

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21852
Docket Number CL-21743

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(
(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8233) that:

1. Carrier violated the Agreement Rules, particularly Rule 1 (Scope), when it contracted with an outside firm, Railroad Traffic Service Company at Greenville, Pennsylvania, to audit the intraline waybills, correct same when necessary, and prepare as well as issue corrected freight bills to its patrons in connection with errors developed as a result of the audit, and;

2. Carrier shall compensate the below named employes covered by the clerical agreement for 220 hours at the overtime rate account of such violation because they were available to perform the service outside of their regular assigned hours.

R. E. Mai	A. M. Kotel	M. D. Rodwell
C. S. Gieske	J. L. Santiago	B. T. Sullivan
M. A. Ahern	V. N. Piccolo	J. W. Berry
R. M. Philpot	T. L. Byers	L. Kulach
B. J. Licht		

OPINION OF BOARD: Carrier abolished seven (7) Revisor Clerks positions in the Department of Freight Rates and Claims Department located at Ravenswood Yard, Chicago, Illinois. The rationale offered for such discontinuance was economic.

Specifically, the task function of said clerks was to audit waybills to detect rate errors, remediate same and prepare and distribute corrected freight bills so as to collect the actual revenue due the carrier.

In 1972, the Railroad Traffic Service Company located in Greenville, Pennsylvania contacted the Carrier and offered to conduct waybill audits, attempt collection where freight rate charges were understated, in exchange for a percentage of the funds recovered.

The Carrier agreed and implemented such arrangement.

Subsequently thereafter, to wit, October 9, 1972, a claim was filed asserting therewith that said action violated Rule 1 (Scope Rule) of the collective agreement as claimants were qualified and held freight revisor positions.

Claimants do not contest Carrier's authority to abolish positions, but argue that position elimination and the assignment of those responsibilities in whole or in part to another position, or, as alleged in the instant case, to an outside company, violate the Agreement's scope rule:

"Positions coming within the scope of this Agreement belong to the employees covered thereby 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 the concluding rule."

The Carrier contends that the work in question was not previously performed by claimants, but was outside audit work which was acceptable practice among carriers. It averred that such additional outside expert audits were conducted only after the Carrier had completed all necessary work, including clerical work on the purported undercharged waybills and they had been filed.

While adducing three (3) Third Division Awards, 1802, 5329, and 13629 as being in point with this case, particular reference is made to Award 1802 (Thaxter) wherein Referee Thaxter states in the Opinion of Board:

"The checking and rechecking ordinarily done by the clerical force of the carrier had been completed in this instance. There was no more work which they could do. There is nothing in the agreement which bars the railroad from contracting for an outside audit and such an audit after the work ordinarily performed by the regular employees is completed is not an infringement of their duties, even though it does of necessity involve the performance of clerical work."

A fundamental threshold question logically raised by this claim is: Did the outside company perform duties that normally would have been done by the revisor clerks after undercharged freight rates were discovered by the outside audits? For example, did the outside

firm perform specific and discernible functions such as making corrections and issuing accurate waybills to customers. Careful examination of the record would reasonably support the conclusion that such was the case. The Railroad Traffic Service Company did in fact conduct the aforesaid task in connection with their audits.

Claimants offered numerous Third Division awards supportive of their position, that Carrier's actions violated the scope rule. Pertinent to this argument are Third Division's Awards 323 and 20839. Award No. 323 (Corwin) held in part:

"Any work necessary in performing the functions of a common carrier belongs to such classes of employees as are protected by its collective agreements with them. If the carrier could farm out any part of the labor necessary to its operation it could arrange with others to do a large part or all of it, impairing the rights of its employees to handle the jobs which the entire spirit and intent of the agreement assures them."

Similarly, Award No. 20839 (Franden):

"The weight of authority of Third Division, National Railroad Adjustment Board Case Law compels of 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'."

After finding that the Carrier perhaps unwittingly permitted the outside company to perform tasks and duties attendant to their audit function, that once were performed by claimants, both by agreement and custom, the Board concludes that Carrier violated Rule 1 (Scope Rule). Moreover, absent any explicit or implicit time limitation that would permit the Carrier to resuscitate those duties in whole or in part, at some future time, and assign them elsewhere, except by mutual agreement, the Board, of necessity must affirm this determination.

Correlatively, Carrier's assertion that Employees' Exhibit No. 3 was never handled on the property and as such constituted new material which Board rules preclude from consideration must be assessed within the contours of this claim. The record is sufficiently confirmatory on its merits without this exhibit to support the Board's findings.

Having thus disposed of this issue, the Board must now consider the question of remedy. Recognizing that a dichotomized and persuasive body of Third Division case law exists on penalties, reparations and damages, the Board will eschew a detailed comparative delineation of the arguments pro and con thereof and instead focus its attention on the particular fact patterns and assertions of this instant case.

Since Carrier consistently argued that the agreement was never violated, it concluded that a remedy was moot. The methodological formula and rationale adduced by Claimants was never challenged directly on the property particularly at the upper stages of the appeal process. Hence, this Board will not try to second-guess what the parties themselves on the property, didn't contest, i.e., the appropriateness of Claimants' proposed remedy.

Accordingly, having found that work previously assigned to Claimants' abolished positions had in fact been performed by the outside audit firm and deciding this case on its unique merits and intrinsic characteristics, the Board sustains 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 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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January 1978.