

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 33408  
Docket No. CL-34502  
99-3-98-3-95

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

**PARTIES TO DISPUTE:** (Transportation Communications International Union  
(National Railroad Passenger Corporation)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Organization (GL-11942) that:

- (a) The Carrier violated the Clerks’ Rules Agreement effective July 21, 1972, as revised, particularly, Rules 1, 6, 7, 14 and other Rules, when on or about August 19, 1996, they awarded former Clerical Employee, J. Keefe, a (newly created) Foreman III Position, and on various dates following same (shown on Attachment ‘A’) they allowed and permitted him to perform duties of Material Control Clerk (shown on Attachment ‘A’) during the 8:00 a.m. to 4:00 p.m. tour of duty, location, Material Control - Turbo Facility, Rensselaer, New York, instead of calling and using Claimant Messerle to perform the work shown on Attachment ‘A.’
- (b) Claimant, R. Messerle, should be now allowed eight (8) hours pay at the appropriate punitive rate for each date shown on Attachment ‘A’, on account of this violation.
- (c) Claimant was qualified, available and should have been called and used to perform this work.”

**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.

In this claim, the Organization contends that when J. Keefe was promoted to the newly created position of Foreman III, he continued performing some of the duties he had performed as a Material Control Clerk. As recognized by both parties, the Material Control Clerk position is covered by the TCU Clerical Agreement. The Special Notice Bulletin of August 21, 1996, posted by Carrier for the position vacated by J. Keefe included in its "Description of Duties" physical work like that alleged by the Organization to be in violation of the Agreement.

The Organization cites incidents occurring after J. Keefe assumed the Foreman III position during which he allegedly performed clerical duties. The dates of the alleged violations of the TCU Clerical Agreement range from August 21, 1996 to September 18, 1996. The Organization claims the work J. Keefe was seen performing is "normally and customarily assigned and performed on a full covered position of Material Control Clerk." The Carrier has denied this claim. It is the position of the Carrier that the work done by J. Keefe was incidental to his job and was *de minimus*.

The controlling issue here is whether the actions of J. Keefe violated the General Scope Rule of the Agreement.

Rule 1 (e) of the Scope Rule says:

"It is not the intent of the company to have supervisors perform work which is within the scope of this Agreement. However, it is recognized that supervisors will occasionally perform such work, when necessary under critical and/or emergency conditions, while instructing employees, and/or when incidental to their assigned duties. Supervisors shall not be used to negate the provisions of the overtime rules of this Agreement."

The Organization bears a weighty burden to show the work performed by J. Keefe is exclusive to the Material Control Clerk position and not incidental to the Foreman III position. After careful review, the Board finds the Organization has not demonstrated the duties J. Keefe performed were not incidental to his job as Foreman.

In Third Division Award No. 19833 the Board stated:

“This Board is fully aware of the very serious consequences of a Scope Clause. Surely a Carrier must refrain from removing work from a class when it has agreed to refrain from said action by contractual language, but just as surely, a Carrier must not be found to be guilty of such a severe violation without more than a conclusionary allegation, supported by a few isolated assertions which fail to specify with any degree of certainty the specific nature, times and amounts of removal. The burden of proof rests with the Organization. That burden exists for the protection of both parties as well as the Board and it is incumbent upon the claimant to produce sufficient evidence to support the version of the facts upon which it relies. See AWARD 10067 (Weston). Here, we have just a fleeting glimpse of the asserted facts.”

After careful review of the record, we find the Organizations evidence is not sufficient to establish a violation of the Agreement. The Organization has not met the burden of persuasion. This claim is denied.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of July 1999.