Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35923
Docket No. CL-35629
02-3-99-3-555

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12418) that:

(1) Carrier is in violation of the Clerical Agreement on and after January 3, 1998, when it implemented the "Customer Order Process System" (COPS) on SCL Seniority District 18 located at 6737 Southpoint Drive South, Jacksonville, Florida. The Carrier failed or refused to negotiate its implementation and increase the rate of pay to the rate of the other similar COPS positions on SCL Seniority District 9.

(2) Carrier shall now be required to compensate each Customer Service Representative in Seniority District 18A and 18B, the difference in the daily rate of $153.34 (the rate of pay on COPS positions in Seniority District 9) and $135.47 from January 3, 1998, and continuous until the rate is adjusted and theviolation stopped."

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.

The Claimants are several hundred clerical employees working in the Carrier's Jacksonville Customer Service Center. The claim has its roots in the January 29, 1991 Agreement for the consolidation and coordination of clerical functions into the Jacksonville Center. The Claimants' positions created thereby gained the title of Customer Service Representative ("CSR") and they were provided the TYMS (Terminal/Yard Management System) computer system to use in connection with their work. According to the bulletins that were posted to begin the filling of these positions, the duties were as follows:

> "Utilize various data and/or mechanical devices to verify and process arriving and departing cars/trains. Make patron notifications; process switching and other work orders. Handle and/or process EDI, waybills, demurrage, weight, and per diem information in accordance with rules and procedures. Handle and update consists, error corrections, and related functions. Maintain, prepare and distribute various reports, records, forms, statements, etc., as necessary. Handle related functions, operate data devices and equipment, and other general clerical duties as required."

A further consolidation Agreement in April 1997 combined clerical positions in Seniority District 18(c) with positions in Seniority District 9. The revenue accounting focus of these positions resulted in their being titled as Customer Service Representative - Revenue ("CSR-R"). The CSR-Rs were also provided a new computer system known as Customer Order Processing System ("COPS") for use in performing their work. Following the transaction, the CSR-Rs were assigned the following duties (we have broken down the descriptive paragraph into separate, numbered sentences for ease of later reference):

> "1. Responsible for preparing and handling shipping instructions received from our customers, customer's agents and interline carriers, including the processing and changing of data.

2. Performs all other duties associated with freight and billing, collection of charges due CSXT and maintenance of all associated tiles.

3. Works and clears suspense in waybilling, settlement, rating and collection process.

4. Maintains customer accounts, collects freight charges, researches and resolves billing and interline settlement disputes.

5. Communicates internally and externally to perform associated and administrative duties as required.

6. Enters and maintains data in computer systems, both internally and externally.

7. Jdentities customer specific prices and enters and maintains pricing data and associated information in computer systems as required.

8. Other duties as may be required and assigned by proper authority."

The parties also negotiated a higher pay rate for the new CSR-R position. At the time the instant claim arose, subsequent rate increases had progressed to a rate of $154.34 for the CSR-R position and $135.47 for the CSR, a difference of $17.87 per day.

The record developed by the parties on the property is unique in that the material facts aregenerated almost entirely by assertions of the Organization that were unrefuted by the Carrier.

On January 3, 1998, the Carrier began extending the use of the COPS system to CSRs in the Jacksonville Customer Service Center and also undertook steps to discontinue the availability of TYMS. The thrust of the claim, filed March 3, 1998, was that the COPS system was implemented without any negotiation and without any pay increase for CSRs to the rate of CSR - Rs. The statement of facts that accompanied the statement of claim alleged that CSRs ". . . are performing the identical duties of the higher rated positions in SCL Seniority District No 9."

The Carrier's March 16, 1998 response was a general denial. It found the claim to be ". . . ambiguous, excessive and lacking merit." However, the response provided no meaningful explanation about how or in what manner the claim was defective.

The Organization's appeal dated July 1, 1998 noted that an apparently retroactive extension of time limits had been granted to allow it to appeal the claim. It went on to state that ". . . CSR Clerks are being required to perform duties comparable to those of higher-rated 'COPS' positions."

By letter dated July 14, 1998, the Organization presented several more similar, if not identical, claims. Its letter included as attachments a listing of the claims on forms that noted they were based on controlling Rules 27, 28, 30 and 32. The letter also noted an agreement to hold the new claims in abeyance pending an Award on the instant claim. Significantly, it noted the existence of a verbal agreement whereby either party could use any correspondence exchanged during the handling of the claims on the property. Until the Organization wrote this letter, no specific Rules had been cited; nor had the Carrier raised any objection to the Organization's failure to cite any specific Rules to this point.

By letter dated August 11, 1998, the Carrier confirmed the existence of the agreement to hold the new claims in abeyance. The letter did not refute the existence of the agreement regarding use of any correspondence, nor did it raise any objection that the Organization had, as yet, still failed to cite any specific Rules violated.

The parties conferenced the claim on November 5, 1998. The Carrier issued a report showing it again declined the claim. No meaningful explanation of its reasons was provided. Instead, the form listed only the following:

"Excessive penalty
No Rules cited
Rates in COPS negotiated - No support of violation of Agreement."

The Organization sent the Carrier a supplemental letter on March 10, 1999. The five-page, single-spaced letter contained a detailed recitation of the consolidation/ coordination events that led up to the claim. It also provided detailed descriptions of the duties of the various positions involved. On page three, the letter made three generalized assertions to the effect that the new COPS system required the Claimants

to perform the duties assigned to the higher-paid CSR-R position. On page four, the Organization transitioned from general assertions to specific assertions about the new duties then being performed by the Claimants. In doing so, it quoted language from the bulletined duties of the CSR-R we listed earlier with numbered sentences. Specifically, the Organization asserted most of sentence No. 1 and explained how the Claimants were performing those duties. With respect to this assertion, we note that sentence No. 1 refers to both ". . . preparing and handling.. ." whereas the Organization's assertion references only ". . . handling.. . ."

In similar manner, the Organization went on to make a specific assertion that the Claimants were performing the duties described in subsequent sentences by quoting the actual words of the respective sentence. The assertion was accompanied by an explanation of how the Claimants were performing the quoted words of the sentence. This pattern of specific assertions continued through sentence No. 6. It did not make a similar specific assertion that the Claimants were performing the duties described in sentence No. 7, which relate to identifying customer specific prices and the entry as well as maintenance of pricing data in computer systems.

The Organization's supplemental letter also asserted that Rule 30 requires that employees temporarily or permanently assigned to higher-rated positions shall receive the higher rate. It was the Organization's stated position that the duties now performed by CSRs ". . . mirror . . ." the duties of the higher rated CSR-Rs.

Instead of refuting any of the detailed assertions contained in the Organization's supplemental letter, by letter dated April 1, 1999, the Carrier took exception to considering the letter as part of the on-property record. The Carrier did so on the grounds that it was late; the Carrier contended the record was "considered closed" with the declination of the claim by the highest designated officer. The Carrier did go on to assert that, per Rule 34, the Carrier could not change the rates of new positions without negotiations between the parties, thereby making the claim handling forum an improper means to change rates.

The final correspondence, which is from the Organization dated April 20, 1999, refutes the Carrier's assertion that the on-property record was closed before its March 10, 1999 supplemental letter was exchanged. It also warned the Carrier of the risks associated with disregarding the content of the supplemental letter.

On July 19, 1999, the Organization tiled its Notice of Intent to tile an Ex Parte Submission with the Board. Thus, has the claim and the on-property record come before us.

Certain observations arewarranted at this point about two extremely well-settled facets of railroad arbitration. First, the Carrier was plainly wrong about the closure of the on-property record. The Organization correctly pointed out that the record remains open until the date of filing a Notice of Intent to tile an Ex Parte Submission with the Board. Therefore, the specific and detailed assertions contained in the Organization's March 10, 1999 supplemental letter are properly considered part of the on-property record. The Carrier had more than four months thereafter to refute those assertions, but it did not do so.

Second, unrefuted assertions of material fact become established fact. Such unrefuted assertions are, for purposes of claim handling, facts admitted or conceded. They are sufficient, by themselves, to prove the requisite elements of a claim; no separate evidence is required.

Because of the unrefuted assertions in this record, we are compelled to find that the Claimants have been assigned to perform certain elements of the higher rated positions. The scope of this finding, however, requires careful explanation. As the on-property record developed, we noted that the assertions about the new work performed underwent evolutionary change. What began as an assertion of performing identical work in the original claim changed to comparable work at the appeal stage. In the Organization's supplemental letter of March 10, 1999, the specific and detailed assertions narrowed the duties even further. Only part of the duties described in sentence No. 1 and none of the duties in sentence No. 7 were asserted. It is these specific and detailed assertions, as they exist at the end of the on-property record development, that must prevail over the earlier and general assertions. Thus, we have before us a record that establishes only that CSRs have been assigned some, but less than all, of the duties of the higher rated CSR-R position. We do not have a claim of equal pay for equal work before us.

Given the status of this record, our authority is limited. It is well settled that we have no authority to determine a rate of pay for what amounts to a new position that is not substantially identical to established positions. That determination must come from negotiations between the parties. Indeed, the original claim recognized this point by

alleging that the Carrier had failed to negotiate the implementation of the COPS system. Moreover, in its supplemental letter of March 10, 1999, the Organization again acknowledged this point when it said, "The Organization is fully cognizant of the fact that rates of pay are subject to negotiations." Finally, the Carrier also conceded its obligation to negotiate in its April 1, 1999 letter. Our authority, therefore, is limited to noting the violation arising from the failure to negotiate. We cannot extend any monetary remedy to the Claimants.

The Organization also argues that employees assigned to higher rated positions are not required to perform all the duties of the higher rated position to be entitled to pay at the higher rate. Typical of the numerous Awards cited by the Organization in support of this precedent are Third Division Awards 11981, 19575 and 25086.

We do not quarrel with the applicability of the foregoing precedent. However, a review of the Awards confirms that it is the underlying facts of each case that determine whether the precedent applies. Essentially three situations emerge from the Awards: First, where a lower rated employee has been assigned to fill a higher rated position and performs some of the work. That is not the case here. It is undisputed that the instant Claimants have not actually been assigned to higher rated positions. Second, where a higher rated position has been abolished and recreated with the same duties but at a lower rate. That, too, is not the case here. The Claimants' positions have not been abolished and recreated, nor do the Claimants perform all of the same duties as the higher rated positions. Finally, where a lower rated employee (or group of employees) has been assigned to perform higher rated work without actually being assigned to the higher rated position. It is this third aspect that requires our careful analysis.

In its initial denial of the claim, the Carrier asserted there was no evidence the Claimants were performing any work that would justify the rate increase requested. As a result, for the Organization to successfully establish entitlement to the higher rate of pay, it is mandatory that the record establish two fact sets: First, the higher rated work that forms the basis for the higher rate of pay must be identified with clarity and precision. Second, the evidence must show that the lower rated employees perform the higher rated work.

The hulk of the factual record in this dispute results from assertions, unrefuted by the Carrier, that use terminology from the CSR-R job description. Job description language, however, is notoriously broad and imprecise because it seeks to embrace a

maximum number of duties while using a minimum amount of verbiage. The job description terminology present in this record is consistent with the foregoing observation.

Compounding the difficulty of the Board's analytical task is the ambiguity associated with some of the terminology used in the Organization's assertions. For example, to make its assertion about the duties expressed in sentence Nos. 3 and 4 of the CSR-R job description, the Organization began, "CSC Reps are also involved in working and clearing suspense in waybilling,. . ." (Emphasis added) Involvement can take many forms that vary significantly in degree. For example, the person who does extensive research and analysis in preparing a document is involved with it; but so is the Clerk who merely tiles it away.

The Organization's Submission identities the two key aspects of the claim that form its basis: The use of the COPS computer system and the performance ofwaybilling functions. It said, on page 7, "The claim explained in detail that CSRs from [Seniority Districts] 18A and 18B were now accomplishing their work through COPS and were mirroring the work performed by their higher-rated counterparts in District 9, particularly waybilling functions." Waybilling is also emphasized in the original claim by means of underscoring and bold typeface.

The use of COPS is readily addressed. COPS is a computer system. TYMS was also a computer system. Both are tools used in the performance of work. While a change of tools may modify the manner in which work is performed, the change of tools does not automatically change the essential nature of the work performed. Stated otherwise, performing work differently is not the same as performing different work. On this record, there is no proper basis for concluding that the use of COPS resulted in the Claimants performing higher rated work.

Resolving the significance ofperformingwaybilling functions requires a step back in history. Prior to the 1997coordination, there were four Seniority Districts: 9, 18A, 18B, and 18C. District 9 encompassed the higher rated revenue accounting functions. The positions had a daily rate of $150.00.

District 18C encompassed waybillingfunctions, among other things, and the work was lower rated. Incumbents had a daily rate of $130.90.

Districts 18A and 18B performed other clerical functions that also carried the lower rate. Incumbents received a daily rate of $130.90.

By Agreement dated April 16, 1997, the parties consolidated 238 former positions in Districts 9 and 18C into 218 positions of which 170 assumed the title of CSR-R at a daily pay rate of $145.37. It would appear this hybrid rate resulted from mixing the lower rated waybilling work with the higher rated revenue accounting work.

The history and results of the April 16, 1997 Agreement strongly suggest that waybilling work is not work warranting a higher rate of pay. This observation is corroborated by the job description of the lower rated CSR employees who remained in Seniority District 18B at the daily rate of $130.90. Their description contains this sentence: "Handle and/or process EDI, wavbills, demurrage,. . . in accordance with rules and procedures." (Emphasis added) The inescapable conclusion that emerges, therefore, is that the performance of waybilling functions is not higher rated work. Rather, it appears, from this record, that it is lower rated work common to both CSR and CSR-R positions.

Although the record herein does not adequately identify, with the requisite precision and clarity, what the higher rated work associated with the CSR-R position is, a clue may be present in Side Letter No. 3 to the April 16, 1997 Agreement. The letter refers to the establishment of a rate school course to ". . . raise the skill level . . ." of employees. This suggests that the higher rated work is the pricing work encompassed within sentence No. 7 of the CSR-R job description. If true, it is undisputed on this record that the Claimants do not perform such work.

In accordance with the foregoing, given the state of this record, we are unable to identify with the requisite clarity and precision the nature of the higher rated work that warrants the higher CSR-R rate of pay, nor are we able to conclude that the Claimants are performing such higher rated work without indulging in an impermissible degree of speculation.

Therefore, we must deny the claim.

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 22nd day of January, 2002.

LABOR MEMBER'S DISSENT
TO THIRD DIVISION AWARD NO. 35923 (DOCKET CL-35629)
(REFEREE G. E. WALLIN)

A review of the record of this dispute reveals that beginning on January 3, 1998, the Carrier implemented the Customer Order Process referred to as COPS on SCL Seniority District 18 wherein the Carrier assigned higher rated duties of Customer Service Representatives (hereinafter referred IO as CSR) in District No. 9 ($152.25) per day io CSR positions in District 18A and 18B who were paid ($135.47) per day in violation of Rule 30.

The unrefuted facts indicate that concurrent with the implernenrarion of COPS in Districts 18A and 18B many of the duties of those employees became identical io the duties of the higher rated **employees** in District 9.

The Majority correctly outlined the dispute and its chronological handling. Page five of the Award details the various higher rated duties asserted by TCU to have been done by the lower rated jobs in violation of Rule 30. It next acknowledges that the Carrier never refuted any of the Organization's detailed assertions.

On page six it then concludes;

> **"Second, unrefured assertions of material fact became esrablished fact. Such unrefuted asserrions are, for purposes of claim handling, facts admitted or conceded. Thev are sufficient. by themselves, to prove rhe requisite elements of a claim; no separate evidence** is **required."** (Underlining our emphasis)

It next states:

> **"Because of the unrefured assertions in this record, we are compelled to find that rhe Claimants have been assigned IO perform certain elements of hieher raredpositions..."** (Underlining our emphasis)

Based upon the aforementioned language logic would suggest that the claim would be sustained as presented since the Carrier never refuted the fact that it violated Rule 30.

At this point, however, the Majority loses focus and misses rhe entire point of the claim and concludes at the bottom of page six the following:

> "...Thus, we have before us a record that establishes only that CSRs have been assigned some, but less than all, of the duties of the higher rated CSR-R position. We do not have a claim of equal pay for equal work before us."

TCU consistently argued that the employees holding the lower rated positions were entitled to the higher rate until such rime as rhe parties negotiate new rates for the subject positions. It further emphasized rhar there is no requirement upon the Union to prove that the lower rated employees did all of the higher rated work to qualify for the higher rate of pay. It also offered several Awards which stand for rhe proposition that if lower rated employees have been assigned to perform higher rated work without actually being assigned to the higher rated position they are entitled to the higher rate.

On page seven of the Award the Majority discusses the aforementioned proposition and concludes by staring:

"We do nor quarrel with the applicability of the foregoing precedent...."

AI rhis point of the Award rhe wind seems IO have shifted and the Majority has regained its balance and is headed towards a "sustained as presenred claim." Unfortunately, that balance does not last long as the Majority turns to speculation and offers possible "de novo"/inadmissable arguments in behalf of the Carrier, none of which were even suggested by ir.

For example, on page nine of the Award, the Majority states:

"...It would appear this hybrid rate resulted..."

or

"The history and results of tbe April 16, 1997 Agreement strongly suggest...'

or

"-Rather, it appears, from this record,..."

A clear reading of the Award leads to the inescapable conclusion that the Majority first derermined rhat rhe Carrier never refuted TCU's arguments that the Claimants were doing higher rated work. It further ruled that precedential Awards have consistently stared that unrefuted assertions become established facts and no other evidence is necessary to prove a grievance. Yet, in this instance after making those two conclusions it decides IO invent arguments never presented by the Carrier which has the net effect of releasing the Carrier from its monetary obligation to the Claimants with nothing more than the admonition it should have negotiated with TCU.

In closing, we concur with the Majority dererminarion that 1) the Carrier was incorrect about the closure of the on-property record, and 2) TCU was correct that the record remains open unril the date of filing a Notice of Intent io file an Ex Parte submission with the Board; and 3) rhe lower rared Claimants were performing higher rated work, and 4) the Carrier failed IO negotiate with TCU. However, we disagree with rhe Majority conclusion which denies compensation to the Claimants. The Majority Decision almost got it right before it became involved in revisionisr claim handling. The inventive specularion has resulted in nothing more than a travesty to the Collective Bargaining Agreement, precedenrial Awards and justice IO the employees. We rherefore, saenuously Dissenr IO rhe Award's failure IO prorecr the integrity of the Agreement.

Respectfully submitted,

William R. Miller
TCU Labor Member, NRAB
January 22, 2002

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 35923; DOCKET CL-35629
(Referee Gerald E. Wallin)

The Majority Findings of the Board are set forth in such a clear and convincing manner that it does not need this Response to bolster its efficacy. There is nothing in the Labor Member's Dissent that even begins to undermine the correctness of the Award.

There are, however, two points that should be made. First, we wish to leave no doubt that&the arguments presented in the Labor Member's Dissent were clearly and forcefully presented to the Board and rejected.

Second, with respect to the Organization's contention that the Carrier's denial was not sufficient to rebut the points raised by the Organization, the Board here came to the same conclusion as that expressed by the Board in Fourth Division Award 4753:

> **". . . [T]he Board is confronted herein with a failure on the part of the Carrier to rebut an assertion that appears clear and obvious from the record to be false. The Board cannot under the instant circumstances, where the Agreement and record are clear as to no violation, hold the Carrier to be in violation simply because its officers were deficient in a full on-property record of rebuttal and refutation. The Board therefore finds no violation in its close examination of this record."**

When all is said and done, the Board here concluded that the burden of proof resting upon the Organization was not met. Such conclusion is not novel.

Michael C. Lesnik
Michael C. Lesnik

Martin W. Fingerhut
Martin W. Fingerhut

P V Varga
Paul V. Varga

January 22, 2002