

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28579
Docket No. CL-28400
90-3-88-3-183

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Chicago and Illinois Midland Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of Brotherhood (GL-10260) that:

1. Carrier violated the TCU Agreement when beginning August 11, 1986, it removed the work of Computer Programming from coverage of the TCU (formerly BRAC) Agreement and transferred same to a Mr. M. Martin employed by Data Management Associates, and not covered by the Agreement between the Carrier and the Organization.
2. Carrier's action in this case violated the Agreement, expressly Rule 1 Scope and associated rules contained therein.
3. Carrier shall now be required to compensate Claimant, Mr. W. R. Baima, Springfield, Illinois, for all hours worked or paid to Mr. Michael R. Martin or the Company Mr. Martin represents - Data Management Associates beginning August 11, 1986, and continuing for as long as Mr. Martin or his Company is employed by the Chicago and Illinois Midland Railway Company."

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.

Some time in 1983, the Carrier began the lengthy process of replacing its obsolete IBM System Three mainframe computer with the Sperry-Unisys System 80. Converting from the IBM system to the Sperry system took even longer than the Carrier expected. The record is vague as to precisely why the conversion was so prolonged aside from references to technical delays and late equipment deliveries. In any event, the conversion was still incomplete in Summer of 1986.

In late July 1986, the Carrier learned that the incumbent Chief of Data Processing, a partially excepted position, would be resigning effective August 8, 1986. At the time, the only other two employees assigned to the Data Processing area were new to their positions and had just embarked on a comprehensive, one year training program. Thus, no data processing employee held the necessary qualifications to perform the duties of Chief, Data Processing. More importantly, the Carrier was fearful that the imminent departure of the experienced Chief, Data Processing would cause a breakdown in day-to-day data processing operations including the timely processing of the Carrier's payroll.

To avoid a complete collapse in the data processing division, the Carrier sought the Organization's cooperation. In his notarized statement dated May 15, 1987, the Carrier's Manager of Personnel attested that he spoke with the Organization's General Chairman via the telephone on July 24, 1986. He conveyed to the General Chairman the Carrier's need to maintain essential data processing functions, such as the payroll, and to continue training the two new data processing employees. According to the Personnel Manager, the former General Chairman consented to the Carrier's retention of an outside contractor to perform the duties of the Chief, Data Processing, including training responsibilities, until the Carrier could procure a replacement. Thereafter, the Carrier retained the services of Data Management Associates (DMA) to handle data processing functions. Simultaneously, the Carrier contracted with the same firm to complete the computer conversion. The record is unclear as to exactly when the Carrier completed the conversion to the Sperry system, but it appears that the new system was installed and operating sometime in Spring, 1987.

On August 5, 1986, the Carrier posted a notice informing employees that the Chief, Data Processing position was vacant effective August 11, 1986. Claimant, a Utility Clerk in the Transportation Department, did not apply for the position. The Carrier was unable to find a qualified replacement to fill the vacancy until April 20, 1987.

On October 4, 1986, the Local Chairman initiated a continuing Claim on behalf of Claimant, alleging that the outside computer firm (DMA) was programming the computer, work reserved to the clerical craft under Rule 1 (the Scope Rule). The Organization also charged that during the period the Carrier was recruiting a Chief, Data Processing, the outside computer consultant improperly became the de facto Chief Data Processing. While Claimant was not working in the Data Processing area in 1986, he had worked (from 1981 until 1983) as a trainee to the Chief Operator and Assistant Programmer, Data Processing in Car Services. Claimant received the highest possible grade in community college classes covering RPG programming. Nevertheless, the Carrier determined that Claimant lacked the fitness and ability to perform computer

situation. Also, the former General Chairman was undoubtedly interested in continuing the training of the other two data processing employees. Perhaps, as the Organization speculates, the former General Chairman did not anticipate that recruiting a successor would take eight months. Nonetheless, the record reveals that the Carrier diligently searched for a replacement by contacting many sources. In December 1986, the parties waived the entry level pay progression in the April 15, 1986 National Agreement in an effort to attract a qualified applicant.

The Organization also charges that DMA improperly developed computer programs as part of converting the Carrier's computerized operations to the Sperry system. Again, the Organization charges that computer programming work is reserved exclusively to employees covered by the clerical agreement per Rule 1.

The record is vague concerning whether or not the Chief, Data Processing had previously performed computer programming work related to the computer conversion. Even if the former Chief, Data Processing was familiar with some aspects of the conversion process, the Organization did not bring forward evidence that he actually engaged in the development of software. On the contrary the Carrier explained that Sperry performed computer programming work on the new system before the Carrier retained DMA to complete the conversion. Therefore, the Organization has not satisfied its burden of proving that computer conversion work is reserved to Clerks under Rule 1.

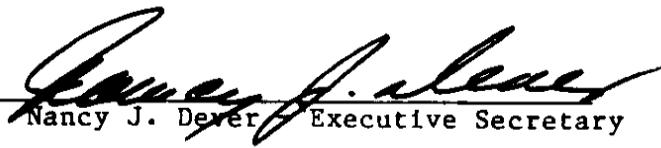
To reiterate, the Organization was estopped from charging that the Carrier improperly contracted out computer programming work normally performed by the Chief, Data Processing position from August 1986 to April 1987 even though the work fell within the ambit of Rule 1. The Organization did not prove that computer conversion duties are reserved to the clerical craft because the record does not contain any evidence that Agreement covered employees performed any quantum of such work prior to August 1986. Therefore, this Board need not decide if Claimant was qualified to perform the computer programming work in dispute.

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 16th day of October 1990.

programming work. According to the Carrier's auditor, the Carrier was unsuccessful in training Claimant to perform intricate computer work when he was in the data processing area in 1981 and 1982. The Carrier pointed out that at most, Claimant was adept at the computer language used on the IBM computer system, but he had no understanding of the Cobol language utilized on the Sperry system. More importantly, the Carrier contended that Claimant indirectly admitted his lack of qualifications since he did not apply for the vacant Chief Data Processing position. The Organization retorted that Claimant's application for the partially exempt position would have been futile because the Carrier had rejected his February 1986 application for the same job.

In February 1986, the Carrier promulgated a job description for the Chief, Data Processing position which shows that the occupant develops and maintains computer programs. Indeed, the Organization and Carrier understood that the job included computer programming when they reached an agreement governing the reorganization of the data processing area. The Carrier concedes that computer programming work is attached to the Chief, Data Processing and that the outside computer consultant performed such work when he maintained day-to-day data processing functions during the eight month period the Carrier was searching for a qualified person to fill the vacant Chief, Data Processing position. Therefore, without doubt, this computer programming work is reserved to the clerical craft under Rule 1, a positions and work scope rule. However, due to the verbal accord reached between the Organization's former General Chairman and the Carrier's Manager of Personnel, the Organization is estopped from contending that the Carrier breached Rule 1 when the Carrier retained the computer consultant to perform computer programming work previously accomplished by the Chief, Data Processing. In early 1987, the Organization's new General Chairman attempted to repudiate the understanding the Carrier reached with the former General Chairman but, by this time, the Carrier had detrimentally relied on the former General Chairman's consent allowing the Carrier to temporarily contract out the disputed work. This Board specifically notes that the record does not contain any evidence, such as a statement from the former General Chairman, refuting the substance of the understanding as evinced in the Manager of Personnel's notarized declaration. It is unfortunate that the parties did not reduce their accord to writing, but since the Organization has not proffered any evidence directly contradicting the existence of the verbal understanding, this Board must enforce it under the doctrine of estoppel.

Also, the circumstances surrounding the sudden resignation of the only data processing employee with the ability to maintain data processing functions supports the Carrier's position that the former General Chairman prudently gave his approval to the Carrier to retain an outside consultant to avoid a complete disruption of data processing functions which may have jeopardized prompt processing of the payroll. It is unlikely he would have given his consent unless he believed that the Carrier was confronted with an urgent