Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31130
Docket No. CL-30822
95-3-92-3-692

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Soo Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10866) that:

1. Carrier violated Rules 1 and 43 of the effective Agreement on December 23, 1990, when it failed and/or refused to permit Mr. J. L. Carty to do work traditionally and historically performed by persons covered under the Working Agreement between TCU and the Soo Line Railroad. This work was removed and assigned to CP Incorporated and/or an outside contractor commencing on November 24, 1990.

2. Carrier shall now pay Mr. J. L. Carty eight (8) hours pay at the punitive rate of $172.8303 per day for each day claimed."

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.

In this case, the Organization alleges a violation of Scope Rule 1(d) which reads in pertinent part as follows:

> "Positions or work coming within the scope of this Agreement belong to the employees covered thereby and nothing in this Agreement shall be construed to permit the removal of positions or work for the application of these rules, nor shall any officer or employee not covered by this Agreement be permitted to perform any work covered by this Agreement which is not incident to his regular duties except by agreement between the parties signatory hereto, nor shall the foregoing be construed to require the transfer of work now being performed by employees not covered by this Agreement to employees covered by this Agreement."

In on-property handling, the Organization described the work at issue, without contradiction by Carrier:

> "...the monitor of the computer console, selecting the computer tape from the tape library per instruction from the console, mounting the tapes on the tape drives, command the console, correct tape problems, the removal of the tapes from the tape drives and return same to the tape library on the second shift 8AM to 4PM December 23, 1990."

Nor is it disputed on this record that the described work was performed on the effective date of the Agreement and for a period of years prior to claim dates in Carrier's Computer Operations Department in Minneapolis, Minnesota, by an Agreement-covered employee in the classification of Tape Librarian. That fact alone is sufficient to bring the work within coverage of the above-quoted "Positions and Work" Scope Rule.

After serving notice but not consulting or negotiating with the Organization, Carrier removed the above-described work from the Tape Librarian's position on or about November 24, 1990, and contracted it out for performance, on and after that day, by a computerized "robot" in the Computer Department of Canadian Pacific Rail, Inc. in Toronto, Ontario, Canada. Carrier advised the Organization on or about October 26, 1990, of the impending subcontracting, but did not negotiate or obtain agreement from the Organization for the removal of this work from the Agreement-covered position. The record does not indicate what eventually happened to the position of Tape Librarian, but Carrier concedes that a position of Data Control Clerk in the Computer Operations Department in Minneapolis, Minnesota, was abolished on April 19, 1991, as a consequence of the contracting out of the above-described work.

The foregoing undisputed facts make out a prima facia violation of the Scope Rule. A plethora of Board and Public Law Board Awards establish that Agreement-covered work may not be removed unilaterally by Carrier from performance by Agreement-covered employees. A leading exemplar of this long line of decisions is Award 1 of Public Law Board No. 945:

> "The weight of authority of Third Division, National Railroad Adjustment Board case law compels a finding that when the Scope Rule of an agreement encompasses 'position and work' that work once assigned by a Carrier to employees within the collective bargaining unit thereby becomes vested in employees within the unit and may not be removed 'except by agreement between the parties....'"

Carrier's defense that the subcontractor utilizes electronic robotics rather than a human employee to perform the Tape Librarian duties at its Toronto, Ontario, Canada headquarters, begs the question at issue. Rule 1(d), as written, flatly prohibits unilateral removal of positions or work from the application of the Rules of the Soo Line/TCU Agreement. Carrier removed such work and subcontracted it for performance by a stranger to the Agreement, thus violating Rule 1(d).

With respect to damages, there is no indication on this record that Claimant spent or would spend eight hours per day performing the Agreement-covered work. In the absence of more definitive evidence establishing the extent of the violation, we shall sustain the claim for one minimum call under the Call Rule of the controlling Agreement for each date of violation.

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 26th day of September 1995.