

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32532
Docket No. CL-32976
98-3-96-3-362

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11229) that:

(a) The Carrier violated the Clerks’ Rules Agreement effective September 26, 1990, particularly Rules 1 (Scope), 4, 5, Appendix I and other Rules, when commencing on or about March 31, 1995, the Carrier assigned and permitted (shown on Attachment B) to perform clerical duties of but not limited to those shown on Attachment A, which are duties that were removed from Position Clerk/Steno, Symbol No. 14 located at Binghamton Yard, Binghamton, NY, following the abolishment of same effective March 30, 1995.

(b) The duties being claimed have been historically assigned to , and performed by, the clerical employees at this location, until March 30, 1995, when the Carrier arbitrarily removed same from Claimant’s positions.

(c) Claimant Tocyloski should now be allowed eight (8) hours punitive pay based on the pro-rata hourly rate of \$14.66, commencing March 31, 1995, and continuing for each and every day thereafter until this violation is corrected.

(d) That in order to terminate this claim all the involved duties must be returned to clerical employees.

(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 said dispute were given due notice of hearing thereon.

This dispute arose on May 23, 1995 when the Organization filed a claim protesting abolishment of Clerk/Steno Position No. 14 at Binghamton Yard, on the grounds that duties formerly performed by that job were being performed by individuals named in Attachment A to the claim. The claim was denied, and subsequently progressed in the usual manner. On October 6, 1995, the Parties met to discuss the matter. At that time, Carrier Officers and the Organization were able to narrow the scope of the duties being performed by non-agreement employees. Carrier officers also agreed to investigate the matter further, and report the results of that investigation to the Organization.

For reasons not clear on this record, the Carrier failed to complete the investigation and/or to report the results to the Organization. The Organization then progressed the matter to the Board. In the absence of a response from the Carrier to the Organization's proposed enumeration of the work being performed by non-agreement personnel, the Board finds that the Organization met its burden of persuasion with respect to that aspect of the present issue. The Scope Rule is a "position and work" Scope Rule (Third Division Award 32180). Accordingly, work remaining following the abolishment of Position No. 14 should be redistributed among employees covered by the Agreement.

The Organization has not, however, provided probative evidence concerning the actual hours spent performing this work. In a similar case involving the same Parties (Third Division Award 32180) the Board held:

"Having found that the Agreement was violated, we turn to consideration of the remedy advocated by the Organization. From the record before us, we find the remedy advocated to be excessive for several reasons . . . [W]e do not find evidence of the Clerical forces performing sufficient crew transportation work to justify its claim for eight hours punitive pay for each day, 24 hours a day, seven days a week, until the violation is corrected.

Based on what we can find on the record before us as to the amount of work involved, . . . we conclude that two hours per shift at the pro rata rate would be a reasonable measure of the losses sustained by the Clerks, until the work is either returned to the Clerical forces or the parties reach some other reasonable accommodation."

The Board concurs with the calculation of losses found in Award 32180. Thus, the Carrier shall pay the Claimant two hours pay per day at the pro rata rate from the date of the abolishment of Position No. 14, until the work is either returned to Clerical forces or the Parties reach some other reasonable accommodation.

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 25th day of March 1998.

**Carrier Members' Dissent
to Third Division Award 32532; Docket CL-32976
(Referee Elizabeth C. Wesman)**

The Majority erroneously found in favor of the Claimant because all facts presented by the parties were not reviewed. The Award held, in part, as follows:

"This dispute arose on May 23, 1995 when the Organization filed a claim protesting abolishment of Clerk/Steno Position No. 14 at Binghamton Yard, on the grounds that duties formerly performed by that job were being performed by individuals named in Attachment A to the claim. The claim was denied, and subsequently progressed in the usual manner. On October 6, 1995, the parties met to discuss the matter. At that time, Carrier Officers and the Organization were able to narrow the Scope of the duties being performed by non-agreement employees. Carrier officers also agreed to investigate the matter further, and report the results of that investigation to the Organization.

For reasons not clear on this record, the Carrier failed to complete the investigation and/or report the results to the Organization. The Organization then progressed the matter to the Board. In the absence of a response from the Carrier to the Organization's proposed enumeration of the work being performed by the non-agreement personnel, the Board finds that the Organization met its burden of persuasion with respect to that aspect of the present issue. The Scope Rule is a "position and work" Scope Rule (Third Division Award 32180). Accordingly, work remaining following the abolishment of Position No. 14 should be redistributed among employees covered by the Agreement." (Emphasis added)

While the Majority may have reviewed the Organization's Submission from cover to cover, the Majority apparently failed to review the Carrier's entire Submission. By letter dated April 8, 1996 (Carrier Exhibit "F") Assistant Vice President Labor Relations Cathryn S. Frankenberg advised General Chairman A. P. Santoro that the Carrier had completed its investigation and reported the results to the Organization. Subject letter reads as follows:

"Reference is made to your File: 77.0 (35) concerning the appeal of a claim on behalf of S. Tocyloski account the Organization claims the Company has assigned work of abolished Position No. 14 to various D&H Supervisors."

"The list of work that you have shown in your attachment 'A' is not work that has been given to various D&H Supervisors. The work of the abolished position, Position No. 14, that is needed to be performed, is being performed by the clerical employees at Binghamton Yard. Approximately once a week a clerk is called from furlough to perform miscellaneous duties related to the operations at Binghamton Yard.

The list of Supervisors that you have shown in your attachment 'B' are not performing any of the work you have identified in attachment 'A.' In reviewing this list of duties with these employees they have advised that they are not doing this work. It is incumbent on the Organization to uphold their claim and not make general statements without specific support.

After further review of your attachment 'A' it is the Carrier's position that items 1, 3, 16, 17, 18, 21 and 27, if and when done, are done by the spare clerk who is called in once a week. Items 2, 6, 14, 15, 20, 31, 32 and 34 are not done. Items 4, 5, 8, 9, 10, 12, 25, 26, and 28 are done by the clerical staff. Items 11, 13, 19, 22, 23, 24, 29, 30 and 33 have been done by both management and clerks and remains to be shared responsibilities. Item 35 is non-specific. Item 7 is being done by the manager using the key pad instead of pen and pencil. The clerical employees do not have exclusive rights to the use of the key pads and computer terminals.

The Carrier is not in violation of Rules 1, 4, 5, Appendix No. I and other rules of the September 26, 1990, Clerical Rules Agreement.

Accordingly, your appeal of this claim is respectfully denied."

The above-quoted letter was, in fact, the report that the Majority erroneously concluded the Carrier failed to provide to the Organization. The letter clearly addresses the narrowed list of items and would have, if reviewed, supported a decision in favor of the Carrier. As noted in the Award, the Majority based its decision entirely on this issue. Inasmuch Labor Member William R. Miller asserted during argument of this case before the Referee on August 19, 1997 that the Carrier's letter constituted new material which had not been given to the Organization, we remain puzzled as to why the Majority reached the conclusion it did. While it is true that the Organization put the Carrier on notice in its letter dated April 17, 1996 that it was still waiting for

the results of the Carrier's investigation, it should have been apparent to the Majority that the Carrier's April 8, 1996 letter and the Organization's April 17, 1996 letter most likely passed in the mail like ships in the night. Importantly, a handwritten note from Labor Relations Officer Roger Koch appears on the Carrier's copy of the Organization's April 17, 1996 letter (Carrier's Exhibit G). The note indicates that the Carrier mailed its April 8, 1996 letter on that date. It further indicates that a copy of the letter was given to Vice General Chairman Russell C. Oathout during conference on April 18, 1996. The Organization did not file its Notice of Intent with the Board until June 6, 1996.

It thus becomes crystal clear that the Organization partially prevailed in this case not because ". . . the Carrier failed to complete the investigation and/or report the results to the Organization..." but because the Carrier officer trusted the Vice General Chairman to forward the April 8, 1996 letter to the General Chairman. The sad lesson to be learned here by the Carrier is that it must "talk with the pencil." Stated differently, when the Carrier received General Chairman Santoro's April 17, 1996 letter, it should have confirmed in writing its transmittal of a second copy of its April 8, 1996 letter directly to the General Chairman.

In our opinion, the Majority further compounded its error by stating:

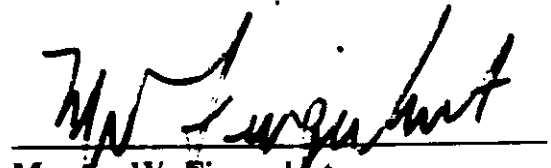
"The Board concurs with the calculation of losses found in Award 32180. Thus, the Carrier shall pay the Claimant two hours pay per day at the pro rata rate from the date of the abolishment of Position No. 14, until the work is either returned to Clerical forces or the Parties reach some other reasonable accommodation."

The reasoning behind this arbitrary amount, as it pertains to the instant case, is perplexing, to say the least. Our review of Organization Exhibit "E-1", which the Organization identified as the document upon which the Claimant had made notes as to where she believed the claimed work had been distributed and is the "narrowed down list," reveals that the Claimant merely stated that she believed that five out of the 35 items listed (Items 4, 5, 22, 24 and 29) may have been performed by Managers. Of these five items, the Claimant admitted that three of them were being performed by Clerks and Managers. Further Item 22 is "Answer Telephone, and record message." Again, had the Majority reviewed Carrier's Exhibit "F" it would have been clear that these five items were addressed in the Carrier's April 8, 1996 report to the Organization.

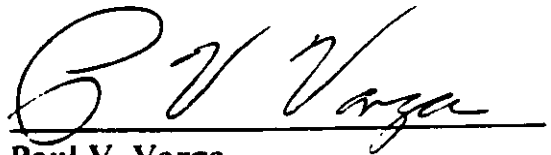
Unfortunately, this Award may very well create yet another dispute. Since March 30, 1995, the Carrier has operated in full compliance with the terms of this Award. The Carrier maintains that there is no clerical work to return to Clerical employees as a result of the abolishment of Position No. 14, as none was removed.



Michael C. Lesnik



Martin W. Fingerhut



Paul V. Varga