NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22690
THIRD DIVISION Docket Number CL-22328

Abraham Weiss, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Western Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8465) that:

1. The Western Pacific Railroad Company violated the Rules of the Clerks Agreement when it abolished the positions of Wire Chiefs, working around the clock, seven days each week, in the Sacramento, California Wire Chief's Office effective with the completion of work on March 29, 1976, and established in lieu thereof three positions of Wire Chief on a partial coverage basis with their work beginning on March 30, 1976, between the hours of 5:00 P.M. to 9:00 P.M. and 6:00 A.M. to 8:00 A.M. being performed by employes outside the Clerks Agreement on a regular daily basis.

2. The Carrier shall now compensate Mr. D. L. Morgan, Mr. J. M. Tognet, Mr. P. C. Sanchez and Mr. R. R. Taillefer eight (8) hours compensation at time and one-half beginning March 30, 1976, and to continue on a daily basis until the violation ceases.

OPINION OF BOARD: At Carrier's Sacramento, California office, four Wire Chief positions operated round the clock, seven days a week up until the close of business March 29, 1976. The four positions were abolished as of March 29 and on March 30, following posting, three Wire Chief positions were established and filled on a partial coverage basis. No coverage was provided between 5:00 p.m. to 9:00 p.m. and between 6:00 a.m. and 8:00 a.m. The result was the elimination of one Wire Chief position.

Claims were filed by the four Wire Chiefs on May 11 and May 12, 1976.

Petitioner alleges that as a result of Carrier's action: (1) The work formerly performed by the Wire Chiefs is being performed on a regular daily basis by employes (dispatchers, maintainers,

supervisors) not covered by the Clerks' Agreement; (2) That the work of the abolished position is work within the scope and operation of the Clerks' Agreement and belongs to Wire Chiefs by bulletin and past practice and has been performed by Wire Chiefs at Sacramento from its inception and was being performed by them when the Agreement was negotiated; (3) That the work involved cannot be removed from positions within the Agreement and transferred to non-covered employes in violation of the Clerks' Agreement Rules, especially Rule 1 and Rule 40(f); and (4) That modification or changes in the Agreement can only be achieved through Rule 64.

The Clerks' Rule 1 is the Scope Rule, Rule 40(f) is captioned JOINT CHECK/ABOLISHING POSITIONS; and Rule 64, DATE EFFECTIVE AND CHANGES.

Petitoner argues that the language of the Scope Rule prohibits Carrier from removing positions within the Scope of the Agreement except through negotiations as provided for in Rule 64; that work is the essence of a position and the work claimed is reserved to the Clerks' craft. In the instant case, however, the Organization argues, Carrier abolished one Wire Chief position and distributed the work among various positions during the hours when no Wire Chiefs are on duty.

Rule 40(f)1 reads:

> "1. When a position within the Scope of this Agreement is abolished, the Division and General Chairmen will be notified . . . . . and will be furnished a statement indicating the remaining work on the position and proposed disposition of such remaining work. The work previously assigned to such position which remains to be performed will be assigned to another position or other positions on the same seniority roster when such position or other positions remain in existence at the location where the work of the abolished position is to be performed."

Rule 40(f)2 covers the situation where "no position on the same seniority roster exists at the location where the work of the abolished position or positions is to be performed." In such event, Carrier is to notify the Organization's representatives 30 days in advance of the abolishment of the position (or positions) and furnish

a statement indicating the proposed disposition of any work remaining of the abolished position.

Petitioner points out that the March 19, 1976 notice from the Superintendent-Communications to the then four incumbents of the Wire Chief position advising them that their positions were being abolished as of March 29 contained the following statement: "Work of above position to be distributed among remaining positions." The claim, however, is that the new Wire Chief positions bulletined do not operate round the clock and that as a result, the work which remained was performed by dispatchers, maintainers, and supervisors when the Wire Chief is off duty. Specifically, Petitioner alleges these non-covered employes do the work of "testing and regulating telephone carriers, telegraph and teletype apparatus, wire testing in Dispatcher and message telephones, as well as directing Linemen and Maintainers in the location and repair of communication equipment failure." In support of such contention, Petitioner submitted a list of 30 such incidents covering the period April 2-June 8, 1976.

Rule 40(f), it is claimed, places Rule 1 (Scope) outside the ambit of a general Scope Rule, which is confirmed by the Superintendent's statement in the notice that the jobs were being abolished; namely, "work of above position to be distributed among remaining positions."

During conferences between the Organization and Carrier's highest designated officer, prior to referral of this dispute to this Board, the Organization submitted to Carrier's representative correspondence between Mr. A. G. Mendoza, Office Chairman, American Train Dispatchers Association (ATDA) and Mr. C. G. Yund, Western Division Superintendent, in connection with the Organization's claim that other than clerks were performing Wire Chiefs' work.

The ATDA, on October 5, 1976, wrote to Superintendent Yund about the gaps in communications availability between 6:00 a.m. and 8:00 a.m. and between 5:00 p.m. and 9:00 p.m. The letter commented "In the last few months since the Carrier has abolished one of the three Wire Chief positions, it has been necessary for the dispatchers to carry out communication duties of the Wire Chief," and then asked "whether we are being assigned Wire Chief's work . . . ."

Superintendent Yund replied on November 29, 1976 that if the ATDA's allegation "refers to communications concerning movement of traffic, whether by wire, telephone or radio, these are normal and customary functions performed by dispatchers and certainly do not involve Wire Chief's work." He continued:

> "In the event some interruption or failure of a communication system should occur during the time no Wire Chief is on duty, if the presence of a Wire Chief becomes necessary, one can be called. This is standard procedure and should present no problem to the dispatchers who should be well acquainted with that procedure."

The ATDA's response on January 10, 1977 listed messages on specified dates and added:

> "These messages picked at random from many in our files were all given by Dispatchers to Terminal Operators to be delivered to trains. Had Wire Chiefs been on duty, the normal handling of these messages would be thus: Wire Chief makes a tape, transmits the tape to the computer, the computer relays the message to the Terminals addressed and the Terminal Operator tears the message off the printer and delivers it to the train involved. In normal handling, the Train Dispatchers only involvement is to ascertain that the message is delivered to the appropriate train.
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> "The work in the Wire Chief's Office was to have been eliminated when one trick of Wire Chiefs was cut off. The work of transmitting train messages by teletype was not eliminated, it was merely transferred to our craft to transmit by whatever means available. We contend that this work still belongs to BRAC and its members.
>
> "Please advise if you are assigning this message work, in the absence of Wire Chiefs, to our craft. Please give us a specific answer at your earliest convenience."

To this letter, Mr. Yund replied on February 17, 1977, in part, as follows:

> "The handling of information to trains and/or terminals regarding the movement of the trains and the work to be performed by trains has always been work of the dispatchers. There are a number of ways that this work has been handled and in all cases changes which occur enroute are handled directly by the dispatcher with the trains and the dispatcher always has the responsibility of seeing that the trains have any messages regarding their operation.
>
> "There has been no new work assigned to the dispatchers. While the procedure may vary from time to time the handling of messages for train movement and work to be performed has always been handled by the dispatcher's office."

Petitioner alleges that the above correspondence between the Train Dispatchers and Carrier's Division Superintendent, and statements in Carrier's Ex Parte Submission demonstrate that the disputed work was performed by other than Clerks and, therefore, the work of the abolished Wire Chief position was not distributed pursuant to the dictates of Rule 40(f)1.

Carrier denied the Clerks' claims on the grounds that: (1) the work load (and Personnel) in the Sacramento office had declined to the point where around the clock coverage could not be justified, and hence it abolished one Wire Chief position; (2) the bulk of the 30 incidents cited by the Organization dealt with messages transmitted by Dispatchers over the telephone circuit, a function normally and customarily performed by Dispatchers and others in this manner; (3) the repair and maintenance of radio equipment -- included in the Organization's list of 30 incidents -- is not Wire Chief's work; and (4) "assisting the technician making radio repairs by voice transmission is not exclusively reserved to Clerks - any employe can and customarily talk on the radio."

Carrier denied that the work of the Wire Chiefs had been transferred to other (non-BRAC) employes.

With respect to the 30 incidents cited by the Clerks as evidence, Carrier holds that the Organization must prove an exclusive right to the work involved, in light of the fact that the Clerks' Scope Rule is a general one which does not assign that work to the Clerks on an exclusive, system wide basis. In support of this line of argument, Carrier cites Awards involving the same parties on this property (Awards 19599, 19551, 10506, 10457, 18416) to the effect that "the Scope Rule is of a general type, in that it does not delineate work"; that the Scope Rule does not give the employes "the exclusive right to perform work...." so that "it is necessary to look to practice and custom"; and that although "the Scope rules describe the class of work, they do not specify directly the inclusion of all such classes of work."

Carrier adds that although Clerks may have performed some of the work involved, it has no exclusive right to such work where such work is not exclusive to the Clerks under the Agreement.

Carrier's Ex Parte Submission to us summarizes its position:

> "Carrier is not before your Board in this docket contending that Wire Chiefs have not performed the work of transmitting train messages by teletype, made voice communication checks by radio or made tests on communication lines and called repairmen (Communication Maintainer and Division Linemen) and directed them in the location of wire problems; what it is contending . . . . is that Dispatchers may and occasionally do choose other means of transmitting train messages to trains and that no exclusive right of such work has been given to employes represented by the Clerks Organization; that making radio checks is not assigned to any craft and all employes perform this function; and that testing communication lines and calling and directing employes in the location of repair is not work reserved exclusively to employes represented by the Clerks Organization.
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> "The fact is that work of the Wire Chiefs at Sacramento has not been transferred to other employes but has actually decreased to the point where around the clock coverage could not be justified."

The Organization in its rebuttal denies a reduction of work, as voiced by Carrier, but instead an increase in technological equipment with additional duties thrust upon Wire Chiefs such as handling microwave plus additional radio and telephone equipment.

Carrier asserts that under the general Scope Rule of the Clerks' Agreement, the Organization must prove an exclusive right to the work described in the 30 incidents cited by the Clerks; i.e., that Carrier has made an exclusive, system wide assignment of the work to members of the petitioning Organization. In support, as previously indicated, Carrier cites several prior denial Awards on this property involving the same parties. (Awards 10506, 19551, and 19599)

Denial Award 10506 (Hall) was based on the Scope Clause, but no position abolishment was involved in that case, and is thus distinguishable from the fact situation confronting us in the instant case. The Board found that the work complained of was incidental to that of another craft and had "been historically and traditionally performed by them over the years"; i.e., that the work performed was not exclusively that of the Clerks.

In Award 19551 (Edgett) the Organization relied on the Scope Rule and Rule 40(f) as well as Award No. 91 of Special Board of Adjustment No. 192. The Board denied the claim stating: "Rule 40(f) makes provision for handling the assignment of work of abolished positions. It is not relevant to the factual situation involved in this claim."

The Board then quoted SBA No. 192, which outlined the Employes' argument as follows:

> "'The employes, in effect, argue that once work is placed under the Clerks' Agreement it cannot be removed therefrom and given to other employes except as provided in Rule 1(c), that Rule 1(c)4 does not stand alone but is interdependent with 1(c)1, 2 and 3.'
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> "Rule 1(c) referred to by the Special Board is similar to Rule 40(f) of the Agreement between these parties. In Award No. 91, Special Board of Adjustment No. 192 limited the application of Rule 1(c) to those factual situations which involved the abolishment of jobs."

In Award 19599 (Lieberman), the Organization relied on the Scope Rule, which Award 19551, referred to supra, determined was of a general type. The Board in Award 19599 denied the Clerks' claim finding that "There was no position abolished nor was there any transfer of work; we have in this matter the elimination of work."

The fact situations involved in these three Awards cited by Carrier are thus clearly distinguishable from the instant situation in that unlike the case before us, no position abolishment was involved. Hence, these Awards relied upon by Carrier offer no support for its position.

The Labor Member of the Panel has referred us to several Awards involving the same parties on this property, in situations comparable to those here present; namely, positions under the Clerks' Agreement were abolished and work was assigned to employes other than Clerks. In those cases, the Board sustained the claims that Carrier violated the Agreement.

In Award 1271 (Hilliard, 1940), the Board stated:

> "This docket is typical of many. The Carrier abolished positions when work contemplated therein continued notwithstanding. In the situation resulting, resort was had to the alternative of assigning the work to employes of an agreement in which it is not scheduled. That, we have often said, and often emphasized, is not permissible. It follows that the claim should be sustained."

In Award 1272 (Hilliard, 1940) the position of third trick train desk clerk was abolished, and the work remaining was assigned to Yardmasters. The Board sustained the Clerks' claim stating: ". . . . Where work within the involved agreement remains to be done, it is subject thereto, and must be performed by the class of employes to which the agreement applies. See Awards Nos. 751, 736, 637, 631, and many others."

In Award 5397 (Donaldson, 1951) the Board, while upholding Carrier's right to abolish any position provided the duties of the position are in fact abolished, held that:

" . . . if the duties are not abolished, the transfer of such duties or work to an employe on another seniority district can only be done after agreement. (Awards 1808, 4076, 4653, 5375.) The Carrier does not controvert the showing made by the Organization that the roundhouse clerk upon another seniority district performed a portion of the duties formerly performed by the storekeeper except to say that the Scope Rule in effect upon this property refers to 'positions' and not to 'work', hence does not prohibit the action taken. We have rejected this contention in numerous Awards holding that work is a component part of a position. See particularly Award 1314."

In Award 5790 (Wenke, 1952) the Opinion read, in part:

"We think Carrier violated the Agreement when it had the agent at Lyoth Quartermaster Depot, on and after February 16, 1948, perform the clerical duties which, up to that date, had been performed by the General Clerk. However, the fact that Carrier must assign this work to clerical employes under the Clerks' Agreement who are entitled thereto and have it performed by them does not necessarily mean that the position of General Clerk must be restored. It is sufficient compliance with the Clerks' Agreement if the work be assigned to and performed by clerical employes entitled thereto. . . ."

We have carefully reviewed other Awards referred to us involving the same parties on this property for their bearing on the instant case. In Award 7047 (Hilliard, 1955) the Organization filed a claim that non-agreement employes did specified clerks' work outside clerks' regular hours and on their rest days. The Board sustained the claim relying on the Scope Rule which (as in the current Agreement applicable in the case presently before us) provided that positions within the scope of the agreement could not be removed "from the application of these rules, except in the manner provided in Rule 64 [Conference on proposed changes]."

In Award 7048 (Wyckoff, 1955) the fact situation related to the abolishment of the positions of Steno-Clerk, working around the clock, seven days a week, and the establishment of three positions working around the clock daily except Sundays and holidays. The Organization claimed that non-agreement employes, on Sundays and holidays, performed the work formerly done by the occupants of positions of Steno-Clerk on such days. The Board sustained the claim on the grounds that the Scope Rule (the same as in Award 7047 supra) protected the Clerks' positions, and, accordingly, "the work of the abolished positions could not properly 'ebb back' to the dispatchers /who had done the clerical work on Sundays and holidays prior to the establishment of Steno-Clerk positions on a 7-day basis/ without action taken under Rule 64."

In Award 19011 (Ritter, 1972), the Clerks protested the action of a Yardmaster who twice on a given day, while Claimant was on duty, made a list of cars and handed the list to a Switch Foreman. The Clerks alleged that such work belonged to employes covered by the Clerks' Agreement and that the involved work belonged to Yard Clerks by bulletin and assignment. The Board sustained the claim and cited in support Award 18804 (Franden).

Carrier, as previously noted, has raised the defense that the Clerks must show exclusive rights to the work in question. We have, therefore, examined Awards on other carriers whose agreements with the Clerks contain rules similar to Rule 40(f) dealing with the procedure governing the assignment of work remaining when a position (or positions) is abolished, along with a general Scope Rule similar or identical to the Scope Rule in the Agreement between the parties here involved.

Third Division Awards 21452 (Lieberman, 1977), 20535 (Sickles, 1974), 20568 (Edgett, 1974), and 13478 (Kornblum, 1965) are relevant in this connection.

In Award 21452, the Clerks alleged a violation of Rule 3-C-2(a)(1), the Scope Rule and the Extra List Agreement. The Relief Crew Dispatcher Position was abolished at Shire Oaks and readvertised simultaneously at West Brownsville; Claimant was awarded the new position at West Brownsville; some of the duties previously performed by the Relief Crew Dispatcher (preparing time cards, verifying the reporting and mark off times of crews, etc.) was assigned to train crew personnel and a Class 2 Extra List employe who continued to work at Shire Oaks.

Rule 3-C-2(a)(1) ASSIGNMENT OF WORK provides:

"(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."

The Board found that the verifying of the reporting and release times remained to be performed after the Relief Crew Dispatcher position was abolished, and that "this work, little as it is" should have been assigned to one or more of the Class 1 positions extant at Shire Oaks in accordance with Rule 3-C-2(a)(1).

The Board added the following comments:

"In our judgment, with substantial authority to support the conclusion: 1. The Scope Rule of this Agreement is a general one which does not reserve work, per se, to any covered employes. 2. Rule 3-C-2 is a special rule, an exception to the Scope Rule, which provides for a detailed procedure in assignment of work when a position is abolished. While we do not agree with Petitioner that Rule 3-C-2 is a 'preservation of work' rule (but rather merely an 'Assignment of Work' as its caption indicates), we do not believe that its implementation is dependent on the 'exclusivity' doctrine. We view with favor the reasoning in Award 20535 which found that there is no conflict in the exclusivity theory as applied to general scope rules and rules such as 3-C-2. . . .

"It is apparent that Rule 3-C-2 was negotiated and placed in the Agreement by the parties in good faith. It would be illogical and redundant to have done so if its implementation were dependent upon the covered employes having the exclusive right to work in the

"first instance. At the same time, as indicated in Award 21324, we do not find that this Rule grants to covered employes any exclusive right to work which was not previously exclusively theirs. (Underlining in original)

"The Board finds that Carrier violated the Agreement in that, after the abolishment of Claimant's position, it violated Rule 3-C-2(a)1 in not assigning the residual work (verification of train crew time cards) to remaining Class 1 Clerical positions remaining at Shire Oaks until November 22, 1971. . . ."

In the case decided by Award 20535 (Sickles, 1974) the position of Day Bill Clerk was abolished and specific work activities or functions formerly performed by the abolished position were assigned to employes not covered by the Scope of the Clerks' Agreement. Claimant alleged a violation of Rule 1(g) - (Scope) and Rule 18(f)(1).

Rule 1(g) in essence requires agreement between the parties for the removal of positions within the Scope of the Agreement, "except as provided in Rule 18(f)." The latter rule is quite similar to Rule 3-C-2(a)(1) discussed in Award 21452 supra. The Board upheld the claim. It noted with approval prior Awards which interpreted rules similar to Rules 1(g) and 18(f)(1) which Awards "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 . . . ."

The Board added:

"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 assignemnt 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. . . ."

Award 20568 (Edgett, 1974) involved the same parties as in Award 20535. In 20568, Carrier abolished the position of relief clerk and yard clerk and reassigned the Agent's work schedule, so that there were no station forces on duty from 8:00 a.m. to 3:00 p.m. The Organization asserted that the Agent was assigned work of the abolished positions. In sustaining the claim, the Board determined that "Carrier has incorrectly relied on the theory that the governing rule /Rule 1(g) and Rule 18(f)(1)/ applies only to work which was exclusively performed by the clerical positions." The Board concluded:

> "The record, fairly read, shows that work which had been performed by the abolished positions is now being performed by the Agent. It is not necessary for the Organization to show that such work is exclusively performed by clerks. It is enough to show that work which had been performed by a clerical position, and which remained after the abolishment, was not assigned as provided by the Rule."

In Award 13478 (Kornblum, 1965), the applicable Agreement contained an Assignment of Work Rule (Rule 3-C-2) similar in major respects to Rule 40(f). In that case, the Board concluded:

> "It is plain that the work comprehanded by Rule 3-C-2(a) does not depend upon the operation of any 'exclusivity theory', i.e. proof that the work involved, either by past practice or Agreement, belonged to and could be performed solely and only by employes covered by the Clerical Rules Agreement. See Award 12903 (Coburn). It is enough that it be proved that the work which remains from the abolished position was 'previously assigned' to such positions. See Awards 12901 (Coburn), 4045 (Fox)."

It seems to us that the critical element in the case before us is whether Rule 40(f) is applicable to the circumstances herein present. The rule is captioned "JOINT CHECK/ABOLISHING POSITIONS." Under well established Board policy, when, as in this case, the applicable Agreement contains a general Scope Rule, Petitioner must show that its members have exclusive right to perform the disputed work, system wide, on the basis of practice, custom, or tradition. In such event, absent a rule similar or identical to Rule 40(f), the Board will generally deny a claim if it were shown that the Petitioner

Organization could not demonstrate exclusive work assignment or that the disputed work was incident to the position of another craft or non-agreement employe and had been historically and traditionally performed by such other craft or non-agreement employe.

But, as in this case, where a position "within the Scope of this Agreement" -- a Wire Chief -- was abolished, Rule 40(f)1 provides first that the Division and General Chairmen will be notified. Any work remaining of the abolished position is to be assigned to a position or positions still remaining at the location of the abolished positions. Here, three Wire Chief positions remained at the same location.

Should no position remain at the same location as the abolished position, then the remaining work of the abolished position can be "transferred to another seniority roster or to a supervisory employe" provided "less than three (3) hours' work per day of the abolished position remains to be performed." In the case at bar, three Wire Chief positions remained at the same location.

As shown above, the Board has ruled in a number of cases involving a rule such as Rule 40(f) which provides how the work of abolished positions is to be assigned. It appears clear to us from these prior Awards that the Board has rejected the exclusivity theory advanced by Carriers in such cases and has sustained the Organization's claim that where a position is abolished at a given location and some of the work remains to be performed at that location, positions which remain can perform that work. It is only when no position remains on the same seniority roster at the location where the position was abolished that the work may be transferred to other employes in accordance with the procedures and qualifications prescribed by the Rule. As stated in Award 4045 (Fox, 1948):

> "Sub-section (1) /of Rule 3-C-2(a)/ is clear and explicit, and furnishes the principle and philosophy sought to be established, a principle not out of line with the general rule of all labor agreements, that the employes of a particular class or craft are entitled to perform the work attached thereto. So long as positions, working under the Clerks' Agreement, at the location where the work of the abolished positions was to be performed, were in existence, they were entitled to do the work of the positions abolished."

Unlike some of the other cases where a Rule similar to Rule 40(f) is listed or is asserted by Petitioner to be an exception to the Scope Rule, in the instant case Rule 40(f) is not an exception to the Scope Rule but is a subsection of Rule 40, captioned "REDUCING FORCES". Rule 40(f) outlines the steps involved in assigning work previously assigned to a position which has been abolished. We are confronted here with the situation of an abolished position, and we find, based on the record before us, and supported by the precedent Awards cited heretofore, that Carrier violated the Agreement when, subsequent to abolishment of the Wire Chief position, certain work formerly performed by that position was assigned to employes not covered by the Scope Rule of that Agreement. We also cite in support of our finding of a violation Carrier's notification to the four Claimants (copies of which were also sent to the Clerks' representatives) that their positions were being abolished. That notice, in our judgment, contained two significant notations which are directly relevant to our decision: (1) a reference to Rule 40; and (2) the statement, "work of above position to be distributed among remaining positions."

Part 2 of the claim involves a request for eight (8) hours' compensation at time and one-half for the four Wire Chiefs involved effective March 30, 1976, when the three positions were established on a partial coverage basis.

Carrier rejects the monetary claim as a form of punitive damages or penalty payment which is not provided for in the applicable Agreement.

Both parties cite court and Board decisions in support of their respective positions regarding penalty payments.

Carrier also points out that although the Organization alleges that non-covered employes are performing clerk's work during six hours of the 24-hour day, the monetary claim is nonetheless for eight hours at time and one-half for each of the four Claimants, or a total of 32 hours per day.

Carrier adds that three of the Claimants continued working as Wire Chiefs without any loss of time and that the other Claimant exercised his seniority to another clerical position and suffered no monetary loss. The Organization's Rebuttal Statement asserts that the Relief Wire Chief suffered a reduction in pay when he exercised his seniority to a clerical position.

The basis for the claim of eight (8) hours' pay is not clear from the record. There is no reference to the amount of time per day represented in the performance of the work by employes not covered by the Agreement with respect to the 30 incidents cited by the Clerks. Based on the 30 examples, which is the only evidence of record, the work complained of was relatively minor as far as time consumed by the dispatchers and/or other non-agreement employes. As previously indicated, 27 of the 30 incidents involved telephone messages, apparently of limited duration, and in the overwhelming majority of cases, only one such message was transmitted per day. Consequently, from the evidence of record, an award of damages to the three Wire Chiefs who continued functioning as Wire Chiefs without loss of time or pay would be speculative. Accordingly, based on this record, they are not entitled to compensation as asked for in the claim.

The situation of the Relief Wire Chief, whose position was abolished and who had to exercise his seniority to claim another position is different. We believe he is entitled to some measure of damages. The measure of damages is difficult when, as in the instant case, there is little information as to the injury to this particular Claimant.

We now come to that portion of the monetary claim which requests compensation at the time and one-half rate. The difficulty is that the record contains no evidence that the disputed work, if performed by the Claimant, would have been performed at penalty (time and one-half) rates. Another problem is that there is no express provision or specific authorization in the applicable Agreement conferring authority on this Board to assess punitive or penalty damages. Our authority is limited to interpreting the Agreement and/or determining whether there has been a violation of any rule thereof. Our authority derives from the Agreement; we have only such powers as are given us by the parties as expressed in their Agreement. We may not substitute our judgment for what the parties have written.

It is true that there is adequate authority for the principle that arbitrators have power to fashion a remedy appropriate to the case before them:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach

"a fair solution of a problem. This is especially true when it comes to formulating remedies. ..... He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreements....."/1

In accord with this dictum, we may use our "informed judgment", but the collective bargaining agreement between the parties circumscribes our award and remedy.

In accordance with the above principle, and in the absence of clear evidence that the disputed work would have been performed at "penalty" rates, it is our judgment that in this case we lack the power to award punitive or exemplary damages.

In the instant case, we are of the opinion that compensatory damages at the pro rata rate for the monetary loss, if any, suffered by the Relief Wire Chief, designed to make him whole in the face of Carrier's violation of the Agreement, constitutes an affirmative remedy, a compensatory award within the bounds of our authority.

This is not to say that repeated, willful violations, if proven, may not warrant punitive damages.

Accordingly it is our judgment that the Relief Wire Chief should be made whole for wage loss sustained, if any, as a result of Carrier's action. We shall direct the parties to make a joint check of the company's records to determine the extent to which, if at all, he has suffered a cut in pay as a result of his assignment to another job, through exercising his seniority following the abolishment of his position. If the position to which he exercises his seniority carries a lower wage rate than that of Wire Chief, he shall receive the difference in pay, pro rata, but not at the time and one-half rate as submitted in the claim. The Relief Wire Chief is entitled to compensatory damages for monetary loss in this situation and we hereby so order on the basis hereinabove outlined.

/1 Steelworkers v. Enterprise Wheel and Car Corp., 363 U. S. 593. Cited 46 LRRM at 2425; 34 LA at 570.

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 Agreement was violated.

A W A R D

Claim sustained to the extent and in the manner set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1979.