Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30459
Docket No. CL-29784
94-3-91-3-134

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10554) that:

1. Carrier violated the Agreement when, on June 20, 1986, it abolished all positions at "SY" Tower, Charleston, South Carolina, and transferred the duties to the Train Dispatchers at Florence, South Carolina, and other employes at Charleston.

2. Carrier further violated Article VIII of the February 25, 1971 National Agreement when, as a result of the abolishments, it consolidated Clerk-Telegrapher duties without proper notice as required by the Agreement.

3. Because of the above violations, Carrier shall restore all positions at "SY" Tower as they existed prior to June 20, 1986, and serve notice in accordance with Section 3, Article VIII of the February 25, 1981 (sic) Agreement. In addition, Carrier shall make whole Clerks F.E. Mobry, F.D. Padgett, J.T. Amerson and all others adversely affected as a result of the abolishments."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The dispute in this case involved the American Train Dispatchers Association as an interested third party. Therefore, in compliance with the United States Supreme Court mandate (No. 28, October Term, 1966) in TCEU vs. Union Pacific, the Board gave notice to the A.T.D.A. of the pendency of the dispute and invited a written Submission from the Train Dispatchers. It filed such third party Submission which was made a part of the record before the record was closed by the Board. Neither of the principal parties elected to file any comments on or rebuttal to the third party Submission.

Prior to June 19, 1986, Carrier maintained at Charleston, South Carolina, a facility known as "SY" Tower. This tower was manned three shifts per day by Clerk-Operator positions. The Clerk-Operators worked under the guidance and instruction of the Train Dispatchers who were located at the train dispatching office at Florence, South Carolina. The Clerk-Operators handled the traffic control machine which operated the switches and signals within the Charleston interlocking. In addition, the Clerk-Operators handled train movement communications and block orders on Norfolk-Southern's Reads Branch under the terms and conditions of a joint use trackage agreement between CSX Transportation and Norfolk-Southern. These work items on the Reads Branch were handled by the Clerk-Operator positions when the regular assigned Norfolk-Southern Operator was not available.

Of concern in this dispute are two facts which impact directly on our consideration and disposition of this claim. First, on this property, the separate Clerk and Telegrapher groups, along with their separate Agreements, were consolidated in accordance with the provisions of the February 25, 1971 National Agreement. Secondly, on this property, Rule 1 - SCOPE was amended effective May 7, 1981, by addition of the following:

"* * *

(d) Positions or work covered under this Rule 1 shall not be removed from such coverage except by agreement between the General Chairman and the Director of Labor Relations. 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 instant dispute had its beginnings in a notice sent by Carrier to the Organization on May 15, 1986, in which reference was made to Rule 57 - CONSOLIDATION OR DIVISION OF OFFICES, DEPARTMENTS AND WORK. In that notice, Carrier indicated that it planned to move the work from "SY" Tower to the Charleston Yard Office and to the Florence, South Carolina, Dispatcher's Office. Rule 57 as referenced in this notice reads as follows:

"RULE 57 -- CONSOLIDATIONS OR DIVISION OF OFFICES, DEPARTMENTS AND WORKS

(a) When, for any reason, offices or departments are consolidated or divided, conferences will be held not less than thirty (30) days in advance between the officer in charge and the Vice General Chairman to jointly consider the disposition of the status and rights of the employees affected.

(b) When, for any reason, a specific class of work involving employees is consolidated, divided or transferred, employees affected will be entitled to follow their work to the extent it is available to them. Employees affected, not following their positions or work, will have displacement rights.

* * *"

Following a conference on the notice, at which the parties were unable to achieve agreement on the planned moves, "SY" Tower was closed and the Clerk-Operator positions assigned thereat were abolished effective with the close of business on June 19, 1986. Carrier asserted, without contradiction, that the clerical duties of the abolished positions which remained to be performed were assigned to other clerical positions at Charleston. Carrier further contended that "all other functions were to be eliminated by automation."

Thereafter, by letter dated August 15, 1986, the claim as set forth in the Statement of Claim supra was initiated by the Organization and subsequently advanced through the normal on-property grievance procedures. Failing to reach a settlement of the dispute, the parties initially listed the case for consideration by Public Law Board No. 4505, but later, by agreement, withdrew from that tribunal and presented the case to this Board on March 1, 1991.

During the on-property handling, the Organization argued that (1) Carrier was in violation of the Scope Rule when it assigned the duties of handling the switches and signals at Charleston to the Train Dispatchers at Florence, South Carolina; (2) that Carrier was in violation of "Section 3, Article VIII of the February 25, 1981 (sic) National Agreement" when it "consolidated the Clerk-Telegrapher work and required the third shift crew caller position at Bennett Yard to perform the duties of the abolished positions on Saturday nights"; and (3) that Carrier was in violation of the Scope Rule when it assigned the handling of train movement communications on the Reads Branch to Yardmasters at Bennett Yard.

Inasmuch as the Organization alternately referred to Article VIII of the February 25, 1971 and February 25, 1981 National Agreement, the Board presumes that all such references are to the 1971 National Agreement. Article VIII, Section 3 of the 1971 National Agreement reads as follows:

"ARTICLE VIII - CONSOLIDATION OF CLERK-TELEGRAPHER WORK

* * *

Section 3.

(a) On and after the dates seniority rosters are combined in accordance with the provisions of this Article, the Carrier may combine work and/or functions performed by clerks and telegraphers. When new positions are created and/or when positions are abolished as a result of the combining of such work and/or functions the carrier shall give at least 30 days written notice to the General Chairmen involved. Such new positions shall be assigned on the basis of seniority, fitness and ability (fitness and ability being sufficient, seniority shall prevail) to the employes affected by the combining of said work and/or functions and on the basis of their combined roster seniority. If the affected employes do not desire assignment to such new positions, the new positions will be bulletined to employes on the combined seniority roster. If rosters have been combined under Section 1(a) or (b) of this Article, the new positions will be designated "C" or "T" in accordance with the designation of the initial employes assigned to such positions. In the event an employee has no such designation, the designation will be determined by the Organization without liability to the Carrier.

(b) When new positions are created and/or positions abolished as a result of the combining of such work and/or functions the rate of pay of the new or surviving positions will be no less than the highest rate of pay of the positions involved."

The Carrier for its part contended that no notice was required under Section 3 of Article VIII of the February 25, 1971 National Agreement because the seniority rosters and work rules of the two separate groups had already been combined and the clerical work of the abolished combined Clerk-Operator positions at "SY" Tower which remained to be performed was properly assigned to other existing clerical positions as required by the Agreement. Carrier argued that there was no combining of work or functions necessary to be accomplished and therefore Section 3 of Article VIII was not involved in this instance.

On the particular issue of having the Train Dispatchers exercise direct control over the interlocking at Charleston, the Carrier argued that the A.T.D.A. Scope Rule was controlling in that it required as follows:

"(d) T.C. Installation

All T.C. machines in service at present and installed in the future will be manned and operated by train dispatchers when the control board is located in offices where train dispatchers are employed. The train dispatcher is primarily responsible for the movement of trains and when the control board is not located in an office where train dispatchers are employed and the T.C. machine is manned and operated by other employees, train movements in that territory shall be by, or under the direction, supervision and control of the train dispatcher."

Carrier further contended that after the control of these switches was incorporated into the Train Control Machine at Florence, the machine at "SY" Tower was unneeded and abandoned and the former work of the Clerk-Operators in this regard ceased to exist. In support of its position on this point, Carrier cited Third Division Award 20753 which held as follows:

"As to (2) the alleged transfer of work being performed by employes under the Agreement at Lewis Street Tower to employes not so covered on another seniority district, the Petitioner has not submitted probative evidence to support its contention, and furthermore this Board has held, in numerous decisions, that the control of switches and signals through Centralized Traffic Control systems, manned by train dispatchers, is not a violation of the Petitioner's Agreement. Awards 19767, 19594, 19068, 14342, 14341, 10725, 10401, 10303."

For its part, the Train Dispatcher's Organization substantially echoed the position of the Carrier on this point. It claimed absolute control of Train Control Machines which are located in offices where Train Dispatchers are employed and in charge of the machines. In this case, the Train Dispatcher's Organization offered the further information that the work in question, that is the Train Control work at Florence, South Carolina, "was subsequently transferred to CSXT's Jacksonville centralized train dispatching center, where it is covered by a rule identical with Article 1(d) in the former SCL agreement."

As to the contention of the Organization relative to the involvement of the Yardmasters at Bennett Yard, Carrier argued that the Reads Branch here in question is property of the Norfolk-Southern Railroad Company and the only interest that the CSX Clerk-Operators at "SY" Tower had relative to movements on this branch was when or if the Norfolk-Southern Operator who controlled movements on this branch could not be reached. Carrier argued that, "The CSX TCU employees have no greater right to perform N-S work than any other CSX employee."

The Board studied the respective positions of the parties, including the third party Train Dispatchers, and read all of the several Awards submitted by the parties in support of their respective positions. On the first of the three issues raised by this claim, the Board is not convinced that there has been any violation of the "position or work" Scope Rule by the act of including the switch and signal controls from "SY" Tower into the centralized Train Dispatcher operated Train Control board at Florence. In the Board's opinion, this was a normal progression of the creation of a Centralized Train Control operation, as further evidenced by the subsequent extension of the Centralized Train Control operation from Florence to Jacksonville. Such control by the centralized train control board was not, in our opinion, an extension of the Clerk-Operator's duties at "SY" Tower, but rather was new work introduced into the automated train control system. The "work" of the Clerk-Operators at "SY" Tower in this regard was eliminated, not transferred. We find support for this opinion in the ruling made by Third Division Award 10401, to wit:

"The record clearly shows that at South Whitley the C.T.C. has done, what it was designed to do, that is, it has made automatic the operation of switches and signals under the Supervisory Control of train dispatchers."

As to the second of the three issues raised by the Organization, the Board does not find any evidence or convincing argument to support the contention that a violation of Section 3, Article VIII of the February 25, 1971 National Agreement has occurred. There is no showing in this record that Carrier combined work or functions performed by Clerks and Telegraphers. Rather, the record shows that the previously combined clerical work of the abolished Clerk-Operator positions was properly assigned to other existing clerical positions. The Organization's argument relative to some unspecified, unidentified operator work allegedly being performed by the third shift crew caller on one shift per week simply has not been supported by probative evidence.

As for the third issue, that of Yardmasters and/or Supervisors allegedly handling communications of record concerning train movement on the Reads Branch which work had formerly been handled by the Clerk-Operators at "SY" Tower, the Board is of the opinion that there was, in fact, a violation of the "position or work" Scope Rule in that some "work" of the abolished positions was transferred to the Yardmasters and/or Supervisors. Carrier's argument relative to the ownership of the Reads Branch is misplaced. There is no argument relative to the ownership of the territory in question. Rather, under the joint facility and use arrangements which existed in relation to the train operations on the Reads Branch, the Clerk-Operator positions at "SY" Tower had, prior to their abolishment, performed certain "work" on this territory. That "work" (whatever it amounted to) remained to be performed after the abolishment of the Clerk-Operator positions and was admittedly "given to the Yardmasters" rather than "to other positions covered by the Scope Rule."

The Board is concerned, however, by the Organization's so-called support of its argument in this regard. In the on-property exchanges of correspondence, there are found only five references to instances in which a Yardmaster/Supervisor allegedly performed work of the abolished Clerk-Operators. Before the Board, the Organization presented ten pages of alleged instances where other than Clerk-Operators allegedly performed work which had formerly been performed by the "SY" Tower Clerk-Operators. When the Board reviewed the five citations mentioned in the on-property correspondence, it was found that the second cited instance could not be verified on the 10-page tabulation.

Additionally, there is nothing in any of the on-property correspondence to suggest or prove that this 10-page tabulation was, in fact, made a part of the on-property handling as alluded to by the Organization in its Submission. The Board's concern in this regard is heightened by the fact that the Carrier voiced no objection to this material in the form of written notice to the Board. Therefore, on the basis of the record as it exists, it is the Board's conclusion that the "position or work" Scope Rule was violated when "work" formerly performed by the Clerk-Operator positions at "SY" Tower was, following the abolishment thereof, performed by Yardmasters and/or Supervisors.

This conclusion brings us to the remedy which is requested in the Statement of Claim. The Organization presented a three-part remedy request. It seeks restoration of the Clerk-Operator positions at "SY" Tower. It asks that three named individuals be made whole because of the abolishment of their positions. Finally, it seeks damages for "all others adversely affected as a result of the abolishments."

As to the first requested remedy, i.e., the restoration of the abolished positions, it is well settled that this Board has no authority to grant injunctive relief or to order the creation or restoration of any position. A few of the many precedential decisions in this regard which have been rendered by various Boards of Adjustment are Second Division Award 10708, Award 83 of Public Law Board No. 1790, Award 6 of Public Law Board No. 3189 and Award 1 of Public Law Board No. 3430. This portion of the requested remedy is, therefore, denied.

The portion of the requested remedy which concerns itself with "all others adversely affected" has not, in any way, been developed by the Organization during the handling of this case. In Third Division Award 25874, the Board held that assertions of a vague and insubstantial nature are not sufficient to meet the burden of identifying the claimant(s) who has (have) been aggrieved. While some Board Awards have granted certain leeway in the designation of claimants who are known or who can be easily determined, the Board cannot, in this situation, extend such leeway to "all others adversely affected" especially where the Organization offered absolutely no information or evidence to even suggest who those "all others" might be. The Board will not speculate on such matters. That portion of the requested remedy is also denied.

As to the portion of the requested remedy which asks that the three named claimants be made whole, the Board is in a quandary which is wrapped in an enigma. The Board accepts the principle that when work has been improperly removed from the Agreement, as we have determined in this case, there is a logical suspicion that some damage has been incurred. However, the Board is also well aware of the principle that monetary damages must have actually been incurred and must be proven by the petitioning party. The Board has no compunction with awarding "make whole" losses when such loss is established or identifiable.

In this case, however, there is not one iota of evidence to indicate in any way the positions to which Claimants exercised their seniority after the abolishment of their positions. Neither is there any support for the premise that they suffered any monetary loss for which they should now be made whole. The Board may not award monetary damages on the basis of speculation or conjecture. There is, of course, a line of arbitral decisions which espouses the principle that the issuance of a sustaining Award without the assessment of some sort of penalty for the Rule violation amounts to an exercise in futility. The Board in this case believes that this line of thought comes dangerously close to a Board imposing its own brand of industrial justice. The Board further believes that such action skirts the requirements of the Railway Labor Act which provides that the jurisdiction of Boards of Adjustment is limited to interpreting and applying the Agreements of the parties. While this concept may have appeal in common justice, it is not well founded in common or contract law. The Board in this case is persuaded by the opinion expressed by Judge Carter in Second Division Award 1638 which held that:

> "The power to inflict penalties when they appear just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

Inasmuch as the Organization in this instance has not met its burden of proving that there was any actual monetary loss sustained by the named Claimants, the Board has no basis upon which to order a monetary award.

The Board does, however, on the basis of our finding of a violation of the "position or work" Scope Rule, find that all of the "work" of the abolished Clerk-Operator positions which remains to be performed must be assigned to employees covered by the Scope Rule. The Agreement demands compliance.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.