

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31176
Docket No. CL-31689
95-3-93-3-699

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-10997) that:

The following claim is presented to the Company in behalf of Claimants R. Daley, H. Van Kempen and the most senior spare/unassigned clerk. (93-DH-010).

(a) The Carrier violated the Clerks' Rules Agreement effective September 26, 1990, particularly Rules 1, 5, 12, 13, Appendix I and other Rules, when effective 0001 hours, October 12, 1992, they improperly removed clerical duties of, but not limited to handling and input of OTE employee payroll, from the Scope of the Agreement by abolishing General Clerk Position #50, location Accounting (payroll) Department, Clifton Park, NY, and assigned the duties of same, along with duties of Claimants' Daley and Van Kempen positions, non-agreement supervisor Gary Lanese and to employees of "Payroll Service Center", located at 127 School Road, Voorheesville, NY, 12186, on a continual basis.

(b) Claimants should now each be allowed eight (8) hours punitive pay based on the pro-rata hourly rate of \$13.64, commencing on or about October 12, 1992, and continuing for each and every workday thereon after, on account of this violation.

(c) That in order to terminate this claim, all clerical duties of position #50, as well as duties of Claimant's Daley's and Van Kempen's positions must be returned to them or other employees covered under the Scope of the Clerical Rules Agreement.

(d) Claimants were qualified and should have been called in seniority order, subject to their availability, on a continual basis to perform the clerical duties claimed.

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

(f) That the successor incumbents, if any, to the above named Claimants' positions be considered as Claimants in this claim and be compensated in a like manner."

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 gravamen of this dispute is whether the Carrier improperly abolished the General Clerk position in the Payroll Department and assigned the work to a non-covered Supervisor and to an outside contractor.

Mr. Santagato was the incumbent of Position No. 50 whose job was abolished on October 12, 1992 when he was transferred to be trained as a Train Dispatcher. The Organization asserts the Carrier then transferred duties of two other Payroll Clerks to Supervisor Lanese and to an outside contractor, i.e., "Payroll Service Center," to perform the existing payroll work on a regular basis. The Organization maintained that although the Carrier abolished permanent Job No. 50 in October 1992, it kept a temporary job in the Department, which it did not abolish until April 1993.

The applicable collective bargaining Agreement states in part in Rule 1:

"(b) This contract shall govern the hours of service, rates of pay and working conditions of employees of the carrier engaged in work in positions to which this agreement applies. . . Positions and/or clerical duties shall not be removed from the application of the Rules of this Agreement except by agreement between the parties."

The Organization stresses that this Scope Rule is not of a general nature, but rather is a position and work Scope Rule, i.e., work and positions once assigned to employees covered by the collective bargaining Agreement becomes vested in the unit and may not be removed except by mutual agreement. It adds that while the Carrier may eliminate work, it does not have the right to continue to have that work performed, in whole or in part, by personnel foreign to the Agreement.

The Organization further stresses that payroll work has not in past been performed by outside contractors or by supervisory personnel. It stresses that the Carrier produced no proof in the way of documentation that outside contractors performed the work in issue. The Organization adds the Carrier's own bulletins shows that Clerks did the work in dispute.

The Organization asserts it is necessary to focus on the disputed work to determine whether it is contractually reserved to covered clerical employees or whether the Carrier is free to transfer it to another craft or to any other group. The Organization asserts that under the Scope Rule, once work has been assigned to covered employees, it becomes vested in them and may not be unilaterally removed and given to other employees.

By way of rebuttal, the Organization alludes to the Carrier's Submission, wherein the Carrier stated that it always contracted out payroll work, and supposedly after it changed its payroll contractor, the Carrier discovered its new contractor had and utilized an optical reader to scan all wage claims that the Carrier forwarded to it in order to process employees' pay checks.

The Organization maintains arguendo that if the Carrier did farm out some payroll work, there is here a clear admission that prior to this time, Clerks exclusively processed time sheets, and this shows that the disputed work contractually belonged to the Organization. The Organization further notes that the Carrier further stated in its Submission that it was Position #50 that previously manually processed these time sheets prior to the utilization of the optical scanner. The Organization asserts on the basis of this statement alone the claim should be decided in its favor because the Carrier admitted that only Clerks did the designated work and the specific responsibility was assigned to Position #50. The Organization adds the Carrier relies on a misplaced technological argument that since new optical equipment replaced the clerical step, the Clerks' work became redundant.

The Organization asserts that Awards have held that various clerical functions can be eliminated due to technological

improvements made by the Carrier on its property, but none of these Awards have held that work can be subcontracted to an outside contractor because it has better technology. The Organization adds that the only way that the work in issue could be eliminated and given to an outside contractor is by agreement of the parties. In the absence of such an agreement, the Organization insists the work is protected to the craft and the Carrier should not be allowed to breach the Agreement on the basis of alleged efficiencies. It reiterates that when work is reserved by Agreement to covered employees, that work may not unilaterally be removed because the Carrier has discovered a more efficient or convenient method to have the work performed.

The Carrier states the claim lacks merit because Position No. 50 was abolished when the incumbent thereof started to receive training as a Train Dispatcher and there was not a sufficient volume of work in the Department to warrant continuing the position. The Carrier adds there has been no loss of duties other than miscellaneous incidental work, and furthermore, no Claimant was disadvantaged by the loss of wages due to the job abolishment. The duties of Job No. 50 were distributed among present staff and these constituted incidental duties, and so did not justify continuing the abolished job. The Carrier asserted no jobs were removed from the scope of the Agreement.

The Carrier stressed that it had always contracted out payroll data. This work was formerly done by "Automatic Processing Service Company," but at the time this claim was filed, the Carrier stated it had changed contractors and executed a new contract with Payroll Service Center of Voorheesville, New York, which utilized an optical reader to scan all wage claims forwarded to it by the Carrier. The Carrier states the first Departments whose employees had their pay checks processed by the optical reader were the staffs of the Mechanical, Maintenance of Way and clerical groups. The Carrier states that it was Position No. 50 that manually processed the time sheets prior to the utilization of the optical reader. However, the duties of Job No. 50 became redundant because the reader could now scan the time sheets, calculate the wages of the employees' and process the pay checks.

When all these matters occurred, there was a vacancy for a Train Dispatcher and the incumbent of Job No. 50 transferred to this vacancy with the remaining duties of this job transferred to the existing positions occupied by the two Claimants in the Accounting Department. Job No. 50 was attrited because there was insufficient work to justify it.

The Carrier adds no duties of Job No. 50 were ever assigned to Supervisor Lanese and the Organization has not stated what duties this Supervisor ever performed or the employees of "Payroll Service Center" improperly performed as a result of the abolition of Job No. 50.

The Carrier denied, and the Organization has not shown or proved how it violated the Organization's cited Rules 1, 5, 12, 13 and Appendix I. These Rules were not applicable to the instant claim and the Organization failed to show either applicability or relevance.

The Carrier maintains that the Organization failed to meet its burden of proof to show that an Agreement violation occurred when the Carrier transferred its payroll processing work from one company to another company and coincidentally attrited Job No. 50 and assigned the incidental duties to covered employees. The Carrier further states the Claimants suffered no loss of earnings in that they enjoyed full employment at the time of the claim. It adds the Organization has not adduced any contractual support for its claim for punitive damages because the Agreement does not provide for it.

On this record the Carrier requests the Board to deny the claim in its entirety.

The Board finds that the Carrier's position is better grounded than the Organization's position in the facts of this claim.

The Board finds that the Organization's alleged vested claim to the work of Job No. 50 under the position and work Scope Rule, has been undermined, in whole or in part, by the Carrier being allowed to subcontract the work to an outside contractor not covered by the existing collective bargaining Agreement. The Organization interposed the defense that the Carrier presented no detailed billings or other proof that an outside contractor performed these payroll services as described in the Organization's Submission.

We note, however, that during the March 26, 1993 conference on this claim the Carrier advanced the defense that there had always been payroll contracting on the property. We conclude that if the Organization had any doubts as to the veracity of the Carrier's subcontracting statement, it had the responsibility to show that subcontracting did not exist before it submitted its Notice of Intent on this matter to the Board in November 1993.

We find no plausible reason not to accept the Carrier's position that payroll processing had previously been done by "Automatic Processing Service" before it changed to "Payroll Service Center" because this latter contractor was more technologically advanced than the initial contractor.

We find that as long as the processing of payroll services had been performed prior to and during the term of the extant Agreement without any exception being taken by the Organization to payroll processing, the Organization is not in a meritorious position to assert that the existence of the "position and work" Scope Rule was a bar to the Carrier's subcontracting activities covering this genus or class of work. The Board finds that the Organization has, tacitly or inferentially, granted the Carrier the right to utilize a subcontractor to perform aspects of its payroll services.

In light of these Findings, we conclude it is not necessary to reach the other questions raised in this claim.

AWARD

Claim denied.

ORDER

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.