Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32459
Docket No. CL-32941
98-3-96-3-318

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11223) that:

(1) Carrier violated the Agreement between the Parties, at Memphis, Tennessee, effective April 3, 1995, and subsequent dates when the assigned duty of inspecting perishable shipments was removed from this class and craft and given to another class and craft, in violation of Rule 1 Scope, among others of the Clerks' Agreement.

(2) Carrier shall now be required to return the work to this class and craft and to compensate Clerk O. R. Freeman, his substitutes and successors for each Wednesday and Thursday; T. W. Griffith, his substitutes and successors for each Monday and Tuesday; and the senior regular or extra clerk available to be called for the work for each Friday, Saturday and Sunday; two hours and forty minutes' pay at the penalty rate in accordance with Rule 34 (a), effective April 3, 1995, and continuing for each date thereafter that the violations occur until the work is returned to the Clerks."

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.

As Third Party in Interest, the Brotherhood of Railway Carmen, Division of Transportation Communications International Union was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

The Carrier posted notice that effective April 3, 1995, the inspections of perishable shipments in Memphis would be performed by Mechanical Department employees (Carmen). The notice detailed the process by which the Lead Carman would be notified of any scheduled perishable shipments that were to arrive and his responsibilities to assure that appropriate Carmen made the proper inspections of perishable shipments.

The Organization filed its initial claim on May 30, 1995 asserting a violation of Rule 1 (Scope) of the Agreement. It argued that the Agreement reserved the work to the Clerks who had by past practice exclusively inspected all perishable shipments. The Organization argued that Rule 1 (d) protected such work from removal except by agreement between the parties. Under a "freeze frame" application the disputed work belonged to the Clerks effective November 1, 1974 when the new "positions and work" Scope Rule was instituted. As the work always belonged to the Clerks, it could not now be assigned to Carmen.

The Carrier denied violating the Scope Rule of the Agreement, particularly Rule 1 (d). The Carrier stated that the work of reading gauges to determine temperature and fuel was incidental to the Carman's regular duties and de minimis. It argued that its action was fully supported by Rule 1 (f) of the Agreement which states:

> "Except as otherwise provided in this rule, no officer or employee not covered by this agreement shall be permitted to perform any work covered by this agreement which is not directly or immediately linked to and an

integral part of his regular duties, except by agreement between the parties signatory hereto."

As this work was "certainly incidental" to the Carman's duties it was in accord with Rule 1 (f), supra.

The Board carefully reviewed the on-property record and the proof submitted by the Organization along with the Carrier's refutation.

This Board made a detailed review of the record as joined and disputed on the property. The claim before us is proper and we conclude that it has all elements of proof necessary to be sustained.

The Organization noted that Rule 1 was a revised "positions and work" Scope Rule. It further noted that with regard to the date of April 3, 1995 when the inspection of perishable shipments was transferred by the Carrier from Clerks to Carmen, the Organization stated:

"Prior to this date, and as far into the past as anyone can remember, the Clerks in Memphis have inspected perishables exclusively."

The Board finds no rebuttal. It stands as fact, that following the change from a general Scope Rule to a "positions and work" Scope Rule on November 1, 1974 and until such transfer as herein disputed, this was the work of Clerks. Further evidence of record from the October 10, 1995 letter confirms these duties were Clerks' responsibilities both prior to and after November 1, 1974.

Even further, the Board studied Rule 1 (f) as the substantive defense given by the Carrier. The Carrier argued throughout this dispute that the work of inspecting perishable shipments was incidental to the Carman's regular duties and therefore allowed by Agreement. The Board notes that the negotiators of Rule 1(f) did not utilize the word "incidental" in the language of the provision. Rule 1 (f) clearly uses a more definitive and explicit phrase to permit others to perform the work only "immediately linked to and an integral part" of the work they performed. Incidental work does not equate with integral work. The former is minor or secondary, while integral denotes an essential part of Carman's responsibilities. There is no evidence of record that this disputed work performed totally by Clerks until this instant claim was "immediately

linked to" and an "integral part" of Carmen's work. The Board cannot find any evidence or support in this record to conclude that the Carrier's action has Agreement support.

Having concluded that there is before us proper evidence and support for a Scope Rule violation, the Board's attention must turn toward remedy. The Carrier argued that reading the temperature and fuel gauges requires no skill or time; that such action is obviously de minimis. We reviewed this full record and conclude, as did Third Division Award 30799 in resolution of a similar claim involving the parties, that the work performed is not de minimis. On the other hand, there is a lack of substantive proof in this record that the violation constitutes two hours 40 minutes. The Board is cognizant of the nature of the work in this continuing claim. We hold that the Scope Rule was violated; that the work belongs to the Clerks; that under the facts and circumstances of this instant claim where work has actually been performed in violation of the Agreement, the Claimants are to be paid one hour per day at the penalty rate.

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 21st day of January 1998.

SERIAL NO. 374

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 32459

DOCKET NO. CL-32941

NAME OF ORGANIZATION: (Transportation Communications International Union

NAME OF CARRIER: (Illinois Central Railroad

We found in Award 32459, which was adopted on January 21, 1998, that the Scope Rule had been violated when Carmen performed the work of reading temperature and fuel gauges that belonged to Clerks. This was a continuing claim that began on April 3, 1995, when the Carrier posted notice that inspections of perishable shipments would be performed by Carmen and ended when the Carrier returned the work to Clerks on April 9, 1998. We ordered that "where work has actually been performed in violation of the Agreement, the Claimants [were] to be paid one hour per day at the penalty rate."

After the Award was issued, the Organization sought payment for 1103 hours at the penalty rate. It now brought to the Board that request, which the Organization alleges the Carrier refused to honor in compliance with the Board's order. The Carrier argued that the approximately 1100 hours requested was determined by adding up one hour for each day between April 3, 1995 and April 9, 1998. It offered to pay only for the proof shown in the record of actual occurrences of Carmen inspecting shipments. Those inspection reports covered only 82 days, which represents the Carrier's liability. The Carrier refused to accept the Organization's compromise offer of 825 hours. As such, the issue has been returned for an Interpretation.

The Organization's claim for either the 1103 hours or its proffered settlement by payment of 825 hours has no basis in fact. Neither conforms to the intent of the Award. Nor can the Board find for the Carrier's offer of 82 hours as being in full compliance with the decision reached. As a continuing claim, the record indicated 82 different dates. There is no record before the Board that said dates were to be considered

exhaustive. We are not persuaded from the original record of 82 dates between April and October 1995 that the Carrier's position has merit. The Board finds no indication in the original dispute that this claim should be treated in a manner different than those of numerous other continuing claims.

The Board's decision was that Claimants were to be paid one hour at the penalty rate where work had actually been performed in violation of the Agreement. Clerks are not to be compensated on dates when perishable inspections were not performed. The parties are instructed to do a joint check of Carrier's records to determine the actual number of hours.

Referee Marty E. Zusman who sat with the Division as a neutral member when Award 32459 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 17th day of May 1999.