

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39528
Docket No. CL-40256
09-3-NRAB-00003-080001

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Springfield Terminal Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization that:

- 1) Carrier violated the terms of the Agreement between Springfield Terminal Railway and TCU, in particular, Rule 23 – Meal Period, when it did not allow Claimant Bruce Baldwin a twenty (20) minute period in which to eat lunch as per the Agreement.

The Carrier shall compensate Claimant Baldwin one (1) hour overtime pay for each and every day worked, beginning February 13, 2006, and continuing until this issue is resolved.

- 2) Carrier violated the terms of the Agreement between Springfield Terminal Railway and TCU, in particular, Rule 1 – Scope when it allowed Managers to perform work which falls under the scope of the Agreement.

The Carrier shall now pay Claimant Baldwin one (1) day pay for each day the violation continues.

- 3) Carrier violated the terms of the Agreement between Springfield Terminal Railway and TCU, in particular Rules 24.2, 27.2, 24 and 26 when it combined two clerical positions

into one position and did not attach the highest rate to the position.

The Carrier shall now compensate Claimant Baldwin the difference between what he is currently earning and the higher rate of the position abolished.”

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 Organization filed the three instant claims on behalf of Claimant B. Baldwin in the wake of the Carrier’s decision to abolish two Clerical positions in the Mechanical Department, and then replace them with one new position covering about the same class of work. In the instant claims, the Organization alleges that the Carrier violated the parties’ Agreement by improperly granting the new position a one-hour unpaid lunch, instead of the 20-minute lunch period without pay reduction that was associated with the abolished positions; by improperly assigning certain elements of the work associated with the abolished positions to managers, rather than to the new position; and by improperly fixing the pay rate for the new position at the lower, rather than the higher, of the pay rates associated with the abolished positions.

The Organization initially contends that as to the first of these three claims, the Carrier improperly distinguishes between Mechanical Department Clerks and Transportation Department Clerks. The Organization asserts that the parties’

Agreement does not distinguish between departments. The Organization argues that the Carrier is one company, and the Agreement is written for and covers all Clerical employees. The Organization points to the Claimant's undisputed statement that the Transportation Department Clerks work at his location and customarily perform some of his duties.

The Organization further maintains that the Carrier is incorrect in contending that the Agreement does not support payment of one hour of overtime. The Organization emphasizes that Rule 23.2 clearly allows for overtime compensation when the 20-minute break is not allowed.

Turning to the second of the three claims at issue, the Organization contends that the Carrier improperly gave some work from the abolished Clerical positions to management employees who are not covered under the Agreement, in violation of the Scope Rule. The Organization points out that the Carrier does not dispute that the work at issue previously was performed by Chief Clerk Position MD-1 prior to its abolishment.

Addressing the Carrier's argument that similar work also was performed by managers and employees in other crafts, the Organization asserts that the Agreement's Scope Rule is not a "general" Scope Rule, but rather a "positions and work" Scope Rule. The Organization argues that the doctrine of exclusivity therefore does not come into play. The Organization emphasizes that it is not claiming that the Clerical employees have an exclusive right to the work in question, just that they have the right under the Agreement to continue to perform the work that they always have performed.

The Organization then argues that Boards continually have ruled that when work is assigned to a position under a "position and work" Scope Rule, such work cannot unilaterally be taken away by the Carrier. Moreover, many Boards have ruled that where a "position and work" Scope Rule is in place, an organization must prove only that the disputed work was performed by Clerical employees. The Organization asserts that the Carrier admits the work in question that is being done by managerial employees previously was performed by Clerks.

The Organization maintains that the Carrier did not negotiate with it to remove the work from under the Agreement, nor was there an elimination of the work. The Organization insists that because there is no dispute that the work at issue was assigned to Clerical employees, and because Rule 1 is a "positions and work" Scope Rule, the work in question cannot be transferred or removed from the Clerical employees to whom it was assigned without an explicit agreement providing for such action. The Organization further asserts that various Awards have held that "positions and work" Scope Rules constitute a defensive shield to protect against the unilateral distribution of the work of Clerical positions to others not covered by a Clerical Agreement. The Organization contends that it, therefore, does not have to meet the exclusivity test in order to prohibit the removal of work from Clerical employees.

The Organization then argues that there is no merit to the Carrier's assertion that the Claimant has no right to Clerical work in Billerica. The Organization emphasizes that it is well accepted that the Organization has the right to name the Claimant of its choice. Moreover, it is illogical to argue that the Claimant was not damaged by the Carrier's actions when many elements of the abolished position were transferred to East Deerfield and assigned to the combined position that the Claimant bid in.

With regard to the third of the three claims at issue, the Organization points out that the Carrier abolished two Clerical positions, then gave some of the work to managerial employees while giving the remainder of the work to the newly established position. The Organization argues that in establishing the new position, the Carrier improperly assigned it the lower rate of the pay associated with the two abolished positions, instead of the higher rate of pay. The Organization asserts that the Carrier did not negotiate with the Organization concerning the rate of pay for the new position. The Organization points to prior Awards holding that the pay rate of a newly established position should be in conformity with that of an abolished, identical position.

The Organization maintains that based on the Carrier's actions, the Claimant lost compensation, and he should be made whole for his loss. The Organization ultimately contends that the instant claims should be sustained in their entirety.

The Carrier initially contends that the Claimant bid on and was awarded the new clerical position. The Carrier asserts that the rates of pay for all Clerical positions are fixed by the Agreement, and the rate of pay for the Office Clerk position that the Claimant bid on was \$18.70. The Carrier argues that the Claimant is not entitled to a higher rate of pay than what is listed in the Agreement, and the established rate of pay for this position was not discontinued or abolished.

The Carrier points to Rule 24.3, which provides that positions, and not employees, are rated, and that rates will not be transferred from one position to another. The Carrier insists that there is no provision in the Agreement that requires the rate of pay for the Office Clerk position in question to be adjusted to a different rate. The Carrier asserts that the Chief Clerk rate of pay is not warranted, in that the Claimant's position was not combined with the former Chief Clerk position at Billerica and the Claimant has not been expected to perform any of former Chief Clerk Martin's Billerica duties. The Carrier additionally contends that the mere existence of more than one rate of pay in the Agreement does not, by itself, require the Carrier to adjust the current rate that the Claimant is receiving for the position that he holds. The Carrier insists that the Agreement simply does not require or otherwise mandate the adjustment that the Organization is seeking.

With regard to the claim relating to the Claimant's lunch break, the Carrier contends that the Claimant's lunch break complies with the terms and conditions of the Agreement. The Carrier asserts that the Claimant is the only Mechanical Department Clerk working in East Deerfield, and the Claimant's primary Mechanical Department clerical duties are covered on one shift. The Carrier emphasizes that all other Clerks located in East Deerfield work for the Transportation Department.

The Carrier insists that Transportation Department Clerks have no relevance to the instant dispute. The Carrier points out that Transportation Department Clerks are not qualified to perform the duties of Mechanical Department Clerks. Moreover, to adequately support the Transportation Department, the work performed by Transportation Department Clerks is covered on more than one shift; the same degree of coverage is not required in the Mechanical Department. The Carrier therefore contends that East Deerfield is a location "where one shift is worked," so the Carrier contractually may provide the Claimant with "not less than

thirty minutes nor more than one hour” for lunch. The Carrier points out that the purpose of allowing only a 20-minute paid lunch where more than one shift is worked is so that the employees’ consecutive shifts do not overlap. The Carrier argues that where only one shift is worked, as in the Mechanical Department, there obviously is no chance of overlapping shifts.

The Carrier then asserts that even if Rule 23 had been violated, the Claimant still would not be entitled to one hour of overtime for every day, as claimed. The Carrier contends that the Agreement does not support the payment of one hour of overtime. The Claimant has not performed any overtime service that would warrant such a payment. The Carrier emphasizes that the Claimant has been permitted to take a one-hour meal period and has been afforded a 40-hour workweek, in accordance with the Agreement. The Carrier contends that the Claimant does not provide any service to the Carrier during his one-hour, unpaid lunch, and that hour is his own time. The Carrier asserts that the Claimant is not entitled to any remedy for this particular claim.

Turning to the Organization’s allegation that the Scope Rule was violated because many of the duties of former Chief Clerk Martin are being performed by so-called “managers,” the Carrier contends that the Claimant has no justifiable claim to any clerical work performed in Billerica. The Claimant is a regular employee with an East Deerfield home station territory, and he is not entitled to a call for any clerical work at the Billerica location.

The Carrier goes on to assert that the Claimant is progressing conflicting arguments. In the first of the three claims, the Claimant alleges that his rate of pay should be adjusted based on the assertion that his position was combined with Martin’s former Chief Clerk position. In the third of the three claims, the Claimant alleges that the duties associated with Martin’s former position were transferred to non scope-covered employees and that he should have been called to perform these duties. The Carrier emphasizes that, not only are these claims inherently inconsistent and contradictory, but the allegations are overly broad, vague, and unsupported by specific evidence.

The Carrier insists that it is not a violation for a manager to perform the work in dispute. The Carrier argues that the Agreement does not grant Clerks the

right to perform this work to the exclusion of all other crafts or management. The Carrier asserts that the evidentiary record demonstrates that both managers and Carmen have been performing the disputed work since its inception.

The Carrier then contends that the instant claims have been improperly presented as running claims. The Carrier asserts that there is no evidence to support a finding of any continuous violation of the Agreement by the Carrier. The Carrier points out that only a few specific dates are referenced in the actual claims, and the allegations associated with those specific dates are not supported by any evidence. Moreover, any allegations pertaining to 2002 are untimely and have been improperly included in the present claims.

The Carrier further argues that the remedy sought by the Claimant is unwarranted. The Claimant has no right to clerical work in Billerica, and he was fully employed at all relevant times. Moreover, the Claimant failed to establish the necessary evidence to warrant any remedy in connection with his claims. Without specific supporting evidence, the Claimant's claims must be denied.

The Carrier also asserts that there is no procedural defect to warrant a sustaining award in this matter. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record in this case, and finds that the Organization failed to meet its burden of proof to support the three different claims that this claim encompasses. Moreover, we find that the claim is dated February 13, 2006, which is 62 days after the award of the position and 70 days after the date of the Carrier's bulletin for the position. The Organization never filed a claim over the bulletin and the Claimant bid on the job and accepted the appointment to the position. Nevertheless, all three claims flow from the December 5, 2005 bulletin and the claim was dated February 13, 2006.

A thorough review of the record indicates that the Claimant has been receiving the proper rate of pay and has been assigned a proper meal period. The Board concludes that the Organization failed to establish that the Scope Rule of the Agreement was violated in any fashion. It is clear that the Claimant's first claim

and his third claim are inherently contradictory, and the general allegations made by the Claimant are overly broad and unsupported by the evidence.

To sum up, the Organization failed to meet the time limits and also failed to sustain its burden of proof of establishing that the Carrier violated the Agreement with respect to each of the allegations associated with the claim. Because the Organization failed in that burden, the claim must be 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 2nd day of February 2009.