

Award No. 13807

Docket No. CL-13394

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5132) that:

(1) Carrier violated and continues to violate the Clerks' Agreement at Pittston, Pennsylvania, when it abolished the position of Lead Clerk held by Mrs. Emily Brodhead, effective May 5, 1960, and assigned the work and duties of the position to an employee not covered thereby.

(2) Carrier be required to restore the work and duties of the abolished position to employees under the Clerks' Agreement.

(3) Mrs. Emily Brodhead and her successor and/or successors, if any, be compensated for all wage loss sustained as a result of the violation of the Agreement.

NOTE: Reparation to be determined by a joint check of Carrier's payroll and other records.

EMPLOYEES' STATEMENT OF FACTS: Prior to May 5, 1960, the following positions under the scope of the Clerks' Agreement were assigned at Pittston, Pennsylvania:

Lead Clerk, held by Mrs. Emily Brodhead, with the following duties:

Verify rates and charges on the following waybills.

In-Bound shipments
Out-Bound shipments
LCL Freight
Carload freight
Coal Waybills

Make up freight bills on typewriter

sively to the Clerks' Organization is being performed by employees outside that class or craft at Pittston. The answer to each of these questions obviously is "no."

It is axiomatic that in abolishing positions no longer necessary to its operations in making other changes to improve the efficiency of its operations, the Carrier retains all authority not specifically surrendered under the Agreement, and that it is free to manage its business according to its best judgment. It is the Carrier's responsibility to determine what the necessities of the service require, and so long as its determinations are not shown to be arbitrary, capricious or discriminatory, this Division cannot substitute its judgment for that of the Carrier.

The business and the work detail at the Pittston freight station continued to decrease, and, on December 9, 1961, the remaining clerical position was abolished. The station force was then reduced to a one man agency, and the Agent-Telegrapher is now performing all the clerical duties of the station.

This Division has in numerous awards established the principle that clerical work can be performed by Telegraphers, and the Division has gone further in stating that originally, and traditionally, such work is work belonging to the Telegraphers.

In conclusion, Carrier contends the rules of the current Agreement between the Clerks' Organization and this Carrier have not been violated, and emphatically support the Carrier's position.

OPINION OF BOARD: This dispute involves the Scope Rule of the Clerks' Agreement. It arises from the abolishment on May 5, 1960 of the Claimant's position of Lead Clerk at the Carrier's freight agency at Pittston, Pennsylvania. The Organization contends that most, if not all, of the work remaining from the abolished position was assigned to an employee outside the coverage of its agreement, namely, the Agent at the Pittston freight office under the Telegraphers' Agreement. The Carrier maintains that the abolished position was combined with the one Clerks' position then left at the agency, the higher rated job of Receiving and Delivery Clerk-Janitor (R&D Clerk), and "all the remaining work" from the abolished position was absorbed by the combined one. On December 9, 1961, the Pittston location became a "one man agency" when the position of R&D Clerk was also abolished.

Before treating the facts at any greater length, it is well first to consider the Carrier's argument as to exclusivity. It urges on this score that the duties in contention never belonged exclusively to the abolished position but primarily were functions of the Agent's position and, both before and after this claim arose, had been jointly performed by the incumbents of both positions. Thus, invoking settled precedent of this Board, it argues that, in any event, this claim must be denied because under the Scope Rule at issue it must be proved by the Petitioner that the work in question, by tradition, custom and practice, has been reserved exclusively and system-wide to employees coming under the Clerks' Agreement.

It has now been held in one line of awards under the Clerks' Agreement that the "exclusivity theory" does not apply to situations involving the transfer of the duties remaining from abolished clerical positions to employees outside that agreement. E.g., Awards 13478, 12903, 12901, and 4045.

We are aware, of course, that the rationale of those holdings was predicated upon the presence of the well known Rule 3-C-2 in the Clerks' Agreements there in issue, a Rule which the subject agreement does not contain. However, we are of the view that in the context of this dispute the following portion of Rule 1 of the agreement, relied upon by the Organization, is at least the basic equivalent of Rule 3-C-2:

"Positions or work coming under the scope of this agreement shall not be removed and transferred to employes coming under the scope of another agreement (except in the case of reduction of clerical forces to establish a one man agency) except by mutual agreement."

In other words, it must be assumed that work which is regularly assigned to a clerical position under the agreement is "work coming under the scope of the agreement" (even if not exclusively under it), and, therefore, when that position is abolished the duties remaining must be assigned to another clerical position at the location coming under the agreement, save in the exception expressly described (reduction to a one man agency). In point of fact, and despite its broader argument as to exclusivity, this is precisely what the Carrier claims was done here until December 9, 1961, when the agency became a one man operation.

We come then to the contentious facts in this matter. While the Carrier asserts that the disputed reorganization of personnel at Pittston was caused by a sharp decline in business and work load there, it admits that "it was not the Lead Clerk's work which disappeared, but the work of the higher rated R&D Clerk's position." Indeed, it also admits, in effect, that at the time the Lead Clerk job was abolished, some 70% of its regular duties remained. "All this remaining work", it says, "was then assigned to the higher rated position."

The weight of the record, however, does not support this last averment of the Carrier, but, rather, upholds the Organization's contention that the bulk of the remaining duties was absorbed by the Agent. In this connection due weight must also be given to the acknowledgment attributed to the Agent on the occasion of the first joint job check in this dispute made by the parties in January 12, 1961. At that time the Agent was said to have openly agreed that he was "absorbing about 80% of the duties of the abolished position." Nowhere in the record does it appear that the making of this admission was specifically denied by the Carrier. Nor does it appear that in ensuing job checks the Agent himself ever recanted this statement; instead, he is said thereafter to have taken a defensive posture of silence, protesting only that, "I'm not saying anything; I have my job to protect." Finally, it should be noted that there was no challenge offered by the Carrier to the figures cited by the Organization that rather than a decline in business, by the end of 1959 the gross revenues of the Pittston freight agency had increased by almost 45% over those of 1956, the year chosen by the Carrier as the one of comparison. Cf., Award 9220 (Hornbeck).

In light of our finding above that most remaining duties of the abolished job were improperly transferred to the Agent, and not to the R&D Clerk-Janitor, there is no need to consider the contention of the Carrier that the Claimant, by virtue of her greater seniority, could have bumped the R&D Clerk when her job was abolished. Suffice it to mention in passing that the Organization contends that since the R&D Clerk's job contained

some heavy duty chores associated with the physical movement of freight and janitorial work, Complainant, a female employee, could properly decline the opening.

As for the remedy for the violation found, the Organization asks for the restoration of "the abolished position to employees under the Clerks' Agreement." In the first place, such relief is now academic under the Agreement because concededly the agency became a one man operation since December 9, 1961. But, even if it were not moot, the relief could not be granted in view of the repeated decisions of this Board that it lacks the power to order the restoration of positions. E.g., Awards 9416 (Bernstein), 9461, 9571 (Begley), 10867 (Miller), 12336 (Dorsey), 13096 (House), 13559 (Hutchins), among many others. The most to which Claimant is entitled is to be made whole for any loss of wages she suffered between the date her job was abolished, May 5, 1960, and the date the agency was reduced to a one man affair, December 9, 1961. E.g., Awards 13025 (Coburn), 13035 (Ables), 13096 (West), 13225 (McGovern), among many others. Accordingly, we will direct that the Claimant be paid the difference, if any, between what she earned or could and would have earned during the period mentioned to make her whole. E.g., Awards 11074 (Dorsey), 13350 (Bailer), and Awards cited immediately above.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated to the extent indicated in the above Opinion.

AWARD

Claim sustained to extent shown in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of August 1965.