NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21724
THIRD DIVISION Docket Number CL-21455

Robert W. Smedley, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Penn Central Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7991), that:

(a) The Carrier violated the Rules Agreement effective February 1, 1968, particularly Rule 3-C-2, Scope Rule, and other Rules, and the Extra List Agreement, when it abolished Position G-191, effective February 9, 1971, located at the South Akron Yards, Akron, Ohio.

(b) The position should be restored in order to terminate this claim and the Claimant Eleanor Weyrick and all others affected by the abolishment of the position, each be allowed one day of eight (8) hours at the appropriate rate of pay for February 10, 1971, and to continue for each consecutive date that the Carrier allows the violation to exist.

(c) That Claimant Eleanor Weyrick be compensated for any loss sustained under Rule 4-A-1 and Rule 4-G-1; be compensated in accordance with Rule 4-A-3(a) and (b), for work performed on holidays, or for holiday pay lost or on rest days of their former positions; be compensated in accordance with Rule 4-A-5; if their working days were reduced below the guarantee provided in this rule; be compensated in accordance with Rule 4-A-6, for all work performed between the tour of their former positions, be reimbursed for all expenses sustained in accordance with Rule 4-A-1(b); that the total monetary loss sustained including expenses under this claim, shall be ascertained jointly by the parties at time of settlement.

OPINION OF BOARD: The issue is whether work of an abolished position was assigned according to contract requirements.

When her position G-191 was abolished, Claimant bid and took another position. She did not lose work. It is conceded that part of her duties went to remaining clerks. It is alleged that other duties went to the trainmaster in violation of

"Rule 3-C-2 ASSIGNMENT OF WORK
"(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 four 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."

This rule is the subject of long and serious controversy. The debate centers on whether the clerks are required to prove they exclusively did certain work in order to retain it under 3-C-2(a) (1). The most recent Awards 21583 and 21584 (both by Lieberman) abandon the exclusivity doctrine and go to a literal reading of the words "work previously assigned." Also, Award 21452 (Lieberman) shakes the exclusivity theory. Earlier Awards 21324 and 21325 (both Liberman) are to the contrary. Having thus done some violence to the doctrine of stare decisis, we would again change only to correct serious error antithetical to reason and justice. That we cannot say of our latest holdings.

Award 21583 treats at length why Award 13921 (Dorsey) should not, on its merits, be considered binding precedent, prompting vigorous dissent by the Carrier Members. With that ordeal behind us, we should address the merits of our stand. In reviewing scores of cases, we see the word "exclusive" appearing ipse dixit without any supportive rationale or explanation. This is then compounded by use

of the prior case as authority to insert the term, again significantly modifying contract language by Board fiat. We suspect, as the Carrier Members' answer suggests in 13921, that unions inadvertently injected the test of exclusivity through verbal forays into the realm of over-possessiveness, only to see it turned on them as a tool to increase their burden.

Each case must be decided on its own individual merits, and the real problem is that exclusivity is simply not helpful if used as an invariable rule. To arrive at truth one fits contract language to facts. "Exclusive," not being contract language, can inhibit truth. Particularly in a clerical or office setting, natural human conduct would see a sharing of duties. One person or another might answer a phone or mark on a form from time to time. Thus, strict exclusivity would be difficult or impossible to prove, even in cases clearly intended under the rule.

We must caution that all of the foregoing is pure dictum because our holding must be that on the property there was no proof or admission to support the claim. Our discussion regarding exclusivity, though dictum, is relevant in that carrier argues nonexclusivity in its briefs. We are asked to interpolate this argument into proof by admission that work was misassigned. This we cannot do (1) because arguments or admissions in submission briefs do not rise to the dignity of proof, either (a) against interest (unless so intended and clearly expressed), or (b) for interest of the advocate, and (2) such brief arguments in this case were written before our rulings in Awards 21583 and 21452, when we were saying exclusivity was a good argument. We are not wont to so entrap through our own machinations.

In a proposed joint statement of agreed facts on the property, the following was stated:

> "Claimant Eleanor Weyrick held position of Chief Clerk, Symbol G-191, 1st trick, South Akron Yard, with Saturday and Sunday rest days, which position was abolished effective end of tour of duty February 9, 1971.
>
> "Claimant in turn displaced incumbent on Position F-283, 1st trick, Akron Freight Station, with Saturday and Sunday rest days.
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> "The work of handling T & E time slips formerly assigned to Position G-191 was absorbed by Clerical Position G-51, G-53 and G-47, and the work of keeping time for Clerks and Yardmasters was assigned to Position G-45.

"The following items of work formerly assigned to Position G-191, was absorbed by the Trainmaster:

Prepare and maintain MG1 reports trainmen's guarantee.
Post and maintain PC and D&O General Notices.
Prepares and maintains G-250 and G-32 notices regarding trials and discipline.
Prepares and maintains all requisition reports for stationary, etc.
Prepares and maintains all 990 and 1870 reports.
Prepares and maintains all CT-75 reports personal injury and train derailment.
Prepares and maintains all vacation assignments.
Prepares and maintains accounts payable reports.
Prepares and maintains MD-40 reports and schedules all trainmen's physical examinations.
Handles all correspondence and answers same by using typewriter or handwriting.
Types or hand writes all claim denials.
Answers all telephone calls."

The Carrier then agreed with the first three paragraphs above. The Carrier categorically denied the entire fourth paragraph which contains a list of twelve items of work allegedly absorbed by the trainmaster. The only item agreed by Carrier was that the trainmaster "prepares and maintains all 990 and 1870 reports." There were assertions that the G-191 position did these forms. But this was not proved by the Union and was denied by the Carrier.

There are many claims but no proof or admissions that the trainmaster did anything more or different after, than before, the abolishment. We are asked to infer that he must have picked up duties because of the fact of the abolishments itself. We cannot so conclude. An equally appealing inference is that the position was ready for abolishment and nothing was left except that assigned to remaining clerks. We cannot accept allegations and assertions in lieu of proof.

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

The claim was not proven.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1977.