

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31099
Docket No. CL-31653
95-3-93-3-669

The Third Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

(Transportation Communications
(International Union
PARTIES TO DISPUTE: (
(Delaware and Hudson Railway Company, Inc.

STATEMENT OF CLAIM: "Claim of System Committee of the Organization
(GL-10993) that:

The following claim is presented to the Company in behalf of Claimant K. Judge (93-DH011).

(a) The Carrier violated the Clerks' Rules Agreement effective September 26, 1990, particularly Rules 2, 12, 13, Appendix I and other rules, as well as Letter 2, dated September 24, 1990, when they maintain position of Police/Legal Secretary as other than a fully covered position, assigning employee S. Koniowka to same, without first obtaining an agreement with General Chairman Randolph, as required and intended within the provisions of Rule 2 and Letter 2 of the Agreement.

(b) Claimant should now be allowed the identical compensation being allowed to employe Koniowka, commencing sixty (60) days retroactive from the receipt of claim and continuing for each and every workday thereonafter on account of this violation.

(c) That in order to terminate this claim the Carrier must advertise said position as a fully covered assignment and honor the principles of seniority in awarding same, or must secure the required agreement from the General Chairman to otherwise maintain same within an exempt type of status.

(d) This claim has been presented in accordance with Rule 28-2 and should be allowed."

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 employee 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.

The antecedents of this claim are that General Clerk/Steno Lane was on disability leave from March 6 to June 10, 1991 and General Clerk/Steno position, Job No. 43, with Clerk Koniowka was established to cover the vacancy caused by the absence of Ms. Lane. When Ms. Lane returned both clerk positions were maintained to keep the files current. By May 1, 1992, the Carrier determined the second position was no longer necessary and Job No. 43 was abolished.

When the Organization discovered that Clerk Koniowka had failed to exercise her displacement rights, it wrote to the Assistant Manager on September 4, 1992 as to Clerk Koniowka's status. On October 5, 1992 the Assistant Manager replied that Ms. Koniowka had not exercised her seniority as she had been "promoted to management position of Police/Legal Secretary."

On September 11, 1992, the Organization filed a claim on the basis that the Carrier had violated the Agreement by maintaining that the position of Police/Legal Secretary was other than a fully covered position and assigning Ms. Koniowka to this position without first obtaining an agreement from the General Chairman. The Organization asserts that Rule 2 and Letter 2 of the Agreement required such action by the Carrier.

The Organization stresses that Rule 2 states the requirements for establishing partially excepted positions and Letter 2, dated September 24, 1990, adds two more partially exempt positions to the Agreement and further provides that the Secretary to the General Manager of Operations and the Secretary to the General Manager of Marketing would be wholly exempt positions. These arrangements resulted as a result of negotiations by the parties to the Agreement.

The Organization asserts in this case that the Carrier promoted a General Clerk/Steno to a wholly newly created position within the combined Police/Legal Department to do clerical work for the major part of each scheduled work day. The Carrier's action was a clear violation of the Rules that obligated the Carrier to

obtain the General Chairman's agreement to create a PEP position. The Organization further asserts that the Carrier is not at liberty to unilaterally at its will create a PEP job and it has to convince the General Chairman of the reasons for the job.

The facts of record clearly show that when Clerk Job No. 43 was abolished on May 1, 1992, the Carrier named the incumbent thereof immediately to a supervisory Police/Legal Secretary. It is fair to conclude that the preponderance of the duties of that position will lean heavily into clerical work. The Organization states Letter 2 clearly defines what positions the parties agree should be wholly exempt from the Agreement. Letter 2 leaves no room for expansion of such jobs without the advance express permission of the General Chairman. The Organization states Rules 2 and 13 specify the mechanics of bulletining new positions and vacancies and how to effect reduction and increase in forces. The Organization notes that the Carrier ignored these Rules.

The Organization states that Awards have held that a covered position under the Agreement may not be unilaterally transferred by the Carrier to non covered work. The Organization adds that since the rate of pay for the newly created job is greater than the Claimant's rate of pay, the Claimant suffered a loss in earnings and she should be compensated as requested in the claim filed with the Carrier.

The Carrier states the claim lacks merit because the position in question, Police/Legal Assistant, is a supervisory post that was created when the Police and Legal Departments were newly created at this location. The Assistant Manager was in error when he described the new position as a Police/Legal Secretary when in fact the job is a Police/Legal Assistant position whose duties were supervisory in nature. The latter position was new to the Carrier and was established when the Carrier newly created the Police and Legal Departments at this location.

The Carrier states that employees represented by the Organization previously never performed clerical duties in these Departments. No employee, therefore, was disadvantaged by the creation of this supervisory position. The Carrier adds that prior to the creation of this new joint department, both the Police Department and Legal Department used supervisory employees, not represented by the Organization, for needed support functions. The Carrier maintains that no Organization represented employee has ever performed clerical duties in these two departments.

The Carrier states the Organization is mistaken when it contends the Carrier is obligated to obtain the General Chairman's permission prior to creating a new supervisory position. It adds there might be some merit to these discussions if the work involved could be clearly shown as being work previously performed by the

Organization and subject to the terms of the Agreement. The Carrier adds that the Organization has not shown that this is work that it had performed historically and that it is work identified in the collective bargaining Agreement and that the employee claiming the work was qualified and available to claim the work in question. The Carrier asserts the Organization has not submitted such proof.

The Carrier stated that when it decided there was a need for the position of Police/Legal Assistant in the new department it was filled by a supervisory appointment graded at the Officers and Supervisors Salary Plan. No displacement and no loss of pay resulted to any Organization member. The Claimant has not shown any disadvantage as she continued to work in the same capacity before and after the appointment.

The Carrier states the Organization has not offered any facts to show that the work being performed by the new supervisory position was work that belonged to the bargaining unit or was even work it was qualified to perform. As the moving party in this dispute, it is incumbent on the Organization to provide documented evidence of a Rule violation. It has not done this because it does not exist. The Carrier stresses that the Organization is seeking to claim a position that is in fact a Supervisory position outside the scope of the Organization's collective bargaining Agreement.

The Carrier contends that the Organization has misrepresented this claim by insisting the position is Police/Legal Secretary, even though the General Manager on March 2, 1993 advised the General Chairman that the position was in fact a Police/Legal Assistant and was a supervisory position. The Organization has not presented any facts to show the position in question was not a supervisory position.

The Carrier states Letter 2 has no application to this dispute. Letter 2 deals with the status of certain positions that were designated as PE as a result of negotiations. The Letter also went on to make wholly exempt the two positions of Secretary to the General Manager of Operations and General Manager of Marketing. The Carrier adds that there is nothing in Letter 2 that obligates it to seek the Organization's approval if it elects to create new supervisory positions.

The Carrier states, arguendo, if there was a violation there is no basis for the relief being requested, the rate of pay sought and the positions claimed are not contained in the Agreement. The authority of the Board is to interpret Agreements of this industry. The Carrier asserts the Board cannot validly require the Carrier to pay a rate for a classification that has not been negotiated and agreed to by the parties. Moreover the Claimant has been fully employed during the period of the claim and incurred no loss of

earnings as a result of the alleged violation. For all of the above reasons the Carrier requests the Board to deny the claim in its entirety.

Upon a review of the entire record, the Board finds the Organization's position more persuasive and cogent than the position advanced by the Carrier. The record reveals that a regularly assigned General Clerk/Steno went on disability leave and the Carrier established another General Clerk/Steno position to perform the work of the absent Clerk. This replacement Clerk was Ms. Koniowka. When the Clerk on disability returned to work, the Carrier maintained both General Clerk positions until all the work was caught up. However, on May 1, 1992, the Carrier abolished the job it had temporarily created to do the work of the Clerk on disability. However, Clerk Koniowka, a covered employee, did not exercise any displacement rights when her replacement work was ended, because the Carrier unilaterally transmuted this covered employee, without conferring and without the consent of the General Chairman, into the occupant of a supervisory job into a new joint department of Police/Legal, and therefore Ms. Koniowka had not exercised displacement rights. The Assistant Manager stated Ms. Koniowka had "...been promoted to the management position of Police/Legal Secretary." It was only after the dispute became extended, that the General Manager stated that it was an error to describe Ms. Koniowka's new job as that of a secretary and that she was in fact an Assistant in the new joint department of Police/Legal.

The Board finds that it could well be that Ms. Koniowka, formerly a General Clerk, had become the incumbent of a position that was supervisory in nature and, therefore, outside the ambit of the collective bargaining Agreement. However, to permit the Carrier to engage in such action without conferring with the General Chairman is to sanction action that could lead to the erosion of the bargaining unit.

The Board finds that it was to cope with such a problem that the parties negotiated Rule 2 and Letter 2. In other words, before the Carrier may establish partially exempt and totally exempt positions, the Organization must be a knowing party to such arrangements. The existing Agreement does not permit the Carrier to unilaterally remove existing or newly created jobs that are covered by the Clerks' Agreement, absent express or implied authority to do so, is to permit the existing Agreement to be subverted and not able to execute those duties and responsibilities which inhere to a collective bargaining Agreement.

Because of the compelling needs of confidentiality, it may well be that positions in the Police/Legal Department should be outside the scope of the Agreement, but such activity has to be done within the clear provisions of the existing Agreement and not

in derogation thereof. The Carrier's conduct in this respect is not contractually sanctioned because the new covered job is located in departments outside the scope of the collective bargaining Agreement. In such a situation the requirement to confer with the General Chairman and gain his concurrence is a valid and binding commitment on the Carrier.

In light of the above stated findings, the Board concludes the Carrier erred in its application of Rule 2 and Letter 2 in placing Ms. Koniowka in a supervisory position without initially conferring and obtaining the concurrence of the General Chairman.

The Board finds that, under all the facts of this case, the Claimant's remedy should be the difference in wages she received and the wages paid to Ms. Koniowka for a regular workweek beginning from the period claimed and continuing until the violation ceases.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.