Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37770
Docket No. CL-38324
06-3-04-3-261

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Union (GL-13043) that:

1. Carrier violated the Scope Rule in the Clerk's Working Agreement on the dates indicated in Ms. Furmon's letter dated May 30, 2003, when it allowed, caused, or permitted someone other than those covered under the Scope of the TCU Agreement to perform work that bad always been done by Clerks at Fayetteville, North Carolina (Milan Yard), until the first-shift Clerk job was abolished.

2. Carrier shall compensate the Senior Available 'Clerk, N. A. Ray, ID159187, in the amount of two hours and forty minutes (2' 40") at the overtime rate account the above violations."

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 instant dispute is another in a long line of Scope Rule cases that allege the Carrier violates the Agreement when it uses non-clerical personnel to transport train and engine crew members within rail yards as well as between on-duty and off-duty points. The case before us arose under the former Seaboard Coast Line Agreement after a day-shift clerical position was abolished at Milan Yard. The claim cited some 13 examples when operating crew members were transported by strangers to the Agreement during day-shift hours between March 5 and 30, 2003.

The principles that govern the resolution of these disputes are intricate and thus a careful analysis of the evidence is required. Although prior Awards have found in favor of both parties, it must be remembered that each dispute is decided on its own record. Because the record in any given case may be more or less well-developed by the parties on the property, the results can vary considerably. Prior Awards, therefore, must be read very carefully before cloaking them with significant precedent value. If it is not readily apparent from the text of an Award that the record from which it emerged was fully developed, then the precedent value of the Award is questionable. An Award is not on point if it does not deal with all of the key issues bearing on the dispute.

The instant parties now have a "positions or work" Scope Rule that was adopted in their 1981 round of collective bargaining. In that same round of bargaining, however, they agreed that the new "positions or work" Rule would be limited on a location by location basis. Indeed, by this May 7, 1981 Agreement, the new Scope Rule could not even be referenced in the claim handling process if, as of May 16, 1981 at each affected location, any of the disputed work was presently being performed by outside parties or employees of other crafts. If such a shared work arrangement existed at a given location on that critical date, then the former general Scope Rule of the parties' January 1, 1975 Agreement controlled at the individual location. That general Scope Rule did not explicitly reserve crew hauling to clerical employees. Moreover, the applicable line of precedent that applied to the general Scope Rule said that, in the absence of explicit language reserving work, the

Organization bad to satisfy the burden of proof to show exclusive past performance at the individual location.

Award 4 of Public Law Board No. 6409 describes in detail the history of the transition from the general Scope Rule to the positions or work Scope Role. It also carefully traces the solid line of authority that emerged from the Awards of veteran Referees. Accordingly, no attempt will be made here to restate the content of that Award. Suffice to say the line of authority established that each crew hauling controversy must be analyzed and decided upon the facts of the specific work practices at each individual location as of the critical date, which is May 16, 1981.

Thus, the threshold issue for our determination is which Scope Rule applies to the instant dispute. The Organization asserted that clerical employees have always performed the hauling of crews at Fayetteville. The Carrier, to the contrary, refuted that assertion and counter-asserted that clerical employees never performed the work exclusively but,, rather, it has been shared with contractors as well as other craft employees and Supervisors. With the threshold Scope Rule issue thus pinned between diametrically opposed assertions, it became the Organization's burden of proof to provide probative evidence demonstrating, at least to a prima facie extent, what the work practice was at Fayetteville as of May 16, 1981.

On this record, the Organization did provide extensive documentation showing that clerical employees have performed crew hauling at Fayetteville in the years leading up to the claim dates. However, the documentation does not reach as far back as the critical date. Thus, the Organization has not succeeded in establishing that the disputed work was protected by the "positions or work" Scope Rule in the instant dispute. Nor has it proven exclusive past performance prior to the critical date under the general Scope Rule.

Given the foregoing discussion, we find that the Organization's burden of proof to establish an Agreement violation has not been satisfied. Accordingly, 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 25th day of April 2006.

LABOR MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 37770, DOCKET CL-38324
(Referee G. E. Wallin)

The Major-ity has erred in its reasoning and, therefore, a Dissent is in order. The subject dispute involved the Carrier's violation of the parties "position or work" Scope Rule when it used non-clerical personnel to transport train and engine crew members within the Milan Yard, Fayetteville, North Carolina, as well as between on-duty and off-duty points.

In prior Award 37767 involving the same parties, same location and same Referee the Majority determined the following:

> "Our review of the record developed on the property reveals that the parties joined the customary Scope Rule coverage and reservation of work issues that are normally seen in claims involving the contracting out of work."

After determining in Award 37767 the work was covered work protected by the parties "position or work" Scope Rule the Majority "flip flops" and decides the work is not covered.

Absent the obvious fact that the instant Award is illogical and flawed we would point out that when the Award discusses the "position or work" Scope Rule compared to the former general Scope Rule it recognizes that specific work practices at individual locations is the measurement for proof of owner-ship of work and there is nor requirement to prove system-wide exclusivity. For example the Majority stated:

> "..Organization had to satisfy the burden of proof.. . at the individual location.. ."

It again stated:

> "..controversy must be analyzed and decided upon the facts of the specific work practices at each individual location.. ."

Simply put that even though the Majority erred in deciding ownership of the disputed work in the instate case it least it got it right that the parties Scope Rule is a "position or work" Rule.

The record of the case is clear that the Carrier violated the Agreement and sold a bogus argument to the Majority. Therefore, I strenuously Dissent to the' Award which is erroneous.

Respectfully submitted,

William R. Miller

William R. Miller
TCU Labor Member, NRAB
April 26, 2006