

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19783
Docket Number CL-19900

C. Robert Roadley, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Bangor and Aroostook Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7128) that:

1. Carrier violated and continues to violate Rules 1 and 3, among others of the current clerks agreement, effective September 1, 1949 when it abolished Claimants position and effective November 2, 1970 distributed its duties in part to another seniority district and in part to a position holly exempted from the agreement.

2. Carrier shall be required to compensate, Claimant, Mrs. Barbara E. Kelley for all wage losses beginning November 2, 1970 until corrected and the work properly restored.

OPINION OF BOARD: This case involves the alleged Carrier violation of Rule 1 - Scope and Rule 3 - Seniority Districts of the Agreement between the parties. Claimant's position was abolished as of the close of work on October 30, 1970. On November 2, 1970, the first working day following the abolishment, a portion of claimant's former duties (machine dictation) was assigned to an "excepted employee" fully exempt from coverage under the Agreement and "a substantial part" of the abolished position's other duties (typing reports, statements, vouchers and abstracts) was assigned to a position in a different Seniority District.

Rule 1 (Scope - Employees affected) states in pertinent part:

"(a) These rules shall govern the hours of service and working conditions of all the following class of employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, *****.

(1) Clerks: Chief Clerks, assistant chief clerks, clerical workers, local storekeepers and assistants, stenographers and calculating machine workers, ticket sellers and ticket clerks, telephone switchboard operators, *****.

(b) Positions and work within the scope of this agreement belongs to the employees covered hereby, and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, except in the manner provided in Rule 49."

The referenced Rule 49 stipulates that changes can be made only as provided for elsewhere in the Agreement or under the provisions of the Railway Labor Act.

Rule 3 (Seniority Districts) states in pertinent part:

"(b) Within the confines of each seniority district, employees have prior rights in accordance with their length of service within the district (fitness and ability being sufficient) to promotion, assignment, displacement and work. It shall therefore not be permissible to assign an employee to a part or the whole of the work of one or more positions in other seniority districts except as otherwise specifically provided in these rules." (emphasis added)

In denying the claim the Carrier relied on the provisions of Rule 2, paragraph (b), quoted as follows:

"It shall not be permissible under Paragraph (a) of this Rule to assign clerical work occurring within the spread of the hours of assignment to more than one position not classified as a clerk for the purpose of keeping the time devoted to such work by one employee below four (4) hours per day."

Under date of November 16, 1970 the Carrier, in denying the claim at issue, wrote to the claimant as follows:

"All duties on the former Clerk Typist position have been distributed among scope employees with the exception of a portion of the Freight Claim Agent's correspondence which has been delegated to the Secretary of the Controller.

Your claim is denied and I would ask that you refer to Paragraph (b), Rule 2 of the Clerk's Agreement."

Following a conference between the Carrier and the General Chairman on June 24, 1971, the Carrier wrote the General Chairman as follows:

"Claim in behalf of Mrs. B. E. Kelley was discussed in which she claimed time effective November 2, 1970, account other than Clerks performing work in the Freight Claims section. This claim was denied on the basis of the language contained in Rule 2, Section B, of our Agreement. This position was abolished because work had eroded to a point where continuation of the position could no longer be justified. Therefore, the claim must remain denied."

The two letters, quoted above, constitute the Carrier's total formal response during the handling of this matter on the property, to the Organization's allegation that the work in question was transferred to people outside the scope of the Agreement and to a position in another seniority district.

Under date of October 29, 1971, following further conference, the General Chairman wrote to the Carrier confirming such conference and stating, in part, as follows:

"We brought to your attention that ***** four (4) hours of dictaphone work was given to Gloria Cyr, Secretary to Vice President of Marketing, fully exempt from the clerk's agreement, and four (4) hours of typing letters for Freight Claim Department was given to Switchboard Operator, Pearl Johnson, on another seniority roster."

Petitioner states that no reply to the October 29, 1971 letter was received and, to avoid time limits, the issue was submitted to this Board.

The record shows that the Carrier relied on the language of Rule 2(b) of the Agreement as being controlling throughout the handling of the issue on the property and did not reference the Agreement of February 7, 1965 as being a determining factor. Therefore, it is the Rules in the Schedule Agreement that must be examined in reaching a determination as to the validity or denial of the claim before us, without regard to certain provisions of the February 7, 1965 Agreement raised by the Carrier for the first time in its submission to this Board. It is a well established principle of this Board that it lacks jurisdiction to consider issues or arguments included in partisan submissions that were not made part of the record of handling on the property. See Awards 18442, 18122, 18006 and others.

An examination of the Schedule Agreement shows that, under Rule 29 cited by Petitioner, positions or work may be transferred from one seniority district to another after conference and agreement between Management and the Organization and that employees may follow their positions or work when same are so transferred. The record before us shows that conference was not held or agreement reached concerning the work that was transferred, in the instant case, to a different seniority district.

After a careful review of the record we note with interest that the issue raised by Petitioner on the property and before this Board is not whether the Carrier had the right to abolish the position held by claimant, per se, but rather that on the first work day following the abolishment the work of the position in question was unilaterally assigned, in part, to an employee not covered by the Agreement and, in part, to an employee in another seniority district. It is this Carrier action that Petitioner alleges was in violation of certain Rules in the Agreement.

The fact that the work performed by claimant was transferred is borne out by the statement in Carrier letter of November 16, 1970, previously referred to and quoted again, in part, as follows:

"All duties on the former Clerk Typist position have been distributed among scope employees with the exception of a portion of the Freight Claim Agent's correspondence which has been delegated to the Secretary of the Controller."
(Emphasis added)

Carrier's reliance on the provisions of Rule 2 (b), previously quoted herein in its entirety, infers that the work of the position had diminished to less than four hours work per day and this factor, read in conjunction with the "Definition of Clerk", Rule 2 (a), which provides that four (4) hours or more work satisfies the definition, was sufficient justification to abolish the position in question. However, Rule 2(b) has no application to the matter of re-assignment or re-allocation of the work of an abolished position. The only Carrier statement in substantiation of its position was that contained in previously referred to Carrier letter of August 17, 1971 which stated, in part:

"This position was abolished because work had eroded to a point where continuation of the position could no longer be justified."

In response to this statement the General Chairman's letter of October 29, 1971 stated, in pertinent part:

"Four (4) hours of dictaphone work was given to *** Secretary to Vice President of Marketing, fully exempt from the clerk's agreement, and four (4) hours of typing letters ***** was given to Switchboard Operator *** on another seniority roster."

The record shows Carrier remained silent regarding the above statement and, therefore, we are persuaded to accept the statement as a factual description of the disposition of the work involved. Here again, the record would indicate that the attention of the Carrier was directed primarily, if not solely, to its rights to abolish the position in question without any apparent concern as to contractual obligations, if any, concerning the disposition of the work of the assignment at the time the abolishment took place.

There is no question, in our view, that certain collectively bargained obligations did, and still do, exist in the Schedule Agreement negotiated by the parties, insofar as the transfer, reassignment and/or reallocation of work is concerned.

One cannot read into the language of Rule 1 (b) the right to remove work within the scope of the Agreement and assign such work to positions not covered by the Agreement, except through the process of negotiations. Countless prior awards of this Board have recognized this principle, spanning a period of more than thirty years. As long ago as 1940 this Board stated in Award 1210:

"It has been well established that carriers have the right to discontinue clerical positions when only a small portion of the duties which constitute the assignment remained to be performed, yet, it is also well established that work coming within the scope of the agreement may not be removed from the agreement and assigned to the employees not covered by the terms. To arbitrarily take work from the scope of the agreement and assign such remaining duties to employment excepted from the agreement or not covered by the agreement would be destructive of the agreement."

As recently as 1972, Award No. 1, of Public Law Board No. 954 (Dorsey), stated, in its consideration of the interpretation of a BRAC Scope Rule, which was identical in language to that contained in Rule 1(b) before us, as follows:

"The weight of authority of Third Division, National Railroad Adjustment Board case law compels a finding that when the Scope Rule of an agreement encompasses 'positions and work' that work once assigned by a carrier to employees within the collective bargaining unit thereby becomes vested in employees within the unit and may not be removed 'except by agreement between the parties;'"

Accordingly, based upon a careful and thorough review of the record before us and for the reasons stated herein, we find that the Carrier erred when it transferred part of the work involved to an employee in another seniority district and assigned the remaining work of the abolished position to a non-contract employee, without conference and agreement with the Organization.

However, in part 2 of the instant claim, Petitioner has requested that claimant be compensated for all wage losses beginning November 2, 1970 and that the work be restored.

Numerous Awards of this Board have held that the Board lacks authority to restore positions and we subscribe to this principle. See Awards 9416, 10743, 10867, 12336, 15521, and 16729.

Insofar as compensation for wage loss is concerned we note in the record that on June 16, 1971 the Carrier wrote to claimant as follows:

"Please be advised that since you have not complied with the requirements of Rule 9, Section C, of the current Working Agreement by failing to re-file your name and address within ten days of June 1 to protect your seniority rights, I have no alternative other than to advise you that your seniority with the Company has been forfeited."

Rule 9 (c) of the Agreement, states in pertinent part:

"Employees desiring to protect their seniority rights and avail themselves of this rule, must, within fifteen (15) calendar days from date actually laid off, file their name and address in duplicate both with the proper official ***** and the General Chairman, and advise promptly any change in address. They must also re-file their name and address within ten (10) days of June 1 and December 1 of each year in the same manner if still laid off. ***** An employee failing to comply with the provisions of this rule ***** will be considered out of service."

It is readily apparent from the foregoing that the claimant did not act to protect her seniority as provided by the Agreement and that, in failing to do so, she did in fact forfeit her seniority as of the date of the above referenced Carrier letter. Nothing in the record indicates that Petitioner challenged the propriety of the action taken by the Carrier on this point. Therefore, we will sustain part 2 of the claim insofar as wage loss is concerned for the period from November 2, 1970 up to the date of Carrier notification to the claimant that her seniority had been forfeited, but deny that portion of part 2 of the claim concerning restoration of claimant's position for the reasons previously stated herein.

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

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That the Carrier violated the Agreement.

A W A R D

Claim sustained as to part 1.

Claim sustained as to part 2 to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May, 1973.