

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33444  
Docket No. CL-33565  
99-3-97-3-28**

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Organization (GL-11678) 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 January 20, 1995, the Carrier assigned and permitted Yardmaster W. Whalen to perform clerical duties of but not limited to those shown on Attachment A, which are duties that were removed from Position Train Clerk, Symbol No. 20 located at Kenwood Yard, Albany, NY, following the abolishment of same effective January 19, 1995, during the first shift tour of duty.**

**(b) The duties being claimed have been historically assigned to, and performed by, the clerical employees at this location, until January 20, 1995, when the Carrier arbitrarily and entirely removed same from Claimant’s positions.**

**(c) Claimant Markley should now be allowed eight (8) hours punitive pay based on the pro-rata hourly rate of \$14.66, commencing January 20, 1995, and continuing for each and every day thereafter until this violation is corrected.**

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

**(e) The successors, if any, to the Claimant’s positions must be considered as a Claimant in this claim.**

(f) Claim is further made that Carrier is in violation of Rule 28-2, Claims and Grievances.

**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.

As Third Party in Interest, the United Transportation Union Yardmasters Department was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

Pursuant to a bulletin dated January 11, 1995, the Carrier abolished the first shift (7:00 A.M. to 3:00 P.M.) Train Clerk position at Kenwood Yard in Albany, New York. The Carrier simultaneously established a second shift (3:00 P.M. to 11:00 P.M.) Train Clerk position at the same location. The incumbent of the abolished position bid for and was awarded the newly established second shift Train Clerk position.

At the time that the Carrier abolished the first shift position, the Organization's Vice General Chairman asked the Carrier who would perform the clerical work formerly performed by the occupant of the first shift Train Clerk position. While the record is not entirely clear, the Carrier apparently did not reply, at least not in writing, to the Organization's inquiry. Thus, the Organization initiated a continuing claim on March 20, 1995 seeking eight hours' pay at the punitive rate on behalf of the former incumbent of the first shift Train Clerk position premised on the allegation that the work previously performed by the Clerk was henceforth performed by a Yardmaster.

In its initial denial of the claim, the Carrier asserted that the disputed work was now being performed by the day clerical staff at Saratoga Yard as well as the evening Clerk (formerly the day Clerk) at Kenwood Yard. The Carrier elaborated that it conducted a study showing that most of the clerical work performed by the first shift Kenwood Yard Train Clerk was generated by train operations occurring during the afternoon of the preceding day. This study, coupled with changes in train schedules, led the Carrier to conclude that a second shift Clerk could perform clerical work more efficiently than the first shift Clerk. The Carrier also opined that it wanted to balance the workload between the Kenwood Yard Clerk and Clerks at Saratoga Yard.

In May 1996, the Organization submitted a plethora of documents (that are incorporated into the instant record) showing that the first trick Kenwood Yardmaster performs a variety of clerical tasks that were formerly performed by the first shift Train Clerk. These tasks included, but were not limited to:

1. Compiling and transmitting train arrival/departure reports;
2. Compiling and transmitting train interchange reports;
3. Communicating with connecting railroads on interchange problems;
4. Compiling and transmitting interchange correctors;
5. Reporting interline traffic received;
6. Compiling and providing the train crew with the train profile;
7. Compiling and providing the train crew with hazardous cargo documentation;
8. Providing the train crew with highwide authority messages;
9. Updating waybills;
10. Updating yard inventory;
11. Performing train checks; and,
12. Maintaining clerical files.

The Organization also produced a memorandum showing that the Carrier was specifically aware that, after the abolishment of the Train Clerk position, the day shift Yardmaster developed hazardous cargo bills, checked car numbers, walked tracks to check cars and updated waybills. The Organization asserted that the Yardmaster was performing about 50 percent of the clerical work previously performed by the first shift Kenwood Yard Train Clerk. The Organization acknowledged that 25 percent of the clerical work was shifted to Saratoga Clerks and 25 percent of the work was now being performed by the new second shift Train Clerk.

To rebut the Organization's evidence, the Carrier raised, for the first time, an affirmative defense. The Carrier contended that the work being performed by the Yardmaster at Kenwood Yard during the day shift was work incidental to the primary duties of the Yardmaster and did not constitute a preponderance of the Yardmaster's aggregate duties. The Carrier specifically cited and relied on Rule 1(c) of the applicable Agreement.

Rule 1 of the Agreement reads, in relevant part, as follows:

"(a) The right to make and interpret contracts, rules, rates and working agreements for employees covered by this Agreement shall be vested in the regularly constituted committee of the Transportation Communications International Union.

(b) This contract shall govern the hours of service, rates of pay and working conditions for employees of the Carrier engaged in work in positions to which this agreement applies as provided in Rule 32, i.e. Clerks Grade I, II and III. Positions and/or clerical duties shall not be removed from the application of Rules of this Agreement except by agreement between the parties signatory hereto or as provided herein.

(c) Clerical duties covered by this Rule which may be incidental to the primary duties of an employee not covered by this Agreement, may be performed by such employee provided the performance of such duties does not involve the preponderance of the duties of the other employee not covered by this Agreement."

The Board notes that a number of procedural time limit arguments were raised and argued by the parties. While the Board carefully considered these procedural arguments, they do not deserve extended discussion. Suffice it to state, neither party violated the applicable time limits in the progression of this case on the property or to the Board.

After carefully perusing the evidence herein, the Board finds that the Organization met its burden of proving that beginning on or about January 20, 1995, the first shift Kenwood Yardmaster assumed about three hours of traditional clerical work formerly performed by the first shift Train Clerk at Kenwood Yard. The Board

also finds that about 50 percent of the work formerly performed by the first shift Train Clerk was shifted to clerical employees at Saratoga or is now being performed by the second shift Kenwood Yard Train Clerk. Last, the Board finds that a small quantum, about one hour of clerical work formerly performed by the first shift Train Clerk, can be performed by the Yardmaster pursuant to Rule 1(c) because the clerical work is incidental to the primary duties of the Yardmaster.

The voluminous documentation provided by the Organization definitively demonstrates that the Yardmaster develops hazardous material and dangerous commodity bills, updates waybills, checks tracks, creates train inventory and enters certain interchange data, which were tasks traditionally and historically performed by the first shift Train Clerk at Kenwood Yard. Third Division Award 32532 held that Rule 1 is a positions and work Scope Rule. Therefore, once the work had been assigned and performed by a clerical employee, the Carrier cannot transfer the work to a member of another craft without the Organization's concurrence unless the work is incidental to the Yardmaster's duties. These tasks are hardly incidental to the Yardmaster operating and overseeing the yard. The tasks are inherently clerical in nature. Put simply, they constitute an entire and distinct clerical task and so, they cannot be construed as incidental to the duties of an employee in another craft.

The Carrier relies on Third Division Awards 30918 and 31648. These two Awards are distinguishable from the factual circumstances herein. Award 30918 concerned the introduction of technology that resulted in the disappearance of clerical work. In Award 31648, the Yardmaster performed the disputed work before the Carrier abolished the clerical position. In this case, the Organization conclusively proved that the first shift Train Clerk performed the clerical tasks at issue before the abolishment of the position. In essence, the Organization proved that clerical work was shifted from a clerical employee to a Yardmaster coincident with the abolition of the first shift Kenwood Yard Train Clerk position.

As the Organization convincingly states, the Yardmaster is performing approximately 50 percent of the duties previously performed by the first shift Train Clerk. However, there are a few incidental tasks that the Yardmaster may perform per Rule 1(c).

To justify the reassignment of work to the Yardmaster under Rule 1(c), the work must be both incidental to the primary duties of the Yardmaster and not constitute a

preponderance of the Yardmaster's total duties. For example, the Yardmaster can routinely call up in the computer, by pressing a few keys on the computer keyboard, information and data entered into the computer by the clerical staff at Saratoga or entered the previous afternoon by the second shift Train Clerk. Therefore, the Yardmaster can call up and view car and waybill data on the computer because digesting such information is incidental to operating and overseeing the yard.

While the Carrier did not precisely describe the quantum of incidental work, it appears from the record that the Yardmaster's incidental duties consume about one hour per shift. Therefore, about three hours of traditional and historical clerical work, work not incidental to the Yardmaster's duties, is being performed by the first shift Yardmaster. As such, the Claimant herein, is entitled to three hours' pay at the pro rata rate for each shift so long as the violation continues. [See Third Division Awards 32180 and 32532.]

The Carrier argues that the Claimant is not entitled to any monetary recovery because the Claimant remains fully employed. We disagree. To reiterate, the Board finds that the Carrier violated Rule 1, a positions and work Scope Rule, by shifting clerical work to another craft. Under the Carrier's theory, it could transfer an unlimited amount of clerical work to other crafts so long as all current Clerks remain actively employed. Rule 1 specifically protects work. Thus, a monetary remedy is not only appropriate, but essential to enforce Rule 1.

### AWARD

Claim sustained in accordance with the Findings.

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**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 23rd day of August 1999.**