

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31175
Docket No. CL-31645
95-3-93-3-659

The Third Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International
(Union
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(Delaware and Hudson Railway Company, Inc.

STATEMENT OF CLAIM: "Claim of System Committee of the Organization (GL-10990) that:

The following claim is hereby presented to the Company on behalf of Claimant R. Daley.

(a) The carrier violated the Clerks' Rules Agreement effective September 26, 1990, particularly Rules 2, 12, 13, Appendix I and other Rules, when effective on or about October 23, 1992, they improperly established a "special assignment" or a "PEP" position to perform clerical duties of, but not limited to, the handling of uncollected waybill revenue and waybill freight corrections, assigning same to J. Culliton and failed to obtain an agreement with the General Chairman as is required under the provisions of Rule 2(b).

(b) Claimant should now be allowed eight (8) hours punitive pay based on the pro-rata hourly rate of \$13.84, commencing on or about October 23, 1992, and continuing for each and every workday thereon after, in addition to any and all other earnings of junior employee, J. Culliton, on account of this violation.

(c) That in order to terminate this claim, the carrier must advertise said position as a fully covered assignment, or they must secure the required agreement from the General Chairman to establish this position with a PEP status.

(d) Claimant is senior, qualified and would have been eligible to bid said position had the carrier properly advertised same.

(e) This claim has been presented in accordance with Rule 28.2 and should be allowed."

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 the dispute waived right of appearance at hearing thereon.

The dispute devolves upon the application of Rule 2(b) which states:

"Partially Exempted Positions will only be established by agreement with the General Chairman. When the carrier desires to create a partially exempted position, they shall notify the General Chairman, in writing. Such notice shall contain the following:

1. Location of the partially exempted position;
2. Proposed rate of pay;
3. Primary duties;
4. Reasons to substantiate that the position should be partially exempted position."

The dispute was precipitated when the Carrier, on or about October 23, 1992, established a temporary supervisory position at the Carrier's headquarter's offices without discussing or receiving agreement of the General Chairman. This temporary supervisory position was filled by J. Culliton. The Carrier stated that Rule 2(b) was not applicable because the work and duties of the temporary job encompassed duties that were not previously performed by the Organization's bargaining unit employees. The Organization strongly contested the Carrier's position, contending that the Carrier had improperly established a partially exempted position, i.e., a special assignment that performed clerical duties that had been performed, up to that time, by the incumbent of Position No. 37, Deborah Cross.

The Organization asserts the newly established PEP position performed work which was not limited to the work of handling uncollected waybills and waybill freight corrections. The Organization contends that the work assigned to this new supervisory position had previously been performed by Clerk Cross. The Organization introduced copies of freight bills for correction dated October 23, 1992 taken from Ms. Cross' desk for Mr. Culliton's assignment.

The Carrier maintains that the work of this new supervisory position pertained to the negotiation and reconciliation of errors in customer billing, changes in computer procedures and practices plus interface with internal and external management. The Carrier insists that such duties have normally and traditionally been assigned to management and not the clerical staff.

The Organization states that under the Position and Work Scope Rule in effect on the property, the Carrier was barred from removing work or positions from the Agreement without the consent of the parties signatory to the Agreement. It adds the Carrier is of the belief that a PEP, if denominated as a "special assignment," can arbitrarily be taken from a regularly scheduled bid and bump Clerk. The Organization cites Awards of this Board which have ruled that the Carrier may not remove or take away the work of a covered employee and unilaterally transfer it to a PEP employee.

The Organization states the chain of events from November 11, 1992 show that the covered employees, including Mr. J. Culliton, all bid on covered clerical jobs, and those bid upon jobs were all clerical in nature and performed duties which the Carrier contended were supervisory in nature. The work of these covered jobs all pertained to sorting waybills, correcting and setting a pattern to rebill incorrect waybills, as well as terminating waybills in the CP computer and assisting Clerks Cross and Mason.

The Organization states that the refusal of the Carrier to confer and secure consent of the General Chairman is sufficient to sustain the claim, but the Carrier engages in specious reasoning when it asserts that the duties of the special assignment are not clerical duties. The Organization further states a review of the job description of the involved employees will reveal that these employees performed the same duties with regard to initiating corrective actions on waybills and corrected computer problems and worked on computer input before the Carrier removed this work and improperly assigned the work to the "Special Assignment."

The Organization stresses that Clerk Cross submitted as proof freight bills on which she had been working and which contained a

notation of correction by Supervisor Joan Dillon. These bills had been taken from Clerk Cross to be given for correction by Mr. Culliton. The Organization adds that the work which the Carrier asserted to be special has consistently been performed by clerks covered by the Agreement.

The Organization states the Carrier is also in error when it asserts that the claimant is not entitled to monetary damages because he suffered no loss. The Organization adds there is a long line of Awards rendered by this Board that the Carrier is liable for a penalty when it commits a contract violation. These awards have held damages are due when the afflicted employee suffers a loss of job opportunity. In the instant case, the Claimant lost repeated work opportunities.

The Carrier states it was not required to confer with the General Chairman about establishing the special assignment in issue because the work performed by this assignment was a supervisory position that had not previously been performed by bargaining unit employees. It adds that the work of the special assignment has traditionally been assigned to management. It states Mr. Culliton was promoted to the position based on his prior experience.

The Carrier states the Bulletin which the Organization attached to its Level I grievance did not reflect the duties performed by temporary Supervisor Culliton. The latter negotiated on billing charges and this is not work normally performed by the clerical staff. It adds that changes in computer procedures cannot in any way be equated with scheduled clerical duties and are not in the Organization's cited Bulletins.

The Carrier maintains that the General Chairman's statement that the Carrier began to remove duties from Clerk Cross to give to J. Culliton for completion is a self serving statement that has no proof to substantiate it. The Carrier adds that Clerk Cross suffered no loss of employment or wages as a result of its supervisory appointment, not has the Organization shown how Claimant Daley was disadvantaged by the establishment of the temporary position.

The Carrier asserts that the Organization charged it with violating Rule 2, but has not cited any of the seven clauses of the Rule. It states that it created a new temporary supervisor position that is a wholly exempted supervisory position fully outside the scope of the collective bargaining Agreement. It is work that is both confidential and supervisory and is work the Organization members never performed.

The Carrier states that the claim is deficient because the record does not contain proof to support the claim. The Carrier further states that the Organization is in error in seeking eight

hours punitive pay for an employee who was working at the time of the alleged violation. It adds the Organization is seeking to remake the Agreement by adding terms and conditions which were not agreed to by the parties during negotiations. The Carrier asserts numerous Boards have held that they have no such authority to modify collective bargaining Agreements.

The Board finds that the weight of the credible evidence shows that the Carrier breached the Agreement when it purported to establish a wholly or a partially exempt position without complying with the mandate of Rule 2(b) i.e., that the Carrier may establish PEP positions with the agreement of the General Chairman. The Carrier stated that it did not follow this procedure because the "special assignment" which it established on October 23, 1992 was work that was supervisory in nature and not within the Scope of the existing collective bargaining Agreement.

The Board finds that the evidence does not support the Carrier's position. The record shows that Mr. Culliton, whom the Carrier designated to fill the assignment, (1) had no apparent prior experience or service in handling supervisory positions (2) was a Customer Service Clerk displaced by Clerk McMannus on October 12, 1992 (3) sought to displace General Clerk Typist VanKempen and (4) stated he would displace Clerk Vankempen when he was released from his "special assignment."

The Board finds that the record shows that the work given to the special assignment was work generally performed by covered clerical employees prior to being removed and placed within the newly established supervisory job. A review of the job description of the bulletin for Clerk position on January 1991 and the bulletin of March 22, 1992 indicate that the duties of the posted Clerk positions included work that was assigned in October 1992 to the special assignment. The Board also finds significant the Organization's exhibit submitted on October 23, 1992 by Clerk Cross, who stated that the listed freight bills were taken from her desk to be given to Mr. Culliton's Special Assignment. These freight bills indicated that Clerk Cross corrected them when necessary under the supervision and direction of Supervisor Joan Dillon.

The Board finds that the weight of evidence strongly suggests that General Clerks reviewed and corrected freight bills under existing supervision and that it was contractual error for the Carrier to remove this work from the clerical staff and contend that it was management work. The Board finds that if there was a question as to the nature and character of the duties that the Carrier was attempting to establish as supervisory work, prudence and caution demanded of management that it discuss the matter with the General Chairman.

The Board finds that there is some merit in this case to the Organization's request for monetary relief. The question as to damages where the alleged aggrieved employee has remained under pay is a dispute that has afflicted this Board almost since the very days of its creation. To apply the common law rule of damages is to ignore the salient fact that a collective bargaining Agreement is not the equivalent of a contract to purchase 5,000 pounds of coal. A collective bargaining Agreement is a charter to establish and maintain terms and conditions of employment to ensure stability in the relationship between the parties. To find that in every situation the Carrier could breach or violate the Agreement with impunity would be to subvert its purpose and intent. A breach of a collective bargaining Agreement can affect the lives and property of its signatories in a way that no contract for the sale and purchase of coal could.

Under the facts, the Board finds, that because the Carrier ignored its contractual responsibilities under Rule 2(b) it is proper to award the Claimant two hours pay at the pro rata rate for each work day the PEP position exists.

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.