Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31681
Docket No. CL-31694
96-3-93-3-740

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

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Monongahela Railway Corporation

Statement of Claim:

"Claim of the System Committee of the TCU (GL-10998) that:

(a) The Carrier violated the TCU Rules Agreement, effective April 1, 1951, as revised July 26, 1990, particularly Rules 9, 11, 17, 18, 27, 28 and other rules when the Carrier arbitrarily and unilaterally removed scope acquired work from the crew dispatcher-caller and extra clerk positions at South Brownsville, Pennsylvania effective November 5, 1992. By notice dated November 5, 1992, the Carrier moved the End of Train Device (E.O.T.) from under the responsibility of the Crew Dispatcher at the South Brownsville Yard Office to another class and craft at the Conrail West Brownsville Yard office. This work was assigned to the crew dispatcher at the South Brownsville yard and they were responsible via notice dated March 13, 1989. There is in effect a 'Positions and Work' Scope Rule on the Monongahela Railway and no positions or work shall be removed from the jurisdiction of this Scope Rule, without an agreement with the TCU, and there has been no such agreement.

(b) Claimant W.E. Shaffer, G.E. Harvey, G.T. Tylka, J.E. Sytko and all other available crew dispatcher callers and extra clerks now be allowed eight (8) hours time and one half pay at the daily rate of $119.68, as a penalty for each date that each Claimant works as a crew dispatcher caller, for November 5, 1992, and all subsequent dates on a continuing basis, until this violation is corrected and the E.O.T.'s are returned to the South Brownsville Yard office and the responsibility for the same is once again assigned to the crew dispatcher callers and the extra clerks as required by the Scope Rule.

© Claim has been submitted in accordance with this Rule 32 and should be allowed as presented. Please advise as to the pay period this claim will 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 said dispute waived right of appearance at hearing thereon.

The antecedents of the claim are that the Monongahela Railroad (MGA) was a wholly owned subsidiary of Conrail at the time of the claim. In 1993 the Monongahela was merged into Conrail.

On March 13, 1989 the MGA issued a rule that became effective March 15, 1989 that stated in part:

> "It will be the responsibility of the Crew-Caller on duty at the South Brownsville Yard Office to prepare [Receiver Display Unit (RDU) and End of Train Device (E.O.T.)] the above listed equipment prior to the Train and Engine crews departure from the Yard Office.
>
> The RDU requires no special equipment. The End of Train Device requires the replacement of all Four (4) Batteries. When the E.O.T. is returned to the yard office the old batteries must be removed....
>
> The sheet now being used as the Radio and Marker sign out log will be used to assign this equipment to the Engineer and Flagman of the crew...."

The balance of the Notice dealt with the information how to remove and replace the batteries.

South Brownsville Yard was the on and off duty point of MGA crews for MGA trains originating at West Brownsville Yard which was on Conrail territory. The South Brownsville Yard contained a storage section for the E.O.T. equipment. When a crew went on duty at South Brownsville for a train being made up at West Brownsville, the Crew Dispatcher-Caller would retrieve the E.O.T. device from the storage area and give it to the outbound Conductor who would take it on his three mile trip to West Brownsville and attach it to his out-bound train.

Since 1984 at West Brownsville trainmen were not required to handle E.O.T. devices as a result of an award of Arbitration Board No. 419 as long as the Carrier had other available labor forces. Since 1984 Carmen handled E.O.T. devices at West Brownsville.

After losing in Award 1, Public Law Board No. 4857, MGA trainmen began filing claims for two-hour penalty payments for handling E.O.T. devices on trains operating without a caboose. To forestall such contingent liability, the Carrier issued its November 5, 1992 Notice which directed that the storage area for E.O.T. devices would be moved to West Brownsville and MGA crews would no longer be responsible for attaching or removing E.O.T. devices from trains and Conrail car inspectors would attach and remove these devices.

This November 1992 Notice relocated the E.O.T. storage area from South Brownsville to West Brownsville as well as the work of the Claimants at South Brownsville. The positions of the Crew Caller-Dispatchers were finally abolished at South Brownsville on May 12, 1993 when crew caller duties were transferred to Conrail's Dispatcher Office at Dearborn, Michigan following the merger.

On December 21, 1992, four Crew-Caller Dispatchers filed the instant claim.

The Organization asserts that the Carrier by its November 5, 1992 Notice violated its Scope Rule wherein the Carrier had covenanted not to remove work within the Scope of the Agreement unless the change was affected by negotiations or mutual agreement. The Organization insists that the Carrier by its November 1992 Notice removed from the South Brownsville Crew Caller-Dispatcher positions the responsibility of handling E.O.T. devices and assigned it to another class or craft of employees at the

West Brownsville Yard. The Organization maintains that this unilateral action by the Carrier was a breach of the Position and Work Scope Rule in effect on the Monongahela Railroad.

The Organization states that the Carrier is in error when it contends that the Carrier's March 13, 1989 Notice did not vest in the South Brownsville Yard Crew Dispatcher the responsibility for preparing the E.O.T. devise prior to the Train and Engine crews departing for West Brownsville. The Organization stated that the logs covering this equipment prepared by the South Brownsville Clerks clearly illustrate how the clerical craft executed the terms and conditions of the March 1989 Directive. The Claimants executed this work assignment completely until the Carrier unilaterally removed the work from the scope of the Agreement and assigned it to employees of another craft and another company by the 1992 Notice.

The Carrier, in addition to its attack on the 1989 Notice also maintains that the claim is deficient because: (1) the work in issue has been eliminated; (2) the claim is excessive since the work took only a few minutes to perform; and (3) the Claimants were actively employed and suffered no monetary loss.

The Organization maintains that none of these defenses are valid and it cites Awards of the NRAB and Public Law Boards which have consistently held that a Carrier may not unilaterally encroach on others or work protected by an Agreement. An Employee "Scope and Work" Rule mandates the exclusive right to the work. The Organization insists that the work in question has not disappeared, but was transferred to employees of another craft of another company. The Organization states its request for monetary damage has been recognized by many Board awards.

The Carrier stated the claim lacks merit and the Board should deny it because there has been no transfer of work to West Brownsville when the storage area was moved from South Brownsville to West Brownsville. It added that there was no violation of the "position and work" Scope Rule because the Organization cannot show or prove that the work in question was ever performed by the clerical craft at West Brownsville. It also stated that the claim should be denied because even if the nature of the work were covered by the aforesaid Scope Rule, it would be work of a de minimis nature.

In the first place, the Carrier stressed that a careful reading of the Carrier's March 13, 1989 Notice did not vest the jurisdiction on the clerical craft to do the work of handling E.O.T. equipment. The Carrier asserts that the 1989 Notice only charged

the Crew Dispatchers with the duty and responsibility of ensuring that the equipment was serviceable by installing recharged batteries and removing old batteries, rather than have the total responsibility over E.O.T. equipment and insuring its delivery to train and engine crews at South Brownsville.

The Carrier asserts there was no transfer of work as a result of the November 5, 1992 notice. The handling of a E.O.T. device to a conductor to transport the device from South Brownsville to West Brownsville to place on outbound trains at West Brownsville were classic "middlemen functions." These functions ceased to exist when the Carrier made an overall effort to have the entire operation performed by one employee - the Car Inspector at West Brownsville. The Carrier asserts that when the E.O.T. storage area was moved from South Brownsville to West Brownsville, the middleman function of retrieving E.O.T. devices and handling them to Conductors disappeared.

The Carrier cited a number of Awards which have held that when work is eliminated rather than transferred to another craft there is no breach of the contract. The Carrier adds that for the Organization to prevail it must show the same kind of work was shifted from clerical employees to stranger forces. It cannot do this. The work of retrieving and distributing E.O.T. devices was not shifted to anyone - the work disappeared when the Carrier changed its operation by relocating the storage area for the E.O.T. devices from South Brownsville to West Brownsville.

The Carrier stated it had the right to make the operational decisions to change the E.O.T. storage rack to West Brownsville to avoid penalty claims from Trainmen. The work did not become the work of the clerical craft at the new location. Seniority does not follow equipment. The Organization had failed to show that the work of retrieving the devices and distributing them to outbound conductors was owned by the clerical craft at the new location.

The Carrier states for the claim to be sustained the Organization must show that the clerical craft was the only craft that performed the work of distributing E.O.T. devices at West Brownsville. The Carrier adds that car inspectors have had the responsibility for handling E.O.T. devices at Conrail's West Brownsville facility since 1984 - when Arbitration Award 419 was issued. The Carrier stated that since that time Car Inspectors at West Brownsville have retrieved the devices from storage and placed them on the train at this location. It adds the fact that South Brownsville Monongahela Clerks formerly performed work similar to a small portion of the West Brownsville Car Inspectors' duties, i.e., the physical retrieval of E.O.T. devices, does not grant them the right to remove the work from the Conrail Carman craft at West Brownsville. The

Carrier insists that the Organization cannot use the MGA clerical scope rule to lay claim to work which has never been previously performed by clerical personnel at West Brownsville.

The Carrier states Awards have held that an Organization may not use a "Work Scope Rule" as a sword to capture work which they had not previously performed. It may only be uses as a shield against the removal of work already being performed at a given location.

The Carrier also maintains that taking a E.O.T. device from a storage area and handling it to a Conductor consumed only a few seconds or a few minutes out of a eight hour day for Conductors at South Brownsville and therefore, if a rule violation was committed, the de minimis nature would allow the Car Inspectors to perform the work without penalty.

The Carrier states that even if the Board should find a rule violation, the Claimants are not entitled to any monetary damages because they were fully employed and compensated during the claims period. It adds that since the Claimants suffered neither monetary loss nor loss of work opportunities, they are not entitled to any penalty payments. The Carrier further notes that since the Claimant's positions were transferred to Dearborn, Michigan on May 12, 1993, the entire claim period only extended from November 5, 1992 to May 12, 1993, if any monetary damages were due.

The Board finds the Organization's position more persuasive than that of the Carrier, even though its claim cannot be sustained in its entirety.

The Board finds that the Carrier gives a too narrow interpretation to the March 1989 Notice. It is true that the Claimants were not responsible for handling E.O.T. devices, if by that the Carrier means attaching and relieving E.O.T. devices from trains. In the first place the trains departed and arrived at West Brownsville Yard, so that the Claimant could not handle these devices at that location. But more importantly, they were Clerks and they did what Clerks did, i.e., they made sure the devices were serviceable by replacing batteries and keeping track of this equipment on the logs they maintained. It is not the function of members of the Clerical craft to install or remove equipment from trains. The 1989 Notice vested in the Claimants the responsibility of ensuring that the equipment was maintained, and accounted for, and as a corollary, given to outbound Conductors for installation on their outbound trains at West Brownsville. The fact that the E.O.T. devices were handled by Carmen at West

Brownsville in no way detracted or diminished the work responsibility of the Claimants under the March 1989 Notice.

When the Carrier moved the storage area for the devices to West Brownsville, it removed from the Claimants the work that had been performing since 1989. This was not an elimination but a transfer of work to another craft, to the detriment of the Claimants.

The Carrier may make such operative decisions as it deems necessary for the efficient and economic success of its business, but it is not at liberty to do it in contravention of the terms of Agreements voluntarily entered into, or if it does, it may have to respond in damages for its breach of contract.

The Carrier may exercise its managerial prerogative to ensure efficient business decisions, but the managerial prerogatives have to be exercised within the circumscriptions of the Collective Bargaining Agreements. In the case at hand, the Carrier removed a block of duties, at South Brownsville which the Clerical craft had performed without objection or protest from 1989 to 1992 without the consent or agreement of the Organization. This was a breach of the existing Collective Bargaining Agreement.

The Board agrees the amount of monetary damages sought by the Organization is not justified by the facts, and therefore the Board finds the Claimants should receive instead one hour pay at the straight time rates in effect at the time the claim arose until 1993 when the Claimants positions were abolished as a result of their transfer to Dearborn, Michigan.

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 29th day of August 1996.