NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29619
Docket No. CL-29599
93-3-90-3-575

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications
(International Union
(
(CSX Transportation, Inc. (former
(International Seaboard Coastline Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10520) that:

1. Carrier violated the current working Agreements when it abolished Position No. 159, Porter Messenger, at Wilmington, North Carolina and instructed and allowed members not covered under the current Agreements to perform these duties.

2. The CSX Transportation, shall now be required to compensate the Senior Available Qualified Employe, furloughed or Guaranteed Extra Board in preference, the applicable rate, to begin August 2, 1989, and shall continue on a daily basis, seven (7) days per week, three (3) shifts per day, until work is returned to the proper personnel and claim settled."

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.

Before considering the merits of this Claim, the Board must dispose of two threshold arguments on time limit violations. First, the Organization contends that the Claim is payable as presented because it was initially denied by an officer other than the officer with whom it had been filed. Second, Carrier contends that the Claim must be dismissed because the Organization missed an appeal to an intermediate level when the Claim was progressed to its highest designated officer.

The initial Claim was filed with the Trainmaster on August 15, 1989. Two weeks after the Claim was filed the Trainmaster was promoted and transferred. On September 9, 1989, Carrier's Division Manager denied the Claim. His denial letter indicted that a copy was being furnished the Trainmaster with whom the Claim had been originally filed. Upon receipt of the denial, the Organization notified the Division Manager that his decision was rejected and within sixty days, in a separate letter, appealed the matter to Carrier's Labor Relations Department. That appeal, in addition to being on the merits, demanded that the Claim was payable as presented because it was not denied by the officer with whom originally filed. Carrier's Director-Labor, Relations denied the appealed Claim on two grounds, it had never been appealed to the Division level and it was without merit under the Agreement.

In Third Division Award 27590 the Board exhaustively, if not tortuously, reviewed the two lines of authority dealing with contentions that claims must be denied specifically by the particular officer that had been designated to receive the initial claim or appeal. Therein the Board concluded that language in Rules identical to the language in Rule 37(a) (the Time Limit Rule involved here) permits claims to be denied by an officer of the Carrier different from the officer authorized to receive the claim in the first instance. Rule 37(a) stipulates the specific officer that is authorized to receive claims, but does not require that this officer be the only one to effect denial. Instead the language of the Rule allows the "Carrier" to make the denial. On the authority of Award 27590, the Organization's contention that the claim is payable on a time limit violation is rejected.

On the second time limit contention, Carrier's argument that it was necessary for the Organization to re-appeal the denial of the Division Manager back to him to satisfy the intermediate step of the process, smacks of entrapment. The denial of the original Claim was signed by the Division Manager as the Division Manager. It openly showed that a copy was being furnished to the departed Trainmaster. This would indicate to a reasonable person that the Trainmaster was being replaced and the Claim was now being handled directly to the Division level.

The Division Manager was placed on notice within a week of receipt of his denial that his decision was rejected and that appeal was being taken to Jacksonville (the location of Carrier's Labor Relations Department). If any exception was to be taken to this handling it was incumbent upon the Division Manager (who was responsible for altering the process when he took it upon himself to assume responsibility for and answer a claim filed with a departing Trainmaster, rather than let his successor make an answer) to make this exception known at the time. The appeal to Labor Relations occurred on November 7, 1989; it was not until May 9, 1990, that Carrier notified the Organization in writing that it considered the failure to re-appeal to the Division Manager a violation of the time limits. This timing foreclosed any opportunity the Organization had to go back to the Division Manager, even though this would seem futile, in light of the fact that he had earlier denied the initial Claim.

The first sentence of Rule 37(b), which Carrier relies on, reads:

> "If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance; and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision."

This provision was literally complied with by the Organization in this matter. The contention of Carrier that an appeal step was missed is rejected.

On the merits of the matter, a dispute exists on which Scope Rule applies to this Claim. The Organization maintains that the "Position or Work" Scope Rule, which became effective May 16, 1981, is the controlling Agreement provision, while Carrier argues that the pre-May 16, 1981, "general-type" Rule is the Agreement provision involved. The dispute over which Scope Rule controls has its underpinnings in the Special Agreement adopted May 7, 1981, at the time the Scope Rule was being revised. This Agreement provides:

> "With respect to the present performance of work by outside parties or employes 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 Seaboard Coast Line Clerical Agreement effective January 1, 1975, with

the understanding that the Scope Rule, as revised and effective May 16, 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 May 16, 1981, (effective date of the agreement) except in accordance with the rule or rules of the Seaboard Coast Line 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 May 16, 1981, and remain in effect until changed in accordance with the Railway Labor Act as amended."

The facts of the Claim concern the abolishment of Porter Messenger Position No. 159, at Wilmington, North Carolina, and the reassignment of the duties of the abolished position to seven Clerical positions and Yardmasters. It is the janitorial work given the Yardmasters which is at issue. Carrier argues that the Yardmasters, along with the Porter, did janitorial work, thus the May 7, 1981 Agreement requires that the "general-type" Scope Rule be applied. With this the Board cannot agree.

A fair reading of the May 7, 1981 Agreement, manifests the certainty that it is not applicable in situations involving re-distribution of work of an abolished Clerk Craft position. The first paragraph of the May 7, 1981 Agreement pertains to the "performance of work of outside parties or employees of other crafts." That paragraph does not mention work which is to be distributed when a Clerk Craft position is abolished. When work of an abolished position is assigned outside the Agreement it is removed from coverage of the Agreement. This is covered by the first sentence of the second paragraph of the May 7, 1981 Agreement. The sentence provides in part:

"This will not be construed as license to remove work from the coverage of the agreement on or after May 16, 1981...."

Thus, the May 7, 1981 Agreement cannot apply in instances where work is being removed from coverage of the Agreement on or after May 16, 1981. If a position abolishment is involved, then the re-distribution of work covered by the Agreement is specifically dealt with in the second sentence of paragraph (d) of the amended May 16, 1981 Scope Rule. That sentence provides:

> "It is understood that positions may be abolished if, in the Carrier's opinion, they are not needed, provided that any work remaining to be performed is reassigned to other positions covered by the Scope Rule."

The work to be reassigned from the abolished Porter-Messenger position was not work "presently being performed by outside parties," nor was it work "presently being performed by employees of other crafts." It was work that was being performed by a position covered by the Scope Rule of the Agreement, and when the position was abolished, that work must be reassigned to other positions covered by the Scope Rule.

Accordingly, the duties of the abolished position which were assigned to Yardmasters, following the abolishment, should have been assigned to positions covered by the Scope Rule.

Carrier has raised two additional defenses in this matter; one, the Claim is excessive and, two, it is for unnamed individuals. Carrier's argument on unnamed Claimants was not raised when the matter was under consideration on the property. Accordingly, it must be rejected as new argument.

With regard to the argument that the Claim is excessive, the Board agrees. The job that was abolished was a five day per week assignment. The Claim seeks 8 hours pay, three shifts per day, seven days per week. A more appropriate remedy would be three hours straight time pay per day, five days per week. Accordingly, the Senior Available Qualified Employee, furloughed or Guaranteed Extra Board in preference, as set forth in the Statement of Claim to the Board, shall be allowed three hours straight time pay for each workday, Monday through Friday, beginning August 2, 1989, and ending when the work of the abolished position that was transferred to Yardmasters is returned to an employee assigned under the Scope Rule. Payments are to be in addition to any other compensation received.

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 8th day of April 1993.