Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41217
Docket No. CL-41389
12-3-NRAB-00003-100316

The Third Division consisted of the regular members and in addition Referee Martin Fingerhut when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(a) Carrier violated the rules of the current Clerks' Agreement at Topeka, Kansas commencing April 1, 2009, when it required and/or permitted employees not covered by the rules of the Agreement to perform routine schedule clerical work; and

(b) The work which was removed from the scope and operation of the Agreement shall now be restored to the employees covered thereby; and

(c) Claimants J. O. Hartman, Jr. and M. L. Escobar shall each be compensated for eight (8) hours' pay at the time and one-half rate of their respective positions for each day commencing April 1, 2009 and continuing until such violation ceases, in addition to any other compensation claimants may have received for these days."

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 24, 2009, the named Claimants were notified that their positions were to be abolished at the close of business on March 31. Claimant Hartman held the position of Section Supervisor and Claimant Escobar held the position of Supervisor Services. Both positions were part of the Strategic Sources and Supply (SS&S) group located in Topeka, Kansas.

The Organization thereafter filed a claim that the Carrier had violated the Scope Rule of the Agreement when "it required and/or permitted employees not covered by the rules of the Agreement to perform routine schedule clerical work." The Organization described the work that had been performed by the Claimants "as associated with the process of building requisitions into purchase orders including building and maintaining purchase orders for warranty materials returned from the field to the vendor for repair and credit . . . and work associated with the sale of scrap cars."

In essence, the Organization took the position that while the introduction of technical advancements in these areas had eliminated many of the functions which required the need for clerical employees, certain "middleman" functions continued to exist, that such functions were covered by the Scope Rule of the Agreement and could not be performed by anyone not covered by the Agreement.

In response, the Carrier argued that it had been implementing technical innovations in these areas of operation since the year 2000, that beginning November 2005 the changes had resulted in the abolishment of seven clerical positions, not including the two in this claim, and that the Organization had not filed any claims with respect thereto. It further argued that to the extent any work continued to exist, it was shared work that historically also had been performed by persons not covered by the Agreement, or was de minimus in nature.

In the handling of the dispute on the property, both sides submitted numerous exhibits, including statements from employees current and retired, providing detailed information about the scope of the technological changes designed to show how the functions were performed both prior and subsequent to the implementation of the changes. The submitted evidence shows a deep factual divide between the parties with respect to the manner in which the work had been performed prior to the technological innovations and subsequent thereto. The Board believes it would serve no useful purpose to review in detail the information provided by the parties. It is clear that both sides argued their positions with deep conviction and with the object of presenting facts as well as assertions.

As described above, the essence of the Organization's position is that the Carrier violated the Scope Rule of the Agreement. Over the years, rules concerning the approach the Board is to follow in evaluating such disputes have been formulated and universally followed in arbitral proceedings.

The underlying principles are not complex. The party requesting the Board for an Award in its favor has the burden of proof of demonstrating through substantial evidence that the facts support its position. It can do so in two ways. First, it can show that the specific language of the Scope Rule clearly and unambiguously supports its position. Second, in the absence of such language, the petitioning party can meet its burden by showing that the past practice in connection with the application of the Rule demonstrates that it has been applied consistently and exclusively on a system-wide basis in a manner consistent with that propounded by the petitioning party.

Applying these principles to this case, the Board initially notes that the Organization does not contend that the clear and unambiguous language of the Scope Rule supports its position. There have been numerous Awards construing the Scope Rule involved here that have concluded that the Scope Rule is general in nature and does not purport, by its terms, to reserve any particular work to TCIU-represented employees. See, for example, Third Division Award 25003.

Instead, the Organization argues that the evidence it presented shows that the work of the two Claimants continued to exist notwithstanding the technological changes and that such work had historically been performed by TCIU-represented employees to the exclusion, on a system-wide basis, of any other employees. In the final analysis, the ultimate question before the Board is whether the Organization presented substantial evidence that its position is correct.

A careful review of the on-property record shows that for every compelling argument raised by the Organization to support its position, at least as equally compelling a counter argument was introduced by the Carrier. The Carrier presented an in-depth analysis of the technological changes that had been introduced and how such changes had impacted the work that previously had been necessary to accomplish the various activities. With respect to any remaining work, the Carrier introduced evidence showing that such work had been shared by clerical employees, employees not in the craft represented by the Organization and, in some instances, by non-railroad personnel. It is obvious that in many instances the parties are in direct disagreement concerning crucial matters of fact. In order for the Board to rule in the Organization's favor, we would be required to conclude that only the factual evidence of the Organization is to be credited and the evidence of the Carrier must be rejected. The Board is unable to do so.

Because the Organization failed to meet its burden of proof, 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 22nd day of February 2012.