

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30799
Docket No. CL-30321
95-3-92-3-102

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

(Transportation Communications
(International Union
PARTIES TO DISPUTE: (
(Illinois Central Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the Union
(GL-10660) that:

- (1) Carrier violated the Agreement between the Parties, effective March 15, 1991, and each day thereafter, when the assigned duties of weighing cars were removed from this class and craft and given to another class and craft, in violation of Rule 1, Scope Rule, among others of the November 1, 1974, Agreement, at Memphis, Tennessee.
- (2) Carrier shall now be required to return the work to this class and craft and to compensate Clerks T.W. Griffin each Monday and Tuesday, O.R. Freeman each Wednesday and Thursday, the senior extra clerk each Friday and Saturday, and Sunday, and their reliefs for two hours and forty minutes each day, as designated in Rule 34(a)."

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 basic facts of this case are not in dispute. On March 15, 1991, train crews who handle train cars as part of their regular assignment began weighing those cars and recording weight related information at the Carrier's facility in Memphis, Tennessee. The Trainmen had been trained by clerical employees who also had performed those duties. As of March 15, 1991, these weighing duties were no longer performed by the Carrier's clerical employees at its facility in Memphis.

The Organization filed a claim objecting to the assignment of these weighing duties to a class and craft of employees not covered by the parties' Clerical Agreement. Carrier denied the claim. The Organization appealed the claim, which was again denied by the Carrier. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization contends that the work at issue is protected by the Agreement's Scope Rule. That Rule reads, in relevant part, as follows:

"(d) Work performed by employees coming within the scope of this agreement on the effective date of this rule belongs to the employees covered thereby and nothing in this agreement shall be construed to permit the removal of such work from the application of these rules except as provided herein or by agreement between the parties signatory hereto.

* * *

(f) Except as otherwise provided in this rule, no officer or employee not covered by this agreement shall be permitted to perform any work covered by this agreement which is not directly or immediately linked to and an integral part of his regular duties, except by agreement between the parties signatory hereto."

The Organization maintains that both the literal language and the intent of the Scope Rule are to prevent the loss of work by clerical employees covered by the Agreement. Thus, it insists that the weighing duties at issue may not be reassigned from clerical employees to Engine Foremen.

The Organization maintains that the Scope Rule only has two exceptions: 1) work which is removed pursuant to an agreement between the parties, and 2) work which is directly or immediately linked to an integral part of the regular duties of an employee not covered by the Clerical Agreement (Rule 1, Section (f)). It argues that neither of these exceptions apply to this dispute. The

Organization asserts that since the Scope Rule explicitly lists certain exceptions, no other exceptions may be implied. Therefore, it insists that the Carrier's assignment of weighing duties to Engine Foremen has violated the Agreement.

The Organization maintains that the Scope Rule creates a "freeze frame" situation in which work performed by employees covered by the Agreement as of November 1, 1974, when the clause was agreed upon, may not be taken from those employees and given to other employees who are not covered by the Agreement. It contends that this interpretation of the Rule is buttressed by the Rule's bargaining history. Moreover, the Organization insists that the work at issue need not have been done exclusively by clerical employees in order to be covered by the Scope Rule. Thus, it argues that the weighing duties at issue would be protected by the Scope Rule even if they had been done in the past by Engine Foremen as well as clerical employees. However, the Organization alleges that weighing duties had not been performed by Engine Foremen at the Carrier's Memphis facility prior to March 15, 1990, when clerical employees were forced to train them.

The Organization disputes the Carrier's assertion that the outcome of this case is controlled by Award 1, Public Law Board No. 4538. It contends that in that Award the Board found the weighing duties at issue to be de minimus in nature. However, here, the Organization insists that the weighing work being taken from the clerical employees is not de minimus. It maintains that the Carrier is incorrect when it alleges that it takes less than one minute to weigh a car. The Organization acknowledges that three cars can be weighed in three minutes. However, it denies that 30 cars can be weighed in 30 minutes. That is so, argues the Organization, because it often takes additional time to couple and uncouple cars and move them onto and off of the scale. As an example, the Organization cites the weighing work performed on October 27, 1990, when it alleges that 77 cars were weighed in five hours and forty-three minutes, for an average of approximately four and one-half minutes per car. Thus, the Organization argues that the weighing work being taken from the Clerks is far from de minimus.

Accordingly, and for the foregoing reasons, the Organization asks that its claim be sustained.

The Carrier, on the other hand, maintains that it has not violated the Scope Rule. It contends that the Organization previously made an identical claim which was denied by Public Law Board No. 4538, Award 1. Therefore, the Carrier argues that based upon the principles of res judicata and stare decisis, the Organization's current claim also should be denied.

The Carrier also maintains that Rule 1 permits its train crews in Memphis to perform the weighing duties at issue. It contends that both the language and the bargaining history of Section (f) of Rule 1 demonstrate that the Scope Rule permits work covered by the Agreement to be performed by employees other than Clerks, so long as that work is incidental to the regular duties of the employees performing it. The Carrier insists that the weighing duties now being performed by train crews in Memphis are incidental to their regular duties, which include moving freight cars on and off the scales used to weigh them. Therefore, it argues that it has not violated the Scope Rule.

The Carrier also maintains that Section (c) of the Scope Rule permits its train crews to weigh freight cars up to four hours per day. It contends that its train crews in Memphis spend far less time each day weighing freight cars. Therefore, Carrier insists that it has not violated the Scope Rule.

Carrier maintains that even assuming, for the sake of argument, that it violated the Scope Rule, the violation is de minimus. It contends that on average, 14.4 freight cars are weighed each day by its employees in Memphis. The Carrier insists that the weighing duties now being performed by train crews involve a simple task which takes 30 to 50 seconds to perform for each car weighed. It alleges that recording car weights only entails pressing a button, and then recording the tare and capacity weight and the car initial and number. The Carrier asserts that no particular skill in any trade or craft is needed to perform this task. It also maintains that the bulk of the time taken to weigh freight cars is consumed by placing the cars on the scales and taking them off. The Carrier notes that this work is already performed by its train crews. Thus, it argues that having the train crews activate the scales and record the weight is a de minimus intrusion on the work previously performed by its Clerks in Memphis.

The Carrier also contends that train crews on its property have been weighing freight cars for many years. Therefore, it argues that it is not a violation of the Scope Rule for its train crews to be performing that task at the Carrier's Memphis facility.

Finally, the Carrier maintains that the Organization is seeking an unreasonable remedy. It contends that there is no set time during the day when cars are weighed. Therefore, it argues that Clerks would have to be called in whenever a car needed to be weighed. The Carrier alleges that train crews would sit idle while awaiting the arrival of a Clerk to press a button. It contends that the rule of reason principle requires that a more reasonable construction of the Scope Rule be adopted. Thus, it insists that

the Organization's construction of the Rule must be rejected.

Accordingly, and for the foregoing reasons, the Carrier asks that the Organization's claim be denied in its entirety.

After careful review of the entire record, we are convinced that the claim must be sustained in part. The work at issue belongs to the Organization's members. In removing that work the Carrier violated the Scope Rule. However, as explained below, because of the limited nature of the Carrier's violation and the inexactitude of the Organization's evidence concerning that violation, no monetary damages shall be awarded.

In reaching our conclusion, we recognize that the Carrier maintains that the weighing duties no longer being performed by clerical employees at the Carrier's Memphis facility, involve simple tasks which take about 30 to 50 seconds to perform for each car weighed. Concisely, the Organization asserted that these duties take on average four and one-half minutes to perform. Thus, a critical divergence of fact exists between the parties.

The record, however, does not clearly support either parties' assertion concerning how long these duties take to perform. Instead, as is often the case, the reality lies somewhere between the positions asserted by the parties. Thus, we suspect that this process takes on average approximately two and one-half minutes to perform.

In order to weigh cars they must be pushed onto and off of the scale. After a car is placed on a scale by a train crew, a button must be pushed and the record tare, capacity weight, car initial and number must be recorded. Moreover, freight cars sometimes need to be coupled and uncoupled and prevented from rolling back on the scale. Thus, we find that the work at issue is clearly significant. Therefore, we find that it must be returned to the Organization's members.

The evidence, however, does not support the Organization's claim for monetary damages. The burden is on the Organization to establish a claim to damages with specificity. Here, even though the Organization established that its claim is not de minimus, the Organization has not established how much work was lost due to the Carrier's violation. Therefore, we find that a claim for damages has not been established.

Accordingly, and for the foregoing reasons, the Organization's claim is sustained only to the extent of requiring that the work at issue be returned to the Organization's members.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 6th day of April 1995.