on its face, Third Division Award 28269, rendered February 28, 1990, rejected the precedential value of the holding in Public Law Board No. 2807, Award 55 with the following dismissive statement:

> "Carrier's reliance on Awards 10 and 55 of Public Law Board 2807 is misplaced; those Awards dealt with circumstances prior to the May 22, 1981 Agreement."

We do not find the approach followed in Third Division Award 28269 appropriate in the present case. A decent respect for stability in labor relations and predictability in contract interpretation and application compels us to treat Public Law Board No. 2807, Award 55 as authoritative precedent.

The only point about which this Board needs to elaborate upon the holding of Public Law Board No. 2807, Award 55 is with respect to the requisite burdens of proof in the application of the May 22, 1981 Memorandum of Agreement. We concur with the holding of Public Law Board No. 2807, Award 55 that the initial burden of going forward to show that the work in dispute is otherwise covered by the "positions and work" Scope Rule lies with the Organization. Once the Organization makes out a prima facie showing that the disputed work is so covered, however, we hold that the burden of proof shifts to Carrier to show that the work comes under the exception stated in the May 22, 1981 Memorandum of Agreement. After all, Carrier is the Party invoking the "escape clause" of that Agreement and seeking to avoid application of the new Scope Rule in these cases. Accordingly, we hold Carrier to the burden of

proving the condition for application of the Memorandum of Agreement, specifically, that the specific work in dispute was "presently being performed by outside parties or employees of other crafts" as of June 1, 1981.

In denying the Claims on the property on November 11, 1989, Carrier provided the Organization with a written statement dated October 27, 1989, by a General Yardmaster, which reads as follows:

> "I have worked at Decatur, Oakworth Yard for 24 years and bills of lading when brought to office by customers when clerks were not in office due to out checking yard or making wagon moves the yardmaster has on these occasions signed bill of ladings so customers would not be detained acct. clerk being out of office. This practice was going on when I first came to Decatur."

Seven months later, by letter of May 21, 1990, the Organization provided Carrier with three statements dated November 25-27, 1989, wherein several Clerks and former Clerks assert that signing bills of lading was a routine duty of their positions at Decatur, Alabama, which they never knew to be performed by Yardmasters.

The net effect of this countervailing record evidence establishes that, as of June 1, 1981, signing bills of lading was work regularly and routinely performed by employees in the Agreement-covered positions of Clerk; except for isolated and sporadic performance of this work by the Yardmaster when a customer came to the office with a bill of lading to be signed and the on-duty Clerk was away from the office performing other duties.

If Carrier in this case had assigned the routine and regular work of signing bills of lading at Decatur, Alabama, to Yardmasters or other strangers to the Agreement effective June 1, 1981, we would not hesitate to find a violation of the "positions and work" Scope Rule. In sustaining just such a Claim, however, Public Law Board No. 2470, Award 147 emphasized that the work at issue in that case had not been the occasional, sporadic or incidental signing of bills of lading, but, rather, the assignment of such work to another craft of employees for routine and regular performance. To the contrary, however, in our present case the work in dispute is the isolated, occasional, and sporadic signing of a bill of lading for a customer present and waiting in the office for such service, at a time when the on-duty Clerk who usually and routinely signs the bills of lading is temporarily away from the office performing other duties of his position. Under these limited circumstances,

we can find no actionable diminution of the quantum of such work being performed by employees in positions covered by the "positions and work" Scope Rule, effective June 1, 1981. Accordingly, we find in this record no violation of the letter, spirit or intent of the "positions and work" Scope Rule.

In deciding this case we have confined our view, as we must, to evidence, arguments and issues properly joined in handling by the parties on the property. Thus, we do not address a number of additional cogent arguments raised by the Organization for the first time in handling before this Board. We are precluded by Circular No. 1 from considering such belated afterthoughts which were not joined by the representatives in handling on the property.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of April 1993.