

Marty E. Zusman, 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-9801)
that:

1. Carrier violated the effective Clerks' Agreement when, on February 10, 1982, it employed the services of an outsider to take down in shorthand a disciplinary investigation and to transcribe such notes;
2. Carrier shall now compensate the senior unassigned available clerical employe with stenographic skills eight (8) hours' pay at the straight time rate of the position of General Clerk, General Superintendent's Office for February 10, 1982.

OPINION OF BOARD: Claim before the Board centers upon the issue of whether Carrier violated the Scope of the Agreement. On February 10, 1982 in conducting a disciplinary hearing, Carrier assigned said work of shorthand and transcription to outside forces. By letter of April 2, 1982, the Organization contends that said work is assigned to the clerical ranks and as such its removal constitutes a violation of the Clerks' Scope Rule, particularly that portion reading as follows:

"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..."

In the instant case Carrier does not dispute the Organization's contention that such work has been performed on property by Clerks covered by the Agreement. The Organization further contends that the Scope Rule provides exclusivity in the disputed work to Clerks who have routinely performed said work. The Organization submits that in a "similar instance" on this same property the Organization's position was sustained (Third Division Award Number 22802) and in effect is of precedential value and should be considered res judicata.

Carrier disputed such contention arguing the Scope Rule to be a general rule and in relevant part by letter of May 27, 1982 that "it has been the historical practice on this Carrier to have investigation proceedings recorded and transcribed by: 1) court reporters on a contract basis, 2) employees not covered by agreement with BRAC, or 3) clerical employees". It further argued that Third Division Award Number 22802 was not of precedential value because of a decision based on lack of "probative evidence" and further that more relevant was Award 1 of Public Law Board 2792 which upheld the position of Carrier.

This Board has carefully reviewed the issues of Scope, exclusivity, past practice and the numerous Awards cited by the parties in this dispute. A review of the record, however, shows that the Organization has failed to present sufficient substantial evidence of probative value to establish that the recording and transcription of investigative proceedings are exclusively Clerks' work under the Agreement. This Board agrees with Carrier that Third Division Award Number 22802 cannot decide this case at bar and Carrier documentation of historical past practice is substantial. A long list of Awards of the National Railroad Adjustment Board has established the precedent that in cases such as this the burden of proof rests with the moving party (Third Division Awards 13691; 19506). That burden has not been met here.

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

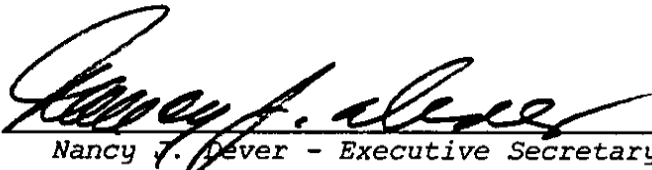
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1985.

