

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20535
Docket Number CL-20497

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship
Clerks, Freight Handlers, Express and
Station Employees

PARTIES TO DISPUTE:

(Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7427) that:

1. Carrier violated the currently controlling effective agreements between the Brotherhood of Railway, Airline and Steamship Clerks and the Union Pacific Railroad Company when, subsequent to the abolishment of the position of Day Bill Clerk effective at close of shift on May 14, 1971 at Hood River, Oregon, the work of preparing Forms 4640, CX and LC Reports, billing of cars and handling of demurrage records was assigned to employees not covered by the scope of the Agreement between the parties to this dispute, i.e., Telegraphers; such work being specific functions formerly performed by the abolished position.

2. Carrier shall now be required to compensate Claimant W. E. Jeffries at the rate of Day Bill Clerk for eight (8) hours daily commencing with May 17, 1971 and continuing until the position is reinstated or the work of the abolished position is returned to the Clerks, thereby, bringing to a stop this continuing violation of the Agreement.

OPINION OF BOARD: The position of Day Bill Clerk at Hood River, Oregon was abolished at the close of business on May 14, 1971, and the duties of the position (preparation of Form 4640, CX and LC Reports, billing of cars and demurrage records) were assigned to Telegrapher-clerks; who are not covered by the Organization's Agreement. The incumbent of the Day Bill Clerk position exercised seniority to displace a Cashier, who subsequently displaced Claimant. Claimant was required to displace at The Dalles, Oregon.

Claimant asserts a violation of its Rules Agreement, specifically Rule 1(g) and Rule 18(f)(1). Rule 1(g) states:

"Rule 1 - Scope.

(g) Positions within the scope of this Agreement belong to the employees herein covered and nothing in this Agreement, except as provided in Rule 18(f) shall be construed to permit the removal of such positions from the application of these rules except by agreement between the parties."

Rule 18(f) states:

"(f) 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 in the Seniority District 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, Yardmaster, Foreman or other supervisory employe, provided that less than four (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, Yardmaster, Foreman or other supervisory employe.

"(3) Performance of work by employes other than those covered by this Agreement in accordance with Paragraphs (1) and (2) of this Section (f) will not constitute a violation of any provision of this Agreement.

"(4) Where the remaining work of an abolished position is re-assigned to employes within this Agreement, Carrier will re-assign work of a similar kind to position or positions performing that particular kind of work, higher rated work to higher rated positions and lower rated work to lower rated positions."

The record clearly establishes that a position covered by the Agreement was abolished, and that other positions remained in existence in the Seniority District at the location where the work of the abolished position was to be performed.

Nonetheless, Carrier defends its action on a number of grounds. For instance, Carrier contends that the Organization had agreed to hold this matter in abeyance, pending a decision in Third Division Docket No. CL-19515 (which was subsequently withdrawn from this Board and submitted to Public Law Board No. 1083) and had agreed to be bound by that Award. Public Law Board No. 1083 denied the claims submitted to it.

While there is no question that the Organization agreed to hold this matter in abeyance, Claimant disputes that the Award of that Board automatically disposes of this dispute. We are inclined to agree with Claimant. Although initial correspondence would tend to support Carrier's position, further correspondence shows that the Organization drew a distinction concerning positions abolished prior to, and after May 1, 1970 (the effective date of Rule 18(f)). The Board does not find that Carrier has established its affirmative defense, in this regard, so as to preclude a ruling on the merits. In addition, Award No. 1 of Public Law Board No. 1083 is not precedent to this dispute. Although it denied the claims before it because Claimants "... failed to establish that the duties in question have been performed exclusively by Clerks...", the decision specifically noted:

"The reliance upon Rule 18(f) is ill founded since that rule as amended, became effective May 1, 1970 and the abolishment of the Relief Clerk position and the reassignment of the duties thereof occurred prior to the effective date of the rule."

Carrier contends that the Scope Rule is general in nature, and in order to prevail, the Claimant must show by a substantive preponderance of the evidence that the work in question has been performed by clerks, historically and traditionally, on a systemwide basis, to the exclusion of others. Further, Carrier submits that no such showing can be made under this record. In support of its contention, Carrier cites numerous denial Awards dealing with the "exclusivity" doctrine; propriety of transferring work to telegraphers, etc.

Carrier states at Page 17 of its Submission:

"Hence under the principles enunciated in Award 11643, Referee Dorsey, and which continue to be followed in the more recent awards dealing with the same subject (see Awards 19187, 19517 and 19570 for example) the claim must be found lacking in merit under Rule 1 (Scope)."

The Organization counters by stating that the Rule adopted on May 1, 1970 (18(f)) replaced the "general" Scope Rule between these parties. Further, Special Boards and this Board have interpreted rules similar to the ones presented here and have uniformly held that it is not necessary to show "exclusive" performance, etc., but merely that the work of the abolished position has been removed and given to other employees (with certain exceptions not here applicable). We have reviewed the cited Awards, and they appear to support Claimant's position. For example, Awards 6527, 6528, 6529, 11674, 13125, 13478, 15140 and 19320 (among others) noted

"exclusivity" arguments and rejected same. It is interesting to note that the Referee relied upon at Page 17 of Carrier's Submission (Dorsey) cited above, also authored Award 13125, more than 16 months after Award 11643. Citing Agreement language similar to Rule 18(f), Award 13125 noted:

"We do not agree that the clerks must prove, in this case, that the work of the abolished position has been performed, exclusively, by employees covered by the Clerks' Agreement."

This Board does not find conflict in the Awards cited by the opposing parties, but in fact finds that they may be read in harmony. While the "exclusivity" doctrine may well be material to certain types of disputes, nonetheless, the various Awards which have interpreted rules dealing with abolishment of a position (and subsequent assignment of the work) have read the agreement language in specific terms and have applied it to the facts of each given case without regard to the restrictions suggested by Carrier herein. No contrary Awards have been brought to our attention.

Further, Carrier relies upon Rule 18(f)(3), cited above, as authority for performance of the work by employees not covered by the Agreement.

It should be noted that Carrier did not raise that defense while the matter was being considered on the property. In any event, the Board does not agree that Rule 18(f) (3) is controlling. Rather, we feel that a reading of the entire rule requires that the provisions of Rule 18(f)(1) be satisfied first. Note that 18(f) states that remaining work is assigned in accordance with the following:

- "(1) To another position...covered by this agreement when such other position...remain...
- (2) In the event no position....exists...then it may be performed by an Agent, Yardmaster, Foreman...
- (3) Performance of work by employees other than those covered by this Agreement in accordance with Paragraphs (1) and (2) of this Section (f) will not constitute a violation of any provision of this Agreement."
(underscoring supplied)

In this regard, other Awards of this Board have held that the basic principle of rules such as 18(f) is to assure that work of a given position is assigned to the entitled employees and that they are inter-dependent provisions which preclude utilization of subsequent sections

unless no positions covered by the Agreement remain in existence at the location in question. See, for example, Awards 3871, 3906 and 4043.

The Board finds that Carrier violated the Agreement when, subsequent to abolishment of the position, certain work was assigned to employees not covered by the scope of the Agreement.

Finally, we will consider the claim for compensation for eight (8) hours per day until the position is reinstated or the work of the abolished position is returned to employees covered by the Agreement.

The question of damages has been the subject of considerable controversy in recent years. While basic principles of damages may be enunciated, it is difficult, indeed, to establish hard and fast rules for each individual violation which may ever be established. Rather, each case must be reviewed upon its own record.

While it is true that Carrier did not defend, on the property, concerning the question of damages, nonetheless, in a September 8, 1971 letter, Carrier stated:

"At the time of the abolishment, and at the present time, the duties of the Day Bill Clerk absorbed by the remaining forces at Hood River amounted to approximately three hours per day."

Although there was opportunity to question the three hour estimate, on the property, Claimant did not do so. Thus, we find validity in the three hour figure.

It may be also true, as urged by the Organization at oral argument, that Carrier did not defend based upon inability of this Board to restore positions, but as we view the claim, as handled on the property, it did not seek such relief in such specific terms so as to require that defense by Carrier.

In general terms, this Board does not have authority to restore or re-establish a position and, in fact, Rule 18(f) grants Carrier a right to abolish the position. Thus, the Board questions the appropriateness of a damage request for eight (8) hours per day.

The record does establish that Carrier's violation of the Agreement resulted in approximately three (3) hours of work per day being performed by employees not covered by the Agreement, and we feel that a damage award in those terms is appropriate; whereas any additional amount would require undue speculation by this Board.

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.

A W A R D

1. Claim #1 is sustained.
2. Claim #2 is sustained only to the extent of compensation at the rate of the Day Bill Clerk for three (3) hours daily, as indicated in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1974.