NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25934
THIRD DIVISION Docket Number CL-25496

M. David Vaughn, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerk,
(Freight Handlers, Expess and Station Employes
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9843) that:

(1) Carrier violated the rules of the Master Agreement effective April 1, 1973, particularly Rule 1, Scope, Rule 3, among others, as well as Memorandum Agreement dated January 8, 1979, when commencing on April 22, 1981, it continues to remove work from the Scope in coverage of said Agreement and arbitrarily permits the farming out of work formerly exclusively performed by clerical forces of the In-put Out-put Section of the Computer Services Department, Roanoke, Virginia, to Whitey's Processing, an outside firm, not coming under the Scope and coverage of the Master Agreement.

(2) Carrier shall now be required to restore the work of producing negative films under the Scope and coverage of the Master Agreement and compensate the senior idle available employe and all employes adversely affected commencing on April 22, 1981, and continue until such time this violation is corrected and the work is restored."

OPINION OF BOARD: The Carrier retains significant amounts of information concerning its accounts, including shipping charges and bills. Historically, it did so by preserving paper copies of waybills and other documents. Employees represented by the Organization performed the work of filing and preserving many of those documents, including waybills. Later, as computers were utilized in Carrier's operations, some information was stored on magnetic tape.

As technology advanced, the Carrier sought to experiment with preserving information in microform in lieu of preserving the original documents or magnetic tapes. The Organization wished to ensure that, if the work of filing and preserving paper documents performed by its members were replaced with new techniques, it would retain the work. Accordingly, the Carrier and the Organization entered into a Memorandum Agreement dated September 1, 1971, concerning experimental micromation programs (the "Micromation Memorandum"). The Micromation Memorandum states, in relevant part:

> "Section 2: The Carrier will be afforded reasonable opportunity to evaluate Micromation techniques by ... a trial and test period . . . * * * If . . . upon expiration of the trial and test periods, the Carrier installs its own Micromation equipment, the operation thereof will be assigned to employes and positions covered by the scope of the applicable Clerks' Agreement."

Pursuant to the Micromation Memorandum, the Carrier conducted and completed trial and test periods and, in 1975, installed its own micromation equipment. Information formerly preseved on paper documents and magnetic tape was preserved in microform, using the micromation equipment. Information was copied onto roll microfilm, which was developed and cut into flat sheets of microfiche. Covered employees and no others operated the micromation equipment.

Effective January 12, 1979, the Scope Rule of the applicable Agreement was amended to state, in relevant part:

> "Positions or work within the scope of this Rule 1 belong to the employes covered thereby and nothing in this Agreement shall be construed to permit the removal of such positions or work from the application of these rules...
>
> "When and where machines are used for the purpose of performing work coming within the scope of this Agreement, not previously handled by machines, such work will be assigned to employes covered by this Agreement. A change in the equipment used for the performance of such work will not remove such work from the coverage of this Agreement." (1979 additions are underlined.)

In 1980, the Carrier acquired additional, different micromation equipment, which produced negative microfiche. Covered employees continued to operate that equipment to develop and copy the microfiche. In 1981, the Carrier implemented a new program to preserve the information contained on original waybill documents on roll microfilm. The old equipment was converted to produce positive 16 millimeter roll film, which was used on a test basis for the waybill program. During the test, beginning in January of 1981, and continuing until April of 1981, covered employees developed and copied the microfilm.

The Carrier discovered as a result of its test that the prints produced from the positive film, which showed white print on a black background, were not satisfactory, because they could not easily be photocopied, but negative film was satisfactory. The Carrier determined that the negative roll film it required could not be produced on its existing equipment and that it would be uneconomical to acquire suitable equipment. Accordingly, the Carrier contracted to an outside business the work of developing and copying negative, 16 millimeter roll film used for the storage of information formerly preserved on paper waybills. This Claim followed.

The Organization asserts that the work in question is reserved to employees covered by the Agreement. It asserts that the Micromation Memorandum allowed only one trial and test process and that the Carrier did implement, and thereby exhaust, the Micromation Memorandum. The Organization contends that the operation of that equipment was exclusively performed by covered employees at the time the Scope Rule was amended in 1979.

The Organization argues that the 1979 changes to the Scope Rule "froze" within the Organization's jurisdiction work which was being performed by covered employees as a result of the Micromation Memorandum. The Organization asserts further that the 1979 Agreement superseded whatever might have remained at that time of the Micromation Memorandum and that work which subsequently came within the Scope Rule could not, by its terms, be unilaterally removed. In addition, asserts the Organization, the 1979 Agreement prohibited the removal of covered work as a result of any change which might be made in the equipment used to perform it.

The Organization argues that, because the Scope Rule specifically protects positions and work, it is not a so-called "general" Scope Rule, and, therefore, no additional showing of its entitlement to the work based on history and custom of exclusive performance of work by bargaining unit members is required. However, it asserts that its members have, in fact, exclusively performed the work.

The Carrier contends that the Micromation Memorandum and the Scope Rule protected, at most, the developing and copying of positive microfiche, a separate and distinct microform from, negative, roll microfilm, the development and copying of which is here at issue. Such work constitutes, in the view of the Carrier, different, unprotected work.

The Carrier argues in addition that, to the extent that the production of negative, roll microfilm might be covered by the Micromation Memoranudum, the 1981 experiment was an initial experiment, after which the Carrier concluded that in-house production was not economical and did not install equipment with negative roll microfilm processing capabilities, never bringing the work within the Scope Rule. The Carrier argues further that the Organization failed to carry its required burden to demonstrate that it had exclusively performed the work of processing and developing negative roll film. Indeed, the Carrier asserts that it has always sent at least some negative, 16 millimeter roll film off the property for processing.

At the core of this dispute lies the question of what is the "work" at issue. The parties have clearly attempted to balance in their negotiations preservation of work in the face of technological innovation. National labor policy favors resolution of such disputes through the bargaining process. See National Woodwork Manufacturers Association v. NLRB, 386 U. S. 612 at 641, 642 (1967). Entities charged with responsibility to interpret such agreements should interpret them in light of the purpose of work preservation. See, generally, NLRB, v. International Longshoremen's Association, 447 U. S. 490 (1980) (interpreting the scope of a work preservation agreement under Section 8 (e) of the National Labor Relations Act, as amended.)

Under the circumstances of this case, the Board is persuaded that a narrow and technical definition of the work is inappropriate. The language of the Micromation Memorandum which defined the work clearly encompassed more than one micromation technique. It allowed testing of "microfilm and/or microfiche" and did not differentiate between positive and negative images. Both that Memorandum and other discussions focused on the work which micromation might replace. Thus, the history of bargaining with respect to micromation supports a conclusion that the parties intended to use a broader definition of micromation-related work.

The Board believes that the work is best defined under the Micromation Memorandum and Scope Rule applicable here in light of its purpose. See, in addition to the Supreme Court cases cited above, Third Division Award 21933:

> "Under the cited 'positions or work' scope rule, all work performed under the agreement is preserved to the Organization until it is negotiated out.***... we feel that the question presented is controlled by the function of the work performed, not the form used. [The function there in question] is a function assigned to clerks and [the Carrier's assignment of the work outside the unit] resulted in a violation.)" (Emphasis added.)

The Board believes that the function of the work here at issue was the storage of shipping and billing information in microform as part of a micromation system and that the use of rolls or strips and positive or negative images were simply different techniques to accomplish the same work.

The Micromation Memorandum authorized only one, "initial" period of experimentation for micromation techniques. The Carrier's completion of that trial and test and purchase in 1975 of micromation equipment exhausted its rights under the Micromation Memorandum and entitled the Organization's members to operate the equipment, including the functions of development and copying of film later contracted out, an option for which neither the Micromation Memorandum nor the 1979 Scope Rule made any provision.

The Board holds that, when in 1979, the Scope Rule was amended to encompass "positions and work", an effect of the amendment was to freeze the work of operating the Carrier's micromation equipment as described in the Micromation Memorandum and to require preservation of that work to covered employees. See Award Number 1 of Public Law Board Number 954 which involved the same parties and a Scope Rule substantially identical to the Rule in question, in which the PLB held:

> "The weight of authority of Third Division, National Railroad Adjustment Board case law compels a 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...'"

That Award has been cited with approval in Third Division Awards 21581, 21382, 20382, and 19783.

The Board does not decide that the 1979 amendment to the Scope Rule froze all work, including work not specifically identified and described by Agreement of the parties as being covered; suffice that it froze the work specifically identified by the Mircomation Memorandum. The instant case is, therefore, distinguishable from those cited by the Carrier (e.g., Third Division Award 20313) in which the work sought to be protected had nowhere been specified by agreement of the parties. The Micromation Memorandum defined the work of operating micromation equipment and the record established that covered employees were exclusively performing it as of the effective date of the 1979 amendment.

In addition to having operated the equipment which produced the predecessor, negative microfiche, covered employees did, during the 1980 test period, produce the positive microfilm used for the precise purpose for which the contracting out was undertaken. The Board holds that the development and copying work contracted out was the same work as that performed during the 1980 test period and, under the Scope Rule, could not be removed without violating the Agreement.

In its Memorandum submitted to the Board on reargument, the Carrier argues for the first time that the Scope Rule changes resulting from the 1979 Agreement did not create a true "positions and work" rule, since the Organization had originally proposed more specific protective language. The final language represents, in the Carrier's view, a compromise; and it argues that the resulting Rule did not have the effect of "freezing" work. It asserts, on that basis, that a showing of exclusivity should be required. The Carrier's argument was not raised on the property or previously before the Board, and all the allegations which support it are not a part of the factual record of the case. Board precedent is clear that assertions not raised on the property and facts not a part of the record may not be considered when raised for the first time before the Board, and the Board declines to do so in this case.

In addition to freezing the operation of micromation equipment within the coverage of the Agreement, the 1979 language also provides that changes in equipment used for the performance of work do not serve to remove it from the scope of the Agreement. When the Carrier determined to accomplish the work of preserving waybill information through negative microfilm rather than positive microfilm or microfiche, the work was not removed from the coverage of the Scope Rule, even though the new technique required different equipment.

The Board has not required in a "positions and work" rule where the work is identified a showing by the Organization of exclusivity in order to sustain jurisdiction over the work. See e.g., Third Division Award 21581 ("the scope rule...is not a general scope rule and our awards holding to a proof requirement of exclusivity therefore do not apply.").

Further, the Board holds that the Organization does not here carry the burden of demonstrating exclusivity because that doctrine is not applicable to situations where work is contracted to an outside contractor. See, e.g., Third Division Award 23217 (citing Award 13236, which held that "The exclusivity doctrine applies when the issue is whether Carrier has the right to assign work to different crafts and classes of its employees - not to outsiders.").

The foregoing does not mean that the Organization carries no burden to show entitlement to the work; rather, as stated in Special Board of Adjustment of the BN/BRAC Agreement, Award Number 113:

> "The Organization must demonstrate unilateral removal and assignment to strangers to the contract of a significant portion of that work which actually was performed as of [the effective date of the rule] by positions listed . . . "

The Board holds that the Organization has carried that burden in the instant case: the Micromation Memorandum defines the work of operating micromation equipment and the record demonstrates that covered employees have performed that work, defined by its purpose and including the development of film. The work was significant, rather than de minimus.

In response to the Carrier's assertion of a past practice of processing negative 16 millimeter roll film off the property, it appears that the film to which the Carrier has reference was unrelated to the purpose of the work here at issue. Under such circumstances, the Carrier's past practice does not undermine the Organization's Claim to the work, even if a showing of exclusivity were required.

The Board construes the 1979 Agreement and the previous Micromation Memorandum in light of their purpose of preserving to the Organization's members work traditionally performed and concludes that, read together, the documents cover the work at issue. The Board concludes, therefore, that the work and positions in connection with the development, processing and copying of negative, 16 millimeter roll microfilm in connection with the waybill project are within the Scope Rule and were properly reserved to covered employees.

Neither the Carrier's managerial prerogatives nor the comparative economic cost of performing the work in question in house using covered employees is sufficient to relieve the Carrier of its obligations under the applicable 1979 Agreement. Numerous Third Division Awards so hold.

The Board concludes further that the change in equipment used to perform the work which occurred when the Carrier changed from positive to negative film did not remove it from the coverage of the Agreement because of the Organization's historical performance of the prior work, the broad definition of work protected under the Micromation Memorandum, and because covered employees performed the work during the period from January until April of 1981, thereby bringing it within the Scope Rule. Accordingly, the Board concludes that the Carrier's action of contracting out the microfilm development and copying violated the Agreement.

The Carrier contends that, even if the Agreement were violated the Organization's requested compensation remedy is inappropriate as a punitive award because no covered employees were laid off or otherwise reduced in work as a result of the contracting out. It asserts further that the Claim does not identify individuals who have been harmed. The Board does not agree. But for the violations, one or more covered employees, presumably the laid-off employees holding greatest seniority under the Agreement, would have received work pay equal to the hours spent by the outside contractors performing the work. The Board concludes that both the senior laid-off employees and the employee hours spent by the outside contractor are identifiable with sufficient specificity to satisfy the Board's requirements.

The Board holds that the Carrier is obligated to pay for the direct consequences of its violation in the form of compensating the senior, eligible covered employee or, if the hours of work performed by the contractor were equal to more than forty hours of work per week for any period, more than one employee, in amounts equal to pay at the appropriate rate under the applicable Agreement for the number of employee-hours equal

to that spent by the contractor, except for the period of extensions of time to file, for which the monetary Claim was tolled by agreement of the parties. Such a payment constitutes a compensatory award rather than one which is punitive. To that extent, the Board must, and it hereby does, grant the relief requested.

The Organization also seeks relief for "all (other) employees adversely affected" by the Carrier action, but it does not identify the employees or provide a reasonable means by which might be identified, nor does it specify the manner in which the employees have been adversely affected. The Board concludes that the Organization's request for such additional relief identifies neither the employees nor the adverse impact with sufficient specifically to warrant relief. Accordingly, that portion of the Claim must be and it is, dismissed for lack of proof.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and 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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 26th day of February 1986.

CARRIER MEMBER'S DISSENT TO AWARD NO. 25934

DOCKET NO. CL-25496

REFEREE M. DAVID VAUGHN

The instant claim is premised on an alleged violation of the Scope Rule as a result of the processing of negative microfilm off the property.

The Majority's determination that the work must be performed by BRAC employees even if the Carrier lacks equipment to perform it is totally erroneous.

The Majority exceeded its jurisdiction by not confining itself to the arguments and exhibits submitted to the Carrier on the property; by rendering a decision based on its own hypotheses and on theories and arguments presented for the first time in the Organization's submission and oral argument to the Board.

In this case, the Organization's only Scope Rule Argument pursued on the property consisted of the following:

> "It is the position of the Employees that the Carrier has violated Rule 1 (Scope) as revised in the January 8, 1979 Memorandum Agreement, when, on April 22, 1981, it construed to permit the removal of the above work from the application of the Rules of the Clerical Class and Craft.
>
> > 'Positions or work within the scope of this Rule 1 belong to the employees covered thereby and nothing in this Agreement shall be construed to permit the removal of such positions or work from the application of these rules subject to the exceptions hereinafter set forth and except in the manner provided in Rule 70.'"

(Carrier's Exhibit "B," page 7).

The Organization's reliance on that paragraph of the Scope Rule reading:

> "When and where machines are used for the purpose of performing work coming within the scope of this Agreement, not previously handled by machines, such work will be assigned to employees

> "covered by this Agreement. A change in the equipment used for the performance of such work will not remove such work from the coverage of this agreement." (underlining added).

was first advanced at page 3 of their ex parte submission, while the Carrier's exclusivity position was not challenged or rebutted until the oral hearing before the Board on March 11, 1985. The Organization's "freeze frame" theory first surfaced at the oral hearing. The Carrier objected to these new averments on the basis they were barred from consideration under Circular No. 1.

While adhering to the position that the Organization's Scope Rule arguments were judicially invalid, Carrier offered rebuttal which conclusively showed that the Organization's arguments were without merit. Instead, the Board held Carrier's challenge to be new argument and as such inadmissible. In its decision in this case, the Majority has attempted to usurp the authority and repudiate the decisions of other arbitrators and revise the Scope Rule.

Public Law Board 2668 has heard and decided this very issue involving this identical Scope Rule in its Award 12, wherein it was held:

> "In our review of this case, we concur with Carrier's position. The basic issue before this Board is whether the operation of the CRT device at the East Decatur Yard exclusively accrued to the clerks. ... The record herein clearly shows that other employees performed tasks that required the use of the CRT device and such use was not de minimus or infrequent. The CRT equipment was needed to perform tasks integral to their positional assignments and reflected shared work. It was not work that was viewed as singularly belonging to them, when the Scope Rule was amended in 1979. Rule 1 does not contain restrictions which would enjoin other employees from using the CRT equipment. The Organization is essentially correct when it argues that the work of operating the aforesaid devices is performed by clerks, but it is also significantly performed by other employees and not unmistakably identified as clerks' work. We will deny the claim."

This is not an isolated decision involving the instant Scope Rule. In Award 13 of Public Law Board 2668, it was observed:

"In our review of this case, we concur with Carrier's decision the record does not show that agreement covered employees exclusively recorded and transcribed investigations, but indicates that independent stenographic contracts were used at times to perform this work. Carrier submitted competent documentation verifying these arrangements and we cannot conclude from this evidence that they were isolated, insignificant occurrences. On the other hand, the Organization's October 27, 1976 Section 6 Notice pointedly reflects a proposeful attempt to reserve exclusively such work to the clerks and a concommitant effort to eliminate the ambiguity attendant to the Scope Rule's coverage. ... It is axiomatic that when a rule change is requested, the party making such request is seeking rights it does not have under the existing Agreement. It must then be evident that the Scope Rule does not contain a reservation of work." (emphasis added).

The above decisions of Public Law Board 2668, were affirmed in its Award 69, which held:

"The issue before this Board in the instant case is whether the transporting of crews using other than Clerks as drivers is an Agreement violation. Petitioner makes the argument that work of transporting crews at Decatur has always been considered within the scope of the Clerks' Agreement, specifically Rule 1 and Revised Rule 1 (Position and Work). It also argues that once work has been assigned to a craft by Carrier under a scope rule that encompasses Position and Work, that work cannot be removed from the Agreement, except by the consent of the parties. It finally argues that to establish that work belongs under the Agreement, it must only be proven that the work in question was assigned to a position under the agreement. It need not demonstrate or prove the exclusivity rule in the instant case. ...

* * *

"This Board has carefully reviewed the record and must conclude that the probative evidence in this case, as well as prior awards that are on point, weighs in Carrier's favor.

"The record establishes that crew hauling has been a shared responsibility for many years at Decatur. Clerks as well as outsiders performed the work. When revised Rule 1 was adopted on this property, it did not exclude all others from performing such tasks. There is nothing in the rule or in the past behavior of the parties to indicate that Clerks have exclusive right to crew hauling.

> "... In the instant case, crew hauling at Decatur was shared work prior to agreement on Rule 1.a. (Position and/or Work). It was handled in the same manner after agreement on the rule. This Board cannot conclude the Carrier has removed work from the coverage of the Clerks' Agreement. In this instance, the claim must be denied."

And Public Law Board 3849, in Award 2 involving this same Scope Rule, observed:

> "With respect to the remaining claims, C through H, the weight of the record does not lend sufficient support to establish that the work in dispute is exclusively reserved to petitioners. In so holding, the Board particularly notes and gives weight to the following specific points: (1) the Scope Rule, upon which the Organization relies, does not mention the work of handling of car material between storage areas; (2) the signed statements of current and past employees submitted as evidence by both parties in Award 64, cited above, are consistent with the Board's position. Accordingly, Carrier's contention that the transportation of materials, as described in these claims, was shared work between the crafts and did not singularly belong to the Clerks is not unreasonable because, in this instance, exclusivity has not been established by the record before the Board." (Emphasis added).

Also similar findings were made by Public Law Board 2668 in Awards 67 and 86 and Third Division Awards 20313 and 25409.

The Majority's determination that the Organization does not have to prove exclusivity not only renders the provisions of Circular No. 1 a nullity but defies comprehension.

By its decision in this case, the Majority has fashioned a remedy instead of interpreting the clear, unambiguous language of the September 1, 1971 Memorandum Agreement which specifically provides for trial periods to evaluate inhouse versus outside contractor micromation techniques prior to the work being placed under the Scope of the BRAC Agreement. This issue was not in dispute between the partisan parties. As a matter of fact, on the property the Organization contended that Carrier violated Section 2 when it failed to obtain permission to perform the test. The Majority's finding that:

"The Micromation Memorandum authorized only one, 'initial' period of experimentation for micromation techniques."

has improperly placed a different interpretation and meaning on Section 2 of the September 1, 1971 Memorandum Agreement from that of petitioner. Thus, there is no factual basis whatever to support the conclusion that the September 1, 1971 Memorandum Agreement provided for only one trial period to test micromation techniques.

Another fatal flaw in the award is the Majority's complete failure to recognize that BRAC employees have never produced negative microfilm on this property. There is no dispute that the Carrier did not nor does it now possess the equipment required to satisfactorily develop negative microfilm. In Third Division Award 8834 involving a similar case, the Board denied the claim on the basis that the Carrier did not possess equipment to perform the work that was contracted out. Requiring the Carrier to resume producing the worthless film is absurd. In Award 14208, this Board held "...that a party to a contract is not obligated to perform a futile act."

The Organization did not take issue with the penalty principle advanced by the Carrier on the property or at the Board level. The fact of the matter is the Organization stated it was only concerned with return of the work to employees covered by the Agreement.

It is readily apparent that the Organization recognized that its claim for relief flew in the face of universally accepted principles regarding damages. The penalty prescribed by the Majority clearly exceeds the Board's jurisdiction and runs counter to the numerous awards cited in the Carrier's ex parte and rebuttal submissions.

In conclusion, the Majority based its palpably erroneous decision upon new evidence presented by the Organization to the Board. The claim before the Board was very straight forward: Was the work of processing negative microfilm "formerly exclusively performed by clerical forces?" The proper answer is: "No" and the claim should have been denied. Because of the gross error of these findings, the award should be treated as an aberration and, therefore, fully lacking precedent value.

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