

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10069) that:

1. Carrier violated and continues to violate the effective Clerks' Agreement when on and after August 27, 1984, it required and/or permitted employee not covered thereby to perform work of abolished clerical positions, which work is reserved to employees covered by such agreement.

2. Carrier shall now compensate the senior available employees, furloughed in preference, for eight (8) hours' pay at the straight time rate if unassigned, or at the time and one-half rate if regularly assigned, for each date commencing August 27, 1984, and continuing 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 employee or employees involved in this dispute are respectively carrier and employees 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 August 1984, the Carrier issued three Bulletins abolishing clerks' positions on the afternoon, midnight and relief turns at the Gary Maintenance of Way Department. This left only one day turn Clerks' position open at that facility, five days a week. The Organization thereafter sent correspondence to the Carrier's Chief Engineer with request for information about "which employees (would) absorb the clerical duties" of the abolished positions. In his response, the Chief Engineer states the following:

"...Gary Works no longer utilize EJ&E track forces to exclusively install and maintain tracks within the plant. This type of work, and others, is let out for bid to independent contractors. Because of our costs we are non-competitive. With the loss of track work, together with dramatic decline in business, M. of W. forces will be reduced by 56%. As of September 1, 1984 there will be one five (5) man track gang assigned to the afternoon turn, and one five (5) man gang assigned to the midnight turn on the Gary Division."

.....
"Clerical work generated by the two five (5) man gangs will be assigned to existing positions in accordance with Rule 19(b) of our current Agreement as in the past when similar reductions were made."

In October 1984, the Organization filed a Claim alleging that "on virtually every turn where a clerk is not maintained supervisors in the M. of W. Department and others have performed work reserved to employees covered by our Agreement." While the Organization states that the "records are too voluminous to cite in their entirety" of the violations allegedly taking place, it gave examples of when calls were made to trackmen in September of 1984 by management employees J. Beatz and R. Weber, and labor dailies prepared in September on two different days by the former. The Claim continues that supervisors "maintain on a continuous basis the log of track work performed and calls for service on track." The Claim also states that the Carrier had eliminated no supervisory positions despite its Claim that there was a decline in business.

The Rule at bar is the following, in pertinent part:

RULE 1

SCOPE AND WORK OF EMPLOYEES AFFECTED

- (A) These rules shall govern the hours of service and working conditions of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees. 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, nor shall any officer or employee not covered by this agreement be permitted to perform any clerical, office, station or storehouse work which is not incident to his regular duties."

In its denial of this Claim the Carrier states that the Claim is improper since no Claimants were specifically identified. With respect to the examples cited by the Organization of alleged violations of the Agreement the Carrier states that it disagrees with the facts except for the following. On September 12 and 13, 1984, Supervisor Beatz did place calls to a "specific number of track employees and....called a bridge tender." The Carrier goes on to say, however, that such does not require "any measurable skill and the Carrier cannot afford to employ people to be available merely to make occasional telephone calls." The Carrier also references a memo issued to supervisory/employees in August 1984, concurrent with the abolishment of the positions in question, which memo is cited by the Organization in the original Claim. The Carrier states the following about this memo:

"(I have studied this) notice and find it deals mostly with improved means of communication between management personnel which was never controlled by clerical employees. At most, a supervisor might leave a message with a clerk to be relayed or have the clerk ask another supervisor to call him but such practice does not preclude management from instituting better, more direct, means of communication. (Paragraphs C and D pertain to procedures for calling Track and B&B personnel including bridge tenders. Clerks have called such employees, but historically this has not been the exclusive work of clerical forces). All B&B forces, including Bridge Tenders, as well as Welders who work in the Track Department, were for many years called by supervisors and/or foremen. The final point, communicating off turn labor and material information to the day turn daily clerk, is certainly permissible. It is done so a clerk can perform that work which is actually his or hers per the current agreement."

Did this same Supervisor maintain on a continuous basis a log of track work performed and calls for service on track as the original Claim alleges? The Carrier officer responds that Supervisors have historically maintained their own notes or log on such matters but he had "examined the official records and (he is) unable to identify any entries on those documents as being done by a Supervisor." The officer states that he is further assured that clerks do keep records although they may use information "provided by a supervisor's notes" which is no violation, in his estimation.

Did this same Supervisor prepare "labor dailies on September 12 and 13, 1984"? The officer states that he finds this charge to be ambiguous since a Supervisor can contribute information or make notes on dailies which are then completed by a Clerk but that the clerical function is to finish the daily in final form. According to information available, the officer states that this is the way it was done as far as he can determine.

Lastly the Carrier disputes the contention of the Organization, on factual grounds, with respect to lay-off of supervisory personnel. The Carrier states that the Gary Division has reduced supervisor positions as well as Maintenance of Way positions. This a matter of record.

On appeal, the Organization cites more specific examples of calls made to trackmen, crane operators and so on by other Supervisors besides Supervisor Beatz (by Supervisors Valtierra, Weber) on various days in September. This information is taken from the record. The General Chairman also cites worklog entries made in September by Supervisors Beatz and Valtierra although he notes that notations of items which are written down when no clerk is on duty "are entered later by clerks". Lastly, he states that in September, on a number of different days Supervisors Beatz and Gurn entered data related to time worked, and compensation, on the labor report.

Lastly, the Carrier argues that there has been no violation of the Scope Rule of the Agreement since it is a general rule and no exclusivity over the work in question has been shown. It is also argues de minimus with respect to the work performed.

The Board has studied the full record before it. The instant Claim cannot be dismissed on procedural grounds because of unnamed Claimants. The records of the Carrier make the incumbents of the original three positions easily identifiable for purposes of the Claim at bar. Numerous Awards have been issued by this and other Divisions of the Board which are consistent with such conclusion (Third Division Awards 10567, 12299, 2143, 25183; also Fourth Division Awards 1835, 2032, 3184). The Carrier has also argued that the Organization's submission contains new information which was not exchanged on property and which is inadmissible in accordance with arbitral precedent (Third Division Awards 20841, 21394, 21463; Fourth Division Awards 4132, 4135, 4137). The Board must conclude that this is true although the Board cannot accept the Carrier's assertion that all information found in Organization's Exhibit K be eliminated from the record since these are the records cited, in part, of the alleged violations under scrutiny here. These records were cited on property by the Organization in its Claim and appeals, and the Carrier admitted in its January 16, 1985, correspondence that the Organization was in possession of such. Such is properly before the Board under title of evidence.

On the merits, the Claim alleges a violation of the Agreement Scope-Rule. The Board must conclude that the Rule is not a general one but a "position and work" rule and as such no need for exclusivity is necessary (See Third Division Awards 25242, 25918, 26452). The Organization must only show that the disputed work allegedly done by another craft or Supervisor or a subcontractor is work which the craft members have done in the past. As moving party the burden of such proof falls on the Organization (Second Division Awards 5526, 6954; Third Division Awards 15670, 25575; Fourth Division Awards 3379, 3482).

A review of the evidence fails to convince the Board that the entries made in the work log by Supervision after the positions were abolished represented violations of the Agreement. In correspondence to the Carrier the Organization admitted that such notations are later entered into the log by the (presumably, day) Clerk. The same conclusion is warranted for log information of track work. The Organization has insufficiently documented for the Board that the Carrier's position on this issue is incorrect when it states Supervisors have historically maintained their own notes which are, granted, used by Clerks later for the record. There has been insufficient showing here that supervisors infringed upon clerical work in this respect. The question of Clerks placing calls to track employees, however, is a different matter. When the three positions were abolished the record supports that supervisory employees on the abolished shifts did make calls which were formerly made by clerical forces. The Carrier further admits that a number of the directives issued by the notice in August 1984, addressed this question, and that it decided to do this for economic reasons. The Carrier also states that this was permissible under de minimus doctrine. The Board must first of all observe that taking work away from the craft under a Rule of the type in question uniquely for alleged economic reasons are insufficient grounds for doing so (See Third Division Awards 24810, 25242). The Carrier's argument based on de minimus is found in the single statement it makes prior to the docketing of this case before the Board wherein it claims that the work at issue is not reserved to clerical employees "in that it was incidental to the involved track Supervisors' regular duties and took less than 5 minutes per day to perform." The Board has ruled on many occasions that assertions are no substitute for proof under substantial evidence criteria (See Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). Since the Carrier offers no evidence on property to support either its de minimus position nor its argument related to the incidental nature of the work for Supervision such arguments, notwithstanding other considerations relative to their validity in this case, must be dismissed.

The factual issue on merits to be resolved by the Board is the extent to which the Agreement was violated when Supervision, in lieu of Clerks, made calls to track employees. The original Claim filed by the Organization and his appeal on property show ten (10) days when violations allegedly took place. These dates are September 13; 15-19; 21-23; 25 and 27, 1984. In its submission, based on documents which the Carrier stated on property were furnished to the Organization, the Organization cites additional dates of alleged violations up to March 17, 1985. The original Claims filed on October 5, 1984, cite "the following dates" which are the original ten (10) days cited above. While the Board has ruled above that the data found in Organization Exhibit K are acceptable as evidence this must be reasonably understood as evidence to support the Claims actually made on property but not as evidence to add to relief when framing a submission to this Board. Likewise the continuing Claim relief requested of this Board in Statement of Claim before it must be dismissed. Such is not consistent with the original Claim filed on property. The Board finds it proper to rule in this manner even though, inexplicably, both the Carrier and the Organization accept the incorrect continuing Claim language in the Statment of Claim before the Board. Their Submissions show that.

It is unclear to the Board how much time was involved when the calls were made on the ten (10) days in question although it is inclined to conclude that it was more than the Carrier states, but less than eight (8) hours per day. The Board must conclude that a reasonable, if arbitrary, compromise on these matters is four (4) hours per day.

The senior furloughed employees available for the positions shall each be paid, therefore, four (4) hours per day for each of the ten (10) days cited in the foregoing. They shall be paid straight-time rate if they were on furlough at the time of the violations, and at time and one half if on assignment at the time of the violations. All other relief requested in the Statement of Claim before the Board is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bevan - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1988.