

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 36937  
Docket No. CL-36973  
04-3-01-3-614

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

**PARTIES TO DISPUTE:** (Transportation Communications International Union  
(Delaware and Hudson Railway Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Organization (GL-12775)  
that:

- D) Claim of the System Committee of the TCU (DHO1/005) in behalf of Karen Higgins.
- (a) Carrier violated the Clerks' Rules Agreement effective September 26, 1990, as revised, particularly Rule 1, 5, 13, and other rules, when it permitted, required, allowed and assigned TCU covered agreement Secretarial and Clerical duties to Strangers of the D & H/TCU Agreement.
- (b) On February 5 and 6, 2001, the Carrier allowed Strangers of the Agreement to take dictation for the Investigation/Hearing of D & H employees, R. Dube and G. Sheehan, held at the Holiday Inn, located in Binghamton, NY. The Investigation/Hearing began at 9:00 a.m., Monday, February 5, 2001 and ending approximately 5:00 p.m., Tuesday, February 6, 2001.
- (c) Following the Investigation/Hearing the strangers were allowed to transcribe, type up and make copies for distribution of the transcript to the interested D&H parties;
- (d) Claimant K. Higgins was qualified, available, and should have been used to perform this work;

- (e) Claimant K. Higgins should now be allowed eight (8) hours pay at the punitive rate of her position, for each date, February 5 and 6, 2001, the date(s) of the Investigation/Hearing and an additional sixteen(16)hours pay at the punitive rate of her position for the time it took the Strangers to transcribe, type, make copies of and mail the investigation to the interested D&H parties. The amount being claimed should be proportionately increased in the event that time involved was *greater than what is being claimed*;
- (f) This claim has been presented in accordance with Rule 28-2, is in order and should be allowed.

**II Claim of the District Protective Committee that:**

- (a) The Carrier violated the Clerks' Rules Agreement effective September 26, 1990, as revised, particularly Rule 1, 5, 13, and other rules, when it permitted, required, allowed & assigned TCU covered agreement Secretarial and Clerical duties to Strangers of the D&H/TCU Agreement;
- (b) On February 7, 2001, the Carrier allowed Strangers of the Agreement to take dictation for the Investigation/Hearing of D&H employees, G. Carachilo J. Burns and S. Loomis, held at Hampton Inn, located in Scranton, PA.
- (c) Following the Investigation/Hearing the strangers were allowed to transcribe, type up and make copies for distribution of the transcript to the interested D&H parties;
- (d) Claimant K. Higgins was qualified, available and should have been used to perform this work;
- (e) Claimant K. Higgins should now be allowed eight (8) hours pay at the punitive rate of her position, the date of the Investigation/Hearing and an additional eight (8) hours pay at the punitive rate of her position for the time it took the Strangers to transcribe, type, make copies of and mail the

investigation to the interested D&H parties. The amount being claimed should be proportionately increased in the event that time involved was greater than what is being claimed;

- (f) This claim has been presented in accordance with Rule 28-2, is in order 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.

On March 12, 2001, the Organization initiated two claims charging that the Carrier violated the applicable Scope Rule by using employees not covered by the Clerical Agreement to take dictation, transcribe, copy and distribute transcripts of disciplinary investigations.

In the first claim, the Organization alleges that the work of taking dictation for a two-day disciplinary investigation held on February 5 and 6, 2001, at the Binghamton, New York, Holiday Inn should have been assigned to the Claimant, a Stenographer/Clerk.

In the second claim, the Organization alleges that the Carrier should have assigned the Claimant to take the dictation of a disciplinary investigation held at the Hampton Inn in Scranton, Pennsylvania, on February 7, 2001.

For each of the three days in question, the Claimant seeks eight hours of pay at the over-time rate.

In a statement dated August 2, 2001, the Claimant attested that she took dictation, performed transcription, and distributed copies of investigation transcripts on many occasions. More specifically, the Claimant wrote that she has transcribed 104 disciplinary investigations.

On the property and in its Submission, the Carrier declared that it has used both clerical employees and court reporters (outside contractors) to transcribe disciplinary investigations. The Carrier further asserted that it assigns the work court reporters when the disciplinary investigation is complicated and time consuming.

Rule 1(b) reads:

**"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."**

Because Rule 1(b) is a "positions and work" Scope Rule, work performed by clerical employees is preserved to employees covered by the Agreement absent an agreement between the Carrier and the Organization. (See Third Division Awards 33444 and 35768.)

The Carrier's contention that court reporters have sometimes transcribed disciplinary investigations is an affirmative defense. The Carrier asserts that transcription work is shared work performed sometimes by clerical employees and at other times by persons not covered by the Agreement. To sustain its affirmative defense the Carrier bears the burden to prove that court reporters performed a quantitative share of the disputed work.

On the property, the Carrier merely proffered the bare assertion that it had used court reporters in the past to transcribe investigations. The Carrier did not provide any reliable or probative evidence to substantiate its bare assertion. If the Carrier's assertion is accurate, it could have easily marshaled evidence to prove its assertion. The only reliable evidence in this particular record is the Claimant's

August 2, 2001 statement which specifies, in great detail, that she performed transcription work.

It may be, as the Carrier avers, that court reporters and Agreement covered stenographers have historically transcribed disciplinary investigations. If the work is shared work, the Carrier did not come forward with evidence showing the quantum of work performed by strangers to the Agreement. Absent such evidence, it is impossible for the Board to discern the proportion (or percentage) of the transcription work falling within Rule 1(b). Similarly, we cannot ascertain the proportion of work that might be properly assigned to court reporters.

In conclusion, the Board finds, within the narrow confines of this particular record, inadequate evidence to support the Carrier's affirmative defense that both court reporters and employees covered by the Agreement have performed the transcription work.

Because the Carrier failed to substantiate its affirmative defense, the Organization proved that the Carrier violated Rule 1(b). However, the requested remedy is excessive. The Claimant is entitled to eight hours' pay at the straight time rate for each of the three claim dates.

#### **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 22nd day of March 2004.**