

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32364
Docket No. CL-32879
97-3-96-3-221**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(Illinois Central Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11213) that:

1. Carrier violated the Agreement between the Parties, effective February 1, 1995, and each day thereafter, when the duties of performing janitorial work was not returned to this class and craft and continued to be performed by outside companies at Carrier's office located at 2921 Horn Lake Road, Memphis, Tennessee.

2. Carrier shall now be required to compensate the Senior Extra Available or Regular Clerk eight (8) hours per day beginning February 1, 1995, and continuing for each date, seven (7) days per week, until the work is restored and assigned to clerical positions subject to the Agreement.”

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.

We see no way of jumping into this debate without reference to the history swirling around it. Briefly, the background is this: Prior to November 1, 1974, the Scope Rule of the Parties' Agreement was a "general rule," which by custom required the Organization to establish that it had a clear contractual right to exclusive performance of the disputed work in order to prevail in a scope dispute. Effective November 1, 1974, a revised Scope Rule was adopted, providing in relevant part as follows:

"RULE 1 - SCOPE

(d) Work performed by employees coming within the scope of this agreement on the effective date of this rule belongs to employees covered thereby and nothing in this agreement shall be construed to permit the removal of such work from the application of these rules except as provided herein or by agreement between the parties signatory hereto."

The terms of the newly negotiated Scope Rule were the subject of a 1976 dispute ultimately resolved by Award 1, Public Law Board No. 2625 (Dana E. Eischen). That Award characterized the revised Rule 1 as a "major departure" from the parties' former "general" Rule, and found that Section 1 (d) "has the effect of 'freezing in place' as of November 1, 1974 the work then performed at various locations around the system by employees covered by the Agreement."

When the revised Scope Rule was negotiated, janitorial work at Carrier's Memphis facilities – including its Yard Office and Crew Caller's Office – was being performed by covered employees. However, sometime prior to February 2, 1981, Carrier leased space in a newly constructed building owned by Mainliner Properties and relocated its Yard Office and Crew Caller's Office to the new facility. It then abolished the two janitorial positions which had served the former offices because such work at the new location was provided by Reeves Janitor Services, Inc., pursuant to a service contract with Mainliner. The Carrier's former facilities were subsequently demolished.

A claim was asserted by the Organization arguing that the relocation of Carrier's two offices did not relieve it of staffing the new facilities with covered employees under the Scope Rule, and that use of outside service providers to do this work was a violation

of the Agreement. Award 5, Public Law Board No. 3398 (Robert E. Peterson) denied that claim. Because that Award has bearing on the outcome here, we set forth below in some detail its summary of Carrier's position in that case, and the Board's principal findings:

"It is the Carrier's position that it was not in violation of the Rules Agreement, that the duties of cleaning of old buildings disappeared and consequently it had the right to abolish the janitorial positions in accord with Rule 16 (c), which states:

'Any position may be abolished when the major portion of its work or requirements is no longer needed.'

The Carrier also states that although the janitorial work at the old buildings fell under the rules, Rule 1 (d) did not guarantee that all positions would remain in perpetuity, and that when the work of cleaning the old buildings was no longer necessary, nothing in Rule 1 (d) required it to continue the two janitorial positions.

*** * ***

After giving careful and studied consideration to the arguments of the parties, the Board must conclude that it finds no rule which has been cited to us which, expressly or by inference, supports the position of the Organization. None of the rules cited is found to have prohibited the Carrier from abandoning its old buildings or from abolishing positions no longer needed. In this same connection, the Board thinks it clear the Carrier had the legal right to sell off its property and to move to leased facilities. The Board likewise believes that with the lessor reserving the right to arrange and/or perform janitorial service for the leased office space, the Carrier was obligated to be bound by the terms of such leasing agreement. Thus, the Carrier's janitorial employees not being needed for the areas occupied under the lease, and the Carrier having no control over the lessor, we do not find that the Organization may claim that the Carrier janitors were entitled to janitorial work in the leased facility as in the old, Carrier-owned offices. The Scope Rule (Rule 1) covers only the work thereunder which is or may be undertaken by the Carrier in connection

with the operation of its own properties. The Rule does not extend to areas where another legal entity has a superior right of control." (Emphasis added.)

Beyond the above background, two ensuing events are important. First, in July 1993, after occupying the office building owned by Mainliner for approximately 11 years, with janitorial services provided to it as tenant in the interim, Carrier purchased that facility. No notice of that transaction was provided to the Organization. Personnel not covered by the Agreement continued to provide janitorial services after the sale. Upon learning of the transfer of ownership, this claim was filed on April 2, 1995 seeking a return of that work to covered employees. Second, on January 23, 1995, the membership ratified a new Agreement on certain issues, including Grievance Resolution/Bonus terms at Article XV (c) providing for lump sum payments of \$1000 to each employee in active service who chose to withdraw without prejudice then-pending claims involving issues other than discipline.

In rejecting the Organization's demand to restore janitorial work at Memphis to its members, Carrier initially asserts two procedural arguments. First, in reliance on the time lapse between date of sale and date of claim, it argues that the claim is untimely as not filed within 60 days of the date it took title to the new building. Secondly, it argues that the claim is barred by the Grievance Resolution/Bonus terms because the facility in question was sold prior to the date those provisions were ratified.

The Board fully credits the Carrier's argument with respect to the well established principle on the timeliness issue: claims, such as this, based upon a single event but couched in terms of a "continuing violation" to circumvent time limits may not be allowed. However, the gravamen of the complaint here is that the Carrier failed to assign covered employees to perform janitorial duties at its newly owned premises. The record demonstrates no knowledge of title transfer on the part of the Organization at the time it occurred. We find therefore that its right to protest the subcontracting did not die 60 days from the date the building was sold to Carrier.

The Carrier next asserts that the claim is barred by the Grievance Resolution/Bonus provision which was effective in January 1995. That theory is not especially winsome. The claim related to the Memphis janitorial issue was filed on April 2, 1995 seeking compensation retroactively commencing February 1, 1995. No dispute was pending in January 1995 on this issue, the waiver of which could have served as

consideration for the \$1000 payments received under Article XV. Thus we find that the Grievance Resolution/Bonus provisions are inapplicable to and do not serve to bar this claim.

Having found that the claim is not precluded by the terms of the January 1995 Agreement, we turn to the sole remaining question: did Carrier fulfill its obligations under the Agreement when it acquired title to and rights of control over the office building it occupied, but failed to assign necessary janitorial work at that facility to its covered personnel. Our reading of Rule 1, and of the two Awards referenced above construing its language, forces the conclusion that it did not.

The clear language of Rule 1 expressly assures that work performed by employees on November 1, 1974 belongs to covered employees, and nothing permits the removal of such work except as provided in the 1974 Agreement. It is undisputed that janitorial work at the Carrier's Memphis facilities had always been performed by covered employees prior to the 1974 Scope Rule revision. Based upon its examination of the bargaining history of the provision, Public Law Board No. 2625 concluded that the new Scope Rule had "the effect of 'freezing in place' as of November 1, 1974 the work then performed at various locations around the system by [covered employees]." In the words of Referee Eischen:

"In plain and unambiguous language, Rule 1 (d) creates a 'freeze frame' situation in which work performed by employees covered by the Agreement as of November 1, 1974 may not be removed from them and given to strangers to the Agreement, absent compliance with the rules of the Agreement or by negotiation and agreement between the parties."

Although by operation of Rule 1 and Award 1, Public Law Board No. 2625, janitorial work at the Carrier's office buildings in Memphis was established as belonging to covered employees, Award 5, Public Law Board No. 3398 subsequently qualified that entitlement when it held that the Scope Rule does not guarantee all positions will exist forever, and that this Carrier on the facts was justified in moving to leased facilities with janitorial services arranged by the lessor. In so finding, that Board excepted from Scope Rule coverage a leasehold situation in which the Carrier does not enjoy absolute control over staffing decisions on the leased property. As the Board there held, however, the Scope Rule does cover work thereunder "which is or may be undertaken by the Carrier in operation of its own properties."

Public Law Board No. 3398 does not expressly address the application of the Scope Rule to the instant facts, where Carrier control is relinquished and then regained, but it does provide some aid in applying the Rule to those facts. The central contention of the Carrier is that the "frozen" rights of covered employees were not only suspended during the period of Carrier's lease – they melted away. Since the new offices were not constructed until 1981, Carrier urges, covered employees could not possibly have performed janitorial work there in 1974 when the Agreement "freezing" their rights became effective.

The Board is of the view that this argument fails to give account either to the text of Rule 1, the tests to be met under the amended Rule in cases involving preservation of work to covered employees, or the rationale underlying the ensuing Awards interpreting it. The Rule makes it clear that it was the janitorial work at offices owned, occupied and controlled by Carrier at Memphis that "vested" in 1974. The Awards make it clear that the Scope Rule did not extend to Carrier's leased facilities between 1981 and 1993 not because those office building were new and did not exist in 1974, but solely because they were not under Carrier's control from 1981 to 1993. The standard for removing work is whether such removal was pursuant to negotiation and agreement between the parties. Nothing in the Agreement or in the two relevant precedents suggests that when the circumstances justifying the subcontracting have disappeared, application of the scope clause should nonetheless remain suspended. A more symmetrical reading of the Agreement, and one more consonant with Award 5, Public Law Board No. 3398, is that Rule 1 neither guarantees the existence of all positions in perpetuity, nor do exceptions to its coverage survive even after the circumstances justifying them vanish.

In sum, there can be no doubt under the Agreement that when Carrier reassumed control of janitorial work in its offices and the right to assign that work as it chose, the employees' corresponding rights to it were revived. In contrast, Carrier's theory would allow it to flee its bargaining agent simply by transferring covered work out of the bargaining unit, relinquishing control of the work site, and resuming control thereafter with covered work permanently lost to the Organization. That result would seem to fall within the classic definition of a runaway.

Although the Board finds the Carrier in violation on the record before it, we do not in any sense intend to imply that the numerous references to fact situations at other locations, whether or not analogous, have played any part in our analysis. This case, professionally and exhaustively argued by the Carrier and Board advocates, who take

their facts as they find them, rides alone on its merits. It addresses farm-out activity at Memphis, not broader work accretion issues, and not activity at other locations.

Remedy issues here pose special problems. It was incumbent upon the Organization to prove damages suffered, but the record does not support the claim for one day's pay for each day janitorial work was performed in the office building in Memphis after it was acquired by Carrier. Because detailed proof of actual damages has not been established, the Board sustains only that aspect of the claim which asserts that the Agreement was violated and directs the parties to commence the process of returning the work at issue to the appropriate members of the Organization.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that 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 30th day of December 1997.