Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 26942
Docket No. CL-26334
88-3-85-3-53

Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9977) that:

1. Carrier violated the effective Clerks' Agreement when on or about January 17, 1983, and thereafter, the Carrier removed work in connection with the handling of interchange reports from the scope of the effective Agreement and required and/or permitted outsiders to perform such work;

2. Carrier shall now compensate the senior available furloughed employe eight (8) hours' pay at the straight time rate of a Car Control Clerks position for January 17, 1983, and for each and every day thereafter that a like violation occurs."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On February 25, 1983, the Organization filed a claim protesting the Carrier entering into a program known as "Electronic Interchange" with the American Association of Railroads (AAR). They also claim that effective January 1, 1983, the Carrier began utilizing the "paperless exchanges." As a result, they assert the Carrier removed work from the position of "Car Control Clerk" which was then eliminated January 14, 1983.

The Organization also in the February 25, 1983 claim outlined the work they believed to have been "eliminated" by the paperless interchanges. The eliminated work was as follows: (1) putting the interchanges in order by jct. point, (2) separating the inbound and outboard, (3) keeping a log of the interchanges, (4) making manual corrections and other duties concerning interchanges. Based on these facts they contend the removal of work from the bargaining unit and subsequent performance by the AAR was a violation of the Scope Rule.

The Parties further clarified, to some extent, the facts with respect to the duties of the Car Control Clerk prior to and after the advent of the AAR program. In 1977, the Carrier became a participant in the AAR's Interchange Continuity System program (ICS) or Train II. This program required the participating Carriers to furnish inbound and outboard interchange information mechanically to the AAR central computer. This inputting was done by bargaining unit employees. However, until January 1, 1982, participating in the AAR program did not change the manner in which the Carrier made interchanges which was largely manual and involve large amount of paper, manual verification, filing, sorting, etc.

The old interchange process involved a sending railroad giving the receiving railroad a list of cars being interchanged. Also, the cars that were received were listed on the basis of "check" by the Clerk and then inputted into the computer. The lists were compared. If there were discrepancies, correction were made and when no matching records were found between the interchange report furnished by the receiving carrier, and the printout of cars delivered by the sending carrier, tracers were prepared and forwarded to the receiving carrier and vice versa). Clerical employees in Carrier's Car Accounting Department titled Car Control Clerks would research discrepancies and issue corrections as necessary. Also involved as previously noted there was manual sorting, filing and logging of the interchange activities.

Commencing January 1, 1982, the N&W Railroad with whom this Carrier interchanges decided to discontinue the exchange of paper records associated with the interchanging of cars between it and this Carrier, relying instead on the ICS. The ICS computer, since all interchange information was inputted into the System, had the capability to automatically compare, match, sort and relay interchange information. Reports were still produced on a magnetic tape record which is converted to microfiche, to be viewed on a screen rather than the former paper record. The work of sorting, filing and logging of paper interchange records, was eliminated and replaced by the magnetic tape record and microfiche. Thus, the label "paper interchange" was given to the new process.

However, under the new system, the Clerk not only still inputs information into the computer, but still handles any discrepancies that may develop through the standard claims procedures. At that time, if a hard copy (paper) is needed to substantiate an unresolved discrepancy, a copy of the applicable record is obtained by a clerical employee. It should also be noted on January 1, 1983, the decision was made to interchange on a "paperless basis" through the ICS with all other participating carriers.

In response to the claim of February 25, 1983, the Carrier contended that the work in question was merely eliminated due to mechanization and that the Scope Rule wasn't violated. Additionally, they took the position that the claim was untimely since the "paperless exchange" with the N&W began January 1, 1982, and since the Carrier's initial participation began in the ICS in 1977. They also took the position that less than 20% of the time on the car control position was dedicated to interchange work and that the position was not eliminated because of the ICS program but because of a substantial decline in business. Last, they noted that the remaining car record work was being performed by other Clerks.

In their Submissions before the Board, the Organization contended the claim is timely. First, they don't believe that the Carrier's initial participation in the ICS in 1977 is relevant for tolling of the time limits. No work was removed at this time and only information was being exchanged. They argue further in this regard that Carrier's argument is not valid in that a connection between two computers is not necessarily a violation of the Agreement. Moreover, they argue the instant claim is a continuing claim and Carrier's argument concerning the time limits should be dismissed.

On the merits, the Organization essentially contends that Rule 1 as quoted below prohibits removal of the disputed work. Rule 1 - Scope - reads, in pertinent part, as follows:

> "(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.
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> (b). Employees affected are as follows:
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> (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.

(2). Station baggagemen, train and engine crew callers, stores truck operators, stores helpers, Stores Department locomotive crane engineer, office boys, messengers, operators of office and station equipment, appliances and devices not requiring clerical ability, and those operating machines for perforating, addressing envelopes, numbering claims, or other papers, and those engaged in work of a similar character.

(3). Laborers and watchmen, in and about stations and storehouses, shop watchmen (without police authority), janitors and freight house and transfer platform truckers.

(c) Clerical work occurring within a spread of eight (8) or nine (9) hours shall not be assigned to more than one position not classified as clerk for the purpose of keeping the time devoted to such work by any one employee below four (4) hours per day.

(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; except that management, appointive or excepted positions, or other positions not covered by this agreement may be assigned to perform any work which is incident to their regular duties.

(e). When a mechanical device is used to perform clerical work assigned to positions covered by the scope of this agreement, the operation of such devices for the performance of that work will be assigned to positions covered by this agreement.

(Underscoring added)

* * * * *"

They also argue the facts in this dispute are identical to those found in Award No. 16 of Public Law Board No. 2189 and should control on the basis of stare decisis. They emphasize that the work has not been eliminated merely by operation of a computer as argued by the Carrier. It is important to note in their opinion that the computer performing this work is located in Washington, D.C. and is operated by employees of the AAR, not by employees of the Carrier to whom the work is reserved by Agreement.

The Carrier, in their Submission, argues, as they did on the property, that the claim was not filed within the time limits which, in their opinion, tolled at least as early as January, 1982, when the Carrier began its paperless interchange with the N&W. Thus, this is not a continuing claim since it is based on a specific act.

Regarding the merits they contend that the claim is not valid because the Carrier has the inherent right to take advantage of efficiencies resulting from mechanization and improved technology. It is their position that they have the right to eliminate work where technologies and other efficiencies allow it. They contend there was no transfer of work and that no position was abolished. Instead, they argue that there was simply an elimination of work through a labor saving device.

In addition, the Carrier argues that the claim is without basis since the Organization has furnished no evidence that the work in dispute is being performed by persons outside the Scope of the Agreement. They note that the Carrier still produces and utilizes interchange reports, except that they are now being produced on a magnetic tape record, which is converted to microfiche, rather than paper. Therefore, in their opinion, there is no basis to the Organization's accusation that the Carrier transferred work in connection with the handling of interchange reports from the Scope of the Agreement to outsiders to perform. The only change that has been made is in the format of the interchange report which now is produced on microfiche instead of paper, thereby eliminating the manual sorting, filing and logging of paper interchange records.

Last, the Carrier argues that even if this Board were to erroneously hold that the Agreement was violated, the claim is grossly excessive and without foundation because: (A) The work eliminated required much less than eight (8) hours per day to perform. And, (B) there is no provision in the working Agreement for penalty payments, and any such payments would result in a windfall to the Claimants. In connection with the amount of work involved they note that the position of Car Control Clerk was eliminated because of a decline in business not due to the elimination of the work and even so the aggregate amount of interchange work was limited to 20% of the time. Even so some of the interchange work remains and is, in fact, performed by other Clerks.

The first issue to be addressed is the matter of timeliness. A strong argument can be made that this is a continuing claim situation. Even if it was not, the fact that the "paperless" interchange commenced with the N&W on January 1, 1982 is not a bar against the instant claim. It is clear in

this record that the Carrier decided on January 1, 1983, to extend the ICS system to all other participating roads. This decision would validly be subject to claims within 60 days of that date. Thus, the issues presented in this claim must be addressed on their merits since it was filed within the relevant time period.

Regarding the merits, the Carrier argues, appropriately, that it has the right to eliminate work and the right to take advantage of new technologies used to eliminate that work. However, their right to take advantage of such mechanization must be exercised in concert with their commitments under the relevant Labor Agreement.

There is nothing in the instant Collective Bargaining Agreement to, per se, prevent Management from utilizing mechanization/computerization to eliminate manual listing, comparing, confirmation sorting, etc. of interchange information through the use of a computer or computers. In fact, Rule 1(E) implies they have this right. However, the Carrier also has an unequivocal obligation under the language of Rule 1(e) to have such a "mechanical device" operated by employees covered by the Agreement. In short, they can eliminate work, but if the work which remains is covered by the Scope Rule--and there is no dispute in this record that is not--and the work is being performed by mechanical means the Carrier is obligated to have such a device operated by positions covered by the Agreement.

In essence, the work of car interchange has not been eliminated. It is still being performed, but by mechanical means--a computer operated by employees of the AAR. Significantly, there is no evidence that the ICS is, in reality, essence or practically speaking a wholly independent automated system unsupported by human manipulating. Under 1(e) the Carrier is obligated when automating to use its employees not the employees of other employers to operate the labor saving devices. Any departure from the dictates of Rule 1(e) must be authorized by Rule 1(d). Since they were not, both Rule 1(d) and 1(e) were violated.

The remaining question relates to damages. There can be no dispute, based on this record, that no position was eliminated as a result of the implementation of the ICS. The Carrier's assertion that the primary reason for the elimination of the position was a decline in business has remained unrebutted throughout the course of this proceeding. Moreover, their assertion was unchallenged that the interchange work never accounted for more than 20% of the Car Control Clerk position's work.

Thus, the loss of work opportunity couldn't amount to more than 1.6 hours (20% of 8 hours) on a daily basis. Additionally, it must be recognized that (1) there was some reduction in the amount of work because of the ICS system regardless of who was operating it and (2) that some work remained under the Agreement.

Accordingly, a reasonable approximation of the lost work opportunity due to the improper assignment of work is one hour for each day that interchange activity occurred from the claim date forward. Such a remedy is not a penalty and relates to the finite and identifiable loss of work opportunity being performed outside the Scope of the Agreement. If such remedial damages are not effected the prohibition set forth in Rule 1(d) and (e) is meaningless. It is noted that such a remedy is consistent with Award 16 of PLB 2189, Award 52 of PLB 1812 and Award No. 11 of PLB 3051 under very similar circumstances.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1988.