Award No. 13921
Docket No. CL-14529

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5451) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 3-C-2, when it abolished two clerical positions, Symbol No. G-93 and Relief No. 1-M, at West Brownsville, Pennsylvania, Pittsburgh Region, effective January 2, 1958, and assigned part of the remaining duties of the abolished positions to Yard Masters not covered by the Clerical Rules Agreement.

(b) Claimant C. E. Vesley should be allowed eight hours' pay a day, as a penalty, for January 2, 1958 and all subsequent dates until the violation is corrected.

(c) Claimant G. P. Cindric should be allowed eight hours' pay a day, as a penalty, for September 17, 1958, and all subsequent dates until the violation is corrected. (Docket 595.)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimants in this case held positions and the Pennsylvania Railroad Company, hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

be such, only affected the incumbent of Relief Position 1-M to the extent of but one day a week, then Claimant Vesley, the former occupant of Position 1-M, would only be entitled to recover damages, if incurred, to the extent of this one day, Wednesday, the day this position relieved Clerical Position G-93 at West Brownsville Junction. Vesley's claim for the other four days should not be considered, therefore, in any possible settlement based on a violation of Rule 3-C-2.

III. **Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that the Yard Masters at West Brownsville Junction perform no work in violation of the Clerical Agreement; that Rule 3-C-2 was not violated as a result of the abolishment of Clerical Positions G-93 and 1-M; and that the Employes have produced no valid evidence in support of their claim.

Therefore, the Carrier respectfully requests your Honorable Board to deny the Employes' claim in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to the time the instant claims arose Carrier maintained the following clerical positions at West Brownsville.

Symbol No. G-91 — 7 A. M.– 3 P. M. — Rest Days Sat. and Sun.
Symbol No. G-92 — 3 P. M.–11 P. M. — Rest Days Mon. and Tues.
Symbol No. G-93 — 11 P. M.– 7 A. M. — Rest Days Wed. and Thurs.
Relief No. 1-M — Sat. and Sun. — G-91
Mon. and Tues. — G-92
Wednesday — G-93
Thurs. and Fri. — Rest Days

And, at the same location there were three Yard Master positions around the clock, seven days a week.

Effective January 2, 1958, Positions G-93 and Relief Position 1-M were abolished. On the same date the tour of duty of Position G-91 was changed to 10:00 A. M.–7:00 P. M., with a one-hour meal period; and, the tour of Position G-92 was changed to 10:00 P. M. to 7:00 A. M., with a one-hour meal period. Therefore, effective January 2, 1958, there were two three-hour periods and two one-hour meal periods in the course of the day when there was no clerical employe on duty at the location.

Prior to January 2, 1958, some clerical work was performed, at times, by Yardmasters as well as clerks at the location. Clerks do not claim that the work performed by occupants of the abolished positions was performed exclusively by them. What they do claim is that proof of exclusivity is not material or a condition precedent to the application of Rule 3-C-2 which, insofar as here material, reads:

"RULE 3-C-2.

(a) When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

(1) To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed.

(2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yard Master, Foreman, or other supervisory employe, provided that less than 4 hours' work per day of the abolished position or positions remains to be performed; and, further provided that such work is incident to the duties of an Agent, Yard Master, Foreman, or other supervisory employe."

Then, Clerks proceed to argue that Carrier violated the Rule when remaining work which had been performed by occupants of the abolished positions was, after the date of abolishments, performed by Yardmasters.

In a multiplicity of cases, involving the same parties, this Board has been petitioned to interpret and apply the Scope Rule and Rule 3-C-2. See, for example, Award Nos. 8218, 8331, 9781, 9822, 10455, 10615, 10762, 10989, 11107, 11963, 12106, 12175, 12177, 12219, 12238, 12340, 12341, 12365, 12434, 12462, 12479, 12512 through 12515, 12556, 12787, 12808, 12823, 12837, 12902, 12905, 12906, 12923, 13273, 13280, 13454. To repeat herein the rationale set forth in the Opinions in those Awards, which persuade that a denial Award in the instant case is in order, would be redundant.

Notwithstanding the succession of cases in accord, the Board deviated from precedent in recent Award Nos. 13478 and 13480. Thus, we are confronted with conflicting Awards. For reasons stated in Award No. 11788 we find the weight of authority in the long line of concurrent Awards which preceded Award Nos. 13478 and 13480. We will deny the Claim.

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 Employes involved in this dispute are respectively Carrier and Employes 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October 1965.

LABOR MEMBER'S DISSENT TO AWARD 13921, DOCKET CL-14529

Award 13921, Docket CL-14529, is in error. The facts and circumstances did not justify the Referee's erroneous conclusion to adopt and apply the "rationale" used in the many Awards listed in the penultimate paragraph of the Opinion. In fact, Awards 8218, 8331, 9781, 9822, 10455, 10615, 10762, 10989, 12177, 12238, 12340, 12434, 12462, 12556, 12808, 12905, 12906, 12923, 13280 and 13454, while helping to make an impressive and unbalanced showing, are not at all in point, for they involved claimed violations of the Scope Rule.

It is generally recognized that only when a Scope Rule is considered ambiguous is a Referee justified in applying the almost impossible "Exclusivity Test" wherein it is demanded that Employes must prove that they alone have exclusively performed whatever work is under claim. In other words, the rationale generally ascribed for invoking the "Exclusivity Test" is that Referees, having been convinced the Scope Rule under consideration is ambiguous, must look to past practice, i.e., the history, custom, tradition and practice of the parties bound by the Scope rule, in order to enable them to determine whether or not it can be shown that it was the intent of the parties to assign certain work exclusively to the Employes claiming it.

In short, the instant case did not involve the Scope Rule; the usual reason for invoking the damnable "Exclusivity Test" did not exist; and reliance on Awards based on such test is improper.

The claimed violation, as will be noted from the Statement of Claim, was that Rule 3-C-2 was violated. While the other 17 Awards relied on involved Rule 3-C-2, some of them were erroneous Awards for the reasons stated above, and in my dissents to Awards 11963, 12219 and 12479. Moreover, had the Awards listed been studied, it would have shown that many of them, e.g., Awards 12175, "* * * The situation contemplated by 3-C-2 thus does not here arise, since the work claimed is being performed by the same employes as before."; and Award 12837, "* * * In this claim, no position was abolished, and so we do not find that Rule 3-C-2 is controlling.", did not apply and that others, e.g., Award 12823 reading "* * * Rule 3-C-2 (a) (1) and (2) which are primarily relied on by Petitioner in the instant claim deal specifically with the abolition of positions, where work

previously assigned to such position remains to be done. They require the assignment of such work to 'another position or positions' covered by the agreement, if such other position or positions are in existence at the location where the work of the abolished position is to be performed. If no such position exists, the work may be assigned to supervisory employes, if said work is incidental to their duties and if it amounts to less than 4 hours' work per day of the abolished position or positions.", actually supported the present claim. Others listed in Award 13921 in a manner tending to show a vast number of denial Awards vis a vis only two "maverick" Awards, were denied on bases other than an interpretation of Rule 3-C-2.

Clearly, this was a case wherein the Referee was called upon to interprete Rule 3-C-2, which is quite clear and free from ambiguity, as can be seen from its quotation in this Award. Its purpose is stated precisely in many Awards between these same parties, and was well known by the Referee who rendered this decision because in Award 13125 he correctly interpreted an identical rule and held that it mandates that work of an abolished Clerk's position must be assgned to another position or positions covered by the Agreement when such other position or positions remain in existence at the location where the remaining work of the abolished position is to be performed! In the instant case, the Referee states " * * * What they do claim is that proof of exclusivity is not material * * * " yet he seemed to require it here, although in Award 13125 he wrote that "Specific provisions of an agreement prevail over general provisions. Therefore, Rule 12(d) of the Agreement, dealing with assignment of the work of an abolished position, prevails. It is unambiguous." (The Rules 12(d) and 3-C-2 are identical.)

The plain and unambiguous language of Rule 3-C-2 is correctly observed, and its intent prevails on all other Carriers known to the writer who have identical or equivalent rules. Obviously, it should not mean something quite different on the Carrier here involved.

The rationale of this erroneous Award calls to mind that short and simple statement made in Award 993 that " * * * precedent must govern; logic, yield to the weight of accumulated awards * * *." The rationale of Award 11788 could well have been applied to Awards 8218, 11107 et al, when Referees first commenced ignoring the plain and unambiguous terms of Rule 3-C-2. It should not have been used here to so easily reject Awards 13478, 13480, and the many Awards prior to 8218 listed in my dissents to 11963 and others for the reason that all were considered in Award 13480 where it was correctly stated that:

> "The answer to this portion of the Petitioner's claim depends upon which one of the antithetical interpretations of Rule 3-C-2 (a) the Board follows in this case. Under the one it must be shown, in all events, that the remaining work in dispute belongs exclusively to the Clerks either in terms of their Agreement or by tradition, custom and practice, e.g., Awards 12479 (West), 11963 (Christian), 11107 (McGrath), 10455 (Wilson). In the other, the application of the Rule does not depend upon any 'exclusivity theory', but rather on a showing that the remaining work, as the Rule expressly provides, was 'previously assigned' to the abolished position, e.g., Awards 12901, 12903 (Coburn), 7287 (Rader), 4043, 4044, 4045 (Fox), 3870 (Douglas).
>
> It would certainly seem, especially in the context of the facts of this case, that the latter interpretation of Rule 3-C-2 (a) is the sounder one. Any other construction would make, for the most part,

the language of sub-paragraphs (1) and (2) sheer surplusage. For example, under sub-paragraph (2) any issue as to the amount of work remaining from an abolished position and assigned to a supervisory employe would be entirely extraneous if, in the first place, it could not be shown that that work belonged exclusively to the Clerks. Moreover, the fact that there was a remaining clerical employe under sub-paragraph (1) would be utterly meaningless if it could not likewise be shown that such work was in the exclusive domain of the Clerks' Agreement."

That precisely is what I have been dissenting about since first being introduced to such reasoning when handling Docket CL-11951 which resulted in Award 11963. The sound reasoning of Award 13480 will eventually prevail, for Referees have no right to read Rule 3-C-2 as though it only refers to work exclusively performed by Clerks. The language of Rule 3-C-2 clearly and unequivocally supports the interpretation and contentions of the Employes.

For the reasons here expressed and in my dissents to Awards 11963, 12219 and 12479, I dissent to this erroneous Award.

/s/ D. E. Watkins
Labor Member
11-3-65

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 13921, DOCKET CL-14529 (Referee Dorsey)

The Dissentor previously offered the same uncomplimentary remarks about the Board's decision in **Awards 12479, 12219 and 11963.** Our answer thereto is incorporated by reference in this case.

In addition, the Dissentor asserts:

"In short, the instant case did not involve the Scope Rule; the usual reason for invoking the damnable 'Exclusivity Test' did not exist; and, reliance on Awards based on such test is improper."

It is difficult, if not impossible, to reconcile this remark with the Petitioner's statement found in this record that: (R., pp. 14-15)

"The Carrier admits the Yard Master performed clerical work which had been assigned to Position G-93 **exclusively** under the Scope of the Clerical Agreement. The performance of this clerical work by the Yard Master, prior to January 2, 1958, was in **violation of the Scope Rule,** just as when Position G-93 was abolished effective January 2, 1958, it was a violation of Rule 3-C-2 (a)." (Emphasis ours.)

It is clear, the test of exclusivity is injected into these cases by the Organization, not the Board or the Referee. When they make such a claim they have the burden of proof. They simply failed to sustain it. The decision is sound.

W. F. Euker
R. A. DeRossett
C. H. Manoogian
G. L. Naylor
W. M. Roberts