

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22802
Docket Number CL-22813

George E. Larney, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8711)
that:

1. The Carrier violated the effective Clerks' Agreement when on Thursday, March 2, 1978, it used the services of an outsider to perform work coming within the scope of the Agreement.

2. The Carrier shall now be required to compensate furloughed employe Barbara J. Grueser eight (8) hours' pay at the pro rata rate of the position of Clerk-General Storekeeper's Office for Thursday, March 2, 1978.

OPINION OF BOARD: On March 2, 1978, Carrier conducted an investigatory hearing involving a charge of unauthorized use of Carrier's telephone facilities by the Local Chairman of the Organization, J. O. Jones, with resulting toll charges to the Company of nearly \$400.00. According to the Carrier, a free lance court reporter was employed to record and transcribe the investigation proceedings rather than using a clerical employe of the Carrier, because of the seriousness and magnitude of the charge. Subsequent to the conclusion of the March 2, 1978 investigatory hearing the Organization initiated the instant claim alleging, among other things, that Carrier had violated the scope rule, Rule 1, of the Agreement, effective date June 15, 1938 as revised October 1, 1972. This rule reads in relevant part as follows:

SCOPE

"Rule 1(a). These rules shall constitute an agreement between the Bessemer and Lake Erie Railroad Company and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, and shall govern the hours of service and working conditions of the employees and positions of the class or craft of clerical, office, agency, telegraphic, station and storehouse employees, of the Bessemer and Lake Erie Railroad Company, except as otherwise provided.

"Rule 1(b). Employees affected are as follows:

(1) Clerks, being those employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, writing and transcribing letters, bills, reports, statements, and similar work, telegraphic work, and to the operation of office or station mechanical equipment and duplicating machines and devices in connection with such duties; agents; levermen; telephone switchboard operators; section stockmen; stores checkers; freight house and transfer platform foremen; freight checkers; car carders and weighmasters.

* * *

Rule 1(d). Positions or work 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 by agreement between the parties signatory hereto."

The Organization takes the position the Scope Rule, in particular paragraph (d) cited above, reserves the work of recording and transcribing investigation proceedings to the employees covered by the Agreement. Based on its contention of exclusivity of the disputed work, the Organization argues that on the date in question, March 2, 1978, the Claimant, then in a furloughed status, was eligible to be called to record and transcribe the investigation proceedings conducted on March 2, 1978.

The Carrier contends that the Scope Rule of the Agreement is of such a nature as not to be a specific rule, but rather general and argues therefore that Rule 1 does not give employees under the Agreement the exclusive right to perform the work in question. In fact, Carrier asserts over the years, other than Clerks have been employed to perform the disputed work, even, on some occasions, free lance court reporters not employees of the Carrier.

Many times our Board has concluded that mere assertion that something is does not constitute probative evidence. Although Carrier asserted throughout the handling of this case on the property that over

the years other than clerks had performed the disputed work in question, Carrier nonetheless failed to offer any probative evidence in support of its assertion. We note Carrier has since produced evidence in contravention of the Organization's position regarding exclusivity over the disputed work before this Board for benefit of our review and consideration. However, since Carrier failed to introduce this evidence at any time during the handling of the instant Claim on the property, such evidence proffered for the first time before us constitutes new evidence. Past precedents of long standing with regard to consideration of new evidence by all the divisions of the Adjustment Board are legion, rendering us unable to entertain Carrier's refutation of the scope rule argument advanced here by the Organization.

Based on the foregoing discussion and the absence of probative evidence in the record contravening the Organization's central position, we find we must uphold the instant 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 Employee involved in this dispute are respectively Carrier and Employee 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 31st day of March 1980.