Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27567
Docket No. CL-27235
88-3-86-3-325

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10102) that:

1. Carrier violated and continues to violate the effective Clerks' Agreement when, on and after January 1, 1985, it required and/or permitted employes not covered by said agreement to perform work reserved to employes covered thereby;

2. Carrier shall now compensate the senior available unassigned employe on the Transportation Department roster for eight (8) hours' pay at the straight time rate of a Butler Yard Clerk for January 1, 1985, 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.

In its February 3, 1985, Claim the Organization alleged:

> "The advance coal report that arrives in the CTD office for the clerk to the CTD to use in preparing morning reports for distribution in the Race Street offices, previously was sent by clerical employees, who are members of this Organization, of the Bessemer and Lake Erie Railroad Co. from Butler yard office, Butler, Pa. This report covers the incoming coal from the Chessie and P & S Railroad systems daily.

> This report is now being prepared by Car Service in Monroeville, Pa. and being transmitted by Officers of the . . . Railroad Co. who are not members of this Organization. Though the information is still being received by the clerk to the CTD Greenville, Pa., the messages are now being prepared by officers of this Carrier."

Carrier responded on February 8, 1985, that:

> "The advance coal report which was for a period of 16 months complied and transmitted from Butler Yard to clerk in Chief Train Dispatchers office was transferred to the Director Equipment Utilization's office effective January 1, 1985, which is permitted under current working agreements with BRAC."

After conference and additional exchange of correspondence Carrier wrote the General Chairman on May 1, 1986, contending:

> "Prior to May 1982, the Department of Equipment Utilization supervisors gathered and prepared the data associated with the Butler coal report, after which they would instruct the clerical employee in their office to transmit the message to other offices through the C&T control system. From May 1982 to August 1982, Car Control supervisors on Saturdays and Sundays, gathered and prepared the coal report data, as well as sent out the related messages through the C&T control system while D.E.U. personnel continued to perform the duties Monday thru Friday. In August 1982, the D.E.U. office was transferred to Monroeville. At that time the B&LE Car Control Department supervisors remaining in Greenville, assumed responsibility for this report seven days a week, i.e., the gathering and preparation of coal report data, as well as sending out related messages through the C&T control system. In August 1983, the B&LE Car Control supervisors were moved to Monroeville and consolidated with the D.E.U. At this time the responsibility for the Butler coal report was assigned to the Butler yardmaster who gathered and prepared the data, while the Butler Yard Clerk sent out the related message per instructions from the yardmaster.
>
> The above facts make it clear that the responsibility for and the preparation of the former Butler coal report had always been that of management. Further, the sending of the related messages, which consumes a minimal amount of time (2 minutes or less a day) has not been the exclusive work of BRAC represented employees, but rather it has been performed

over the years by both management and clerical employees; thereby falling under the concept of shared work. In fact, the next to the last paragraph of the Scope Rule supports the Carrier's position that the Director Equipment Utilization's force can transmit messages such as described above."

Rule 1 of the Agreement provides in part:

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.

(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 weigh masters.

(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.

(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.

It is understood that management, appointive or excepted positions may activate mechanical devices referred to in this rule (1) for the purpose of making inquiry, securing reports or otherwise using the data stored in the mechanical device, but shall not be permitted to operate such devices for the input or storage of data currently assigned to positions covered by this agreement.

Nothing in this rule (1) shall be construed to reserve the operation of such devices exclusively to employees covered by this agreement when such devices are used to perform work of the type that is now being performed by employees not covered by this agreement.

* * * * *

Director Equipment Utilization's force (title formerly Superintendent Transportation) may transmit messages and reports by telephone."

* * * * *

We believe Carriers' reliance upon the third paragraph of Rule 1(e) is misplaced. That section of the Rule seems clearly to apply only to the "operation of such devices" when used to "perform work of the type that is now being performed by employees not covered" by the Agreement. That is not the situation here.

In Third Division Award 26942 involving the same parties and Rule it was held:

"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."

That reasoning is applicable. Nor do we believe those portions of Rule 1 which specifically provide the "Director Equipment Utilization's force . . . may transmit messages and reports by telephone" applies to the input of computer data as presented by this case. On the contrary we believe well accepted rules of construction require that we limit enumerated exceptions to the specific exceptions agreed upon by the parties.

Carrier argues that if any violation is erroneously found it should be considered de minimis as the work involved requires no more than two minutes per day. The Organization views this as new argument which must be disregarded. We agree a de minimus argument is not the same thing as a Claim of excessiveness but we do note that Carrier argued in its initial response, and consistently since, that the Claim is excessive.

While it now states only about two minutes of work per day is involved Carrier also placed the figure at ten to fifteen minutes per day during handling on the property. Even assuming fifteen minutes daily we agree the requested relief of 8 hours pay is excessive.

We recognize not every violation of an Agreement requires a monetary award, but here we are faced with a daily, repetitive, violation. We view remedy from the standpoint of compensation, not penalty. We agree eight (8) hours pay per day would constitute a penalty and we shall award one (1) hour pay per day. We recognize this may require compensation for more time than would actually be spent working on the Advance Coal Report, but we also must consider it was the Carrier that violated the Agreement and is under a duty to make whole employees for losses suffered. Carrier made no attempt on the property to submit evidence, as opposed to mere assertion, regarding the issue of time required to do the work it had improperly reassigned. In these circumstances we are confident that the interests of both parties to the Agreement are protected by this Award.

Carrier shall compensate the senior available furloughed employee one (1) hours pay at the straight time rate for each and every day that the violation has continued.

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 29th day of September 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD 27567, DOCKET CL-27235
(Referee Cloney)

The only part of the five page "Award" that makes sense is the first four paragraphs on page one following the "Findings" caption.

For instance, following the quoted rule in contention, the Majority issues the following conclusionary statement that simply glosses over the uncontested, unchallenged history of the work here concerned as outlined in Carrier's letter of May 1, 1986 (Quoted on Pages 2 and 3 of this Award). The following is from Page 4:

> "We believe Carriers' reliance upon the third paragraph of Rule 1(e) is misplaced. That section of the Rule seems clearly to apply only to the 'operation of such devices' when used to 'perform work of the type that is now being performed by employees not covered' by the Agreement. That is not the situation here."

The "...the situation here..." is that as of the date the work and position Scope Rule was signed, other than Clerks were doing the very work that is the center of this dispute. The "...now being performed..." (From third paragraph of Rule 1(e)) has reference to the manner and method this work was being performed when the work and position Scope Rule was signed. The Majority's ruling, in this dispute, seems to say that once employees within the scope are assigned an item of work, it is theirs exclusively, regardless of the work history. This theory defies logic and ignores well-established principles of contract

construction as set forth by other Majorities in both PLB's and Awards of this Division.

See Awards 15 and 69 of PLB 2668, Award 8 of PLB 3051, Award 10 of PLB 2969, Award 70 of PLB 2037. Third Division Awards 25902, 25975, 26597, 26327.

This Majority has recklessly abandoned sound principles of this Board, ignored basic facts of the history of this work that clearly, without challenge or comment reflected that this item of work went from supervisors exclusively, to clerks and supervisors jointly, to supervisors exclusively, to clerks exclusively, to supervisors exclusively, with the only claim being filed was the one here concerned.

Having reached the conclusion that indeed Carrier was guilty of the infraction, the Majority then proceeds to search out a remedy, based not on lost work opportunities, based not on the facts of the case established on the property without challenge, and only in pursuit of some self-serving ideal to impose its own brand of industrial justice, did assess a penalty, a penalty the Majority knows that is beyond scope of its jurisdiction.

The soundness(?) of their opinion is found by their further statement that,

> "...Carrier made no attempt on the property to submit evidence, as opposed to mere assertion, regarding the issue of time required to do the work it had improperly reassigned...."

The aforequoted would stand without comment had Carrier's statement that only 15 minutes at the most was required for the disputed work, been challenged by the employees, but it was not.

Fifteen minutes of work per day is involved, and pay therefore could be rationalized as lost work opportunities, but the extra forty-five minutes has to be because "...it was the Carrier that violated the Agreement..."

The Honorable Justice J. Frederick Motz, of the United States District Court of Maryland, in Docket JFM-84-3140, B&O vs. BRAC, clearly established that this Board lacks authority to assess a penalty when he overturned Third Division Awards 24861,24862, 24863, 24864, 24865 and 24866. Excerpts from Judge Motz's opinion follows:

> "...The Fourth Circuit has held that penalty pay is proper only if the employer had been guilty of willful or wanton misconduct or if the collective bargaining agreement provides for penalty pay.
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> * * *
>
> Likewise, it is clear that the collective bargaining agreement does not provide for penalty pay. Indeed, BRAC does not argue to the contrary.....There is no authority in the agreement to apply this rule to the alleged violation of Rule 87, by awarding penalty pay, the Fishgold panel was merely dispensing its own brand of industrial justice."

The Award is a nullity and defies sound principles of this Board as supported by the Federal Courts.

We Dissent.

Robert L Hicks
R. L. HICKS

M W Fingerhut
M. W. FINGERHUT

Michael C. Lesnik
M. C. LESNIK

P V Varga
P. V. VARGA

James E. Yost
J. E. YOST

LABOR MEMBER"S RESPONSE

TO

CARRIER'S DISSENT OF AWARD 27567 (DOCKET CL-27235)

(REFEREE COLNEY)

The Minority Dissent continues to express it's misunderstanding of the Award when it begins by stating:

> **"The only part of the five page "Award" that makes sense is the first four paragraphs on page one following the "Findings" caption."**

Contrary to the aforementioned statement Award 27567 is not only sensible, it is the only logical conclusion that could be made. The Award does not break new ground it instead reinforces previous decisions on the same property, the most recent being Award 26942 rendered by Referre G. Vernon (former Carrier Member N.R.A.B.). Both Awards correctly concluded the following:

> (1) **The Scope rule in question is a "positions and work" Scope Rule, not a General Scope Rule.**
>
> (2) **The inputting of raw or new information into computers is protected work because it is the transmission of information by a mechanical means.**
>
> (3) **Where there is loss of work opportunity reasonable compensation must be afforded to protect the Agreement.**

The Minority further argues that the **"...Majority has recklessly abandonded sound principles of this Board, ignored basic facts of the history of this work..."** That argument is incorrect. When the Carrier argued that Supervisors performed similar duties in the past; the Organization was able to prove that those employes who did like

work in the past were in fact covered by the Agreement, whereas in the instant dispute the work being performed by supervisors in Car and Train Control belonged to covered employees. To argue otherwise is contrary to the facts.

Last, but not least the Miniority asserts:

> **"...to impose its own brand of industrial justice, did assess a penalty, a penalty the Majority knows that is beyond scope of its jurisdiction."**

The aforementioned does not square well with the Award. On page 5 the next to last paragraph the Majority stated:

> **We recongnize not every violation of an argreement requires a monetary award, but here we are faced with a daily, repetitive, violation. We view remedy from the standpoint of compensation, not penalty. We agree eight (8) hours per day would constitute a penalty and we shall award one (1) hour per day. (Underlining our emphasis)**

The Minority Dissent does not detract from the soundness of Award 27567 which correctly followed the precedence of Award 26942.

The Majority made a reasonable conclusion that this Board should stand by past decisions and not disturb settled matters "Stare Decisis". The Minority simply continues to ignore the factual record which sustained the Organization's position. We disagree with the Carrier Member's Dissent.

William R. Miller
Labor Member

October 21, 1988
Date