Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32028
Docket No. CL-32646
97-3-95-3-570

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11183) that:

(a) The Carrier violated the Amtrak - Northeast Corridor Clerks' Rules Agreement, particularly the Scope Rule, Rule 3-C-2, paragraph A, Section 1 and 2, and others, when the Carrier abolished Claimant Alex's position of janitor in the M and W Building, Symbol WIJ102, rate of pay = $11.45/hr. effective 1/15/93 and then assigned duties of that position effective 2/3/93 to a non-agreement supervisor, Mr. Pete Adamovich, on a continual basis. Duties include cleaning all offices located at the M of W base (which includes adequate maintenance of lavatories and locker rooms) and B&B Department. Person in the position must also be qualified to operate mechanical cleaning equipment.

(b) Claimant Alex should now be allowed eight (8) hours pay at the pro-rate of $11.45/hour per day commencing January 15, 1993 and continuing each and every work day thereafter until this violation is corrected.

(c) In order to terminate this claim, said clerical work must be returned to the employes covered by the Clerks' Agreement.

(d) This claim has been presented in accordance with Rule 7-B-1 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 were given due notice of hearing thereon.

At the time this dispute arose, Claimant was employed as a Janitor at Carrier's Wilmington, Delaware, Mechanical Facility. On January 15, 1993, Claimant's Janitor position WIJ102 and other cleaner positions were abolished. On February 3, 1993, Maintenance of Way employees were instructed to clean their respective work areas. By letter of February 16, 1993, the Organization filed a claim alleging that Carrier had violated the Scope Rule, Rule 3-C-2, and others when it abolished Claimant's position and subsequently assigned the work to employees not covered by the Agreement. That claim was denied and subsequently progressed in the usual manner, up to and including Carrier's highest officer. Following conference on the property the matter remains in dispute.

The rules cited by the Organization read in pertinent part as follows:

"RULE 1 - SCOPE

(a) These rules shall govern the hours, compensation and working conditions of all employees engaged in the work of the crafts or classes of (1) clerical, office, station and storehouse employees; and (2) station, service employees, subject to the exceptions listed herein.

* * *

This definition also includes stockmen, shippers and receivers, tallymen,

blue printers, baggage checkmen, parcel room attendants or checkers, routemen, receiving and deliverymen, foreman and assistant foreman - station or storehouse excluding shop labor foreman gang and gang leaders who supervise shop laborers and storehouse laborers.

Other office, station and storehouse employees of the following classifications:

* * *

Janitors

* * *

(d) When a reduction in force occurs which affects employees covered by this Agreement, the remaining work shall be performed by employees covered by this Agreement.

(e) It is not the intention of the Corporation to have supervisors perform work which is within the scope of this agreement. However, it is recognized that supervisors will occasionally perform such work, when necessary, under critical and/or emergency conditions, while instructing employees, and/or when incidental to their assigned duties. Supervisors shall not be used to displace or replace employees regularly assigned to perform the task, nor will the supervisors be used to negate the provisions of the overtime rule of this Agreement.

* * *

RULE 3-C-2 - ASSIGNMENT OF WORK

(a) When a position covered by this agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

(1) To another position or other positions covered by this Agreement when such other position or other positions remain in

existence, at the location where the work of the abolished position is being performed.

(2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yard Master, Foreman, or other supervisory employee, provided that less than four (4) hours' work per day of the abolished positions or positions remains to be performed; and further provided that such work is incident to the duties of an Agent, Yard Master, Foreman or other supervisory employee."

It is the position of the Organization that the duties assigned to the Janitor position occupied by Claimant remained after the abolishment of the position. The Organization asserts that the work in question was not "incidental" work, but constituted a job requiring eight hours per day. Under the provisions of the Scope Rule and Rule 3-C-2, the work remaining after the abolishment must be assigned to covered employees. Further, the Organization maintains that they need not show "exclusivity" of performance of the work at issue. The work here at issue was reserved to employees under the Agreement by custom and practice (Third Division Award 29262).

The Carrier contends that the Scope Rule was not violated. The work in question was not performed exclusively by TCU employees either on a system-wide basis, or at the Wilmington facility by custom, tradition or practice. The Carrier maintains that it is not unusual for Maintenance of Way employees to be required to clean up their own work area, and that doing so was a normal part of their own job duties. In addition, the Carrier asserts that the work in question is historically performed by non-TCU employees and outside contractors across the Carrier's system. (Third Division Awards 21268; 19833, and Public Law Board No. 2792, Award 1).

A careful reading of the Scope Rule at issue indicates that it is general in nature. It enumerates positions included in the Agreement -- but does not specifically reserve the work at issue herein to the employees covered by the Agreement. In a similar case involving the same parties and the same Scope Rule, Public Law Board No. 4304, Award 4 found:

"... The language of the Scope Rule...lists certain job classifications and does not specifically reserve any duties of work exclusively to these classifications...."

Accordingly, as noted in Public Law Board No. 2792, Award 1, in order to carry its burden of persuasion, the Organization must show that:

"...1) the reservation of the work to [Janitors] by literal and unambiguous contract language, or 2) the mutual intent or implicit understanding of the parties to the Agreement that, notwithstanding contractual silence or ambiguity, the work at issue should be reserved for [Janitors] covered by the Agreement."

Absent clear language establishing the reservation of the work at issue to employees covered by the Agreement, the Organization must present probative evidence that the work at issue has been reserved by practice and tradition to the employees covered by that Agreement. After a careful review of the record in this case, the Board finds that the Organization has failed to meet its burden of persuasion in that regard.

AWARD

Claim denied.

ORDER

This 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 6th day of May 1997.

LABOR MEMBER'S DISSENT TO
AWARDS 32028, 32029, 32032,
DOCKETS CL-32646, CL-32655, CL-32728
(REFEREE E. C. WESMAN)

The Majority Opinion has erred and issued three awards which are palpably erroneous depriving the Claimants of their contractual rights.

The Majority seemingly understood the facts and the parties' positions, unfortunately it failed to address all of the issues. For example in the lead decision Third Division Award 32028, (CL-32646) on pages three and four it correctly recopied Rule 3-C-2 Assignment of Work and then set forth TCU's position in the first full paragraph of page four regarding the rule as follows:

"It is the position of the Organization that the duties assigned to the Janitor position occupied by occupant remained after the abolishment of her position. The Organization asserts that the work in question was not 'incidental' work, but constituted a job requiring eight hours per day. Under the provisions of the Scope Rule and Rule 3-C-2, the work remaining after the abolishment must be assigned to covered employees. Further, the Organization maintains that they need not show 'exclusivity' of performance of the work at issue. The work here at issue was reserved to employees under the Agreement by custom and practice (Third Division Award 29262)."

It then proceeds on to suggest that the parties have a General Scope Rule never again addressing Rule 3-C-2 therefore leaving the false inference that the Scope Rule overrides.

Rule 3-C-2 stands alone it is not dependent upon nor is it a corollary to Rule 1. The subject claims should not have risen or fallen based solely upon the Majority perception of the Scope Rule. They have fallen because the Majority did not address Rule 3-C-2.

Rule 3-C-2 is explicitly clear. It requires that when clerical positions are abolished the individual duties of each position will be distributed to other clerical positions. There is no requirement to prove that the work exclusively belongs to the craft nor does it matter whether the work might be shared work. The Majority decision to ignore the arguments concerning Rule 3-C-2 and focalize only on Rule 1 has allowed it to render a decision which is contrary to the better reasoning of Third Division Awards 13807, 22011, 29619 and 29692 to name just a few.

A reading of Majority opinions is like the telling of half a story. The Majority simply walked away from Rule 3-C-2 and in doing so rendered an incongruous decision of no redeeming value. Because of those errors I strenuously Dissent.

Respectfully submitted,

William R. Miller

William R. Miller
TCU Labor Member, NRAB
May 6, 1997

CARRIER MEMBERS' CONCURRING OPINION TO THIRD DIVISION AWARDS 32028, 32029, AND 32032 (REFEREE E. C. WESMAN)

The Carrier Members concur with the Majority's finding that the parties' general Scope Rule and long-standing, extensive mixed practice—with substantial arbitral precedent recognizing these elements—defeat the Organization's claims against other crafts performing cleaning duties in these cases.

The Organization's assertion, in the Labor Member's Dissent to these Awards, that the parties' Rule 3-C-2 stands apart and independent of the Scope Rule and therefore required distribution of the abolished Janitor position duties to other clerical positions at the Maintenance of Way Shop, is erroneous. In accordance with classic tenets of labor contract construction and interpretation (see Third Division Awards 3870 and 3842, among many others), contract rules are not independent but must be considered in context with co-related provisions from which their meaning flows. Certainly, the Scope Rule frames the context of the labor contract, and cited Rule 3-C-2 cannot assume authority beyond that vested in the Scope Rule by language, practice, and arbitral precedent.

Accordingly, the Carrier Members do wholeheartedly concur with the Majority's finding in these cases, and do reject the Labor Member's dissenting assertions.

Patricia A. Engle
Patricia A. Engle

M W Fingerhut
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Michael C. Lesnik
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Paul V. Varga
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June 10, 1997