

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 33406  
Docket No. CL-34259  
99-3-97-3-809

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)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Organization (GL-11882) that:

The Carrier has violated the current Rules Agreement particularly, but not limited to:

Rule 1 - Scope

Rule 2-A-1 - Bulletining and Awarding of Positions

Appendix E - Extra Board Agreement

Appendix G - Union Shop

On or about early August, 1995, the Carrier knew a vacancy was going to exist on the Commuter Rail Secretaries Position, GC-1, due to the fact that Ms. Toni Bonano was about to undergo carpal tunnel surgery.

Initially the Carrier refused to post the vacant position, and chose instead to hire a “Kelly Girl” (from outside the Industry) on a supposed temporary basis. However, the position still continues to be covered by the temporary agency in violation of our Agreement.

Therefore, claim is made as a penalty for eight (8) hours pay at the punitive rate for each and every day beginning August 17, 1995, and continuing until such time as a satisfactory resolution is reached, on behalf of Ms. Ann Bulmer, who has made written application to perform the duties of the illegally covered position after completing her regular assignment on a daily basis.

Claim is additionally made on behalf of other qualified secretaries, including Ms. Lenore Neil and Ms. Mary Mahoney, for any day that Ms. Bulmer is, or has been, unavailable.

You do not have the right to contract out our work, and we have taken a major exception to your arbitrary action.

This claim is presented in accordance with Rule 7-B-1, is in order, 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.

It is the position of the employees that the Carrier violated the Scope Rule of the Agreement when it elected to use a non-agreement "Kelly Girl" to perform the clerical Scope-covered work regularly performed by Ms. Toni Bonano on Commuter Rail Secretary Position GC-1. In particular, the Organization cites Section (d) of that Rule, which reads in pertinent part as follows:

"(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."

In addition, the Organization cites Rule 2-A-1 - Bulletining and Awarding of Positions. Section (a) of that provision reads as follows:

**“(a) All new positions and vacant positions known to be of more than thirty (30) days duration will be bulletined on the Wednesday following the date they occur, but not later than the succeeding Wednesday, in the seniority district, for a period of seven (7) calendar days in places accessible to employees affected. Bulletin will show position (indicating if new), location, primary duties, tour of duty, meal period, days of rest, rate of pay, symbol number, if numbered, and whether position is of a permanent or temporary nature.”**

**The Organization maintains that the Carrier did not follow the standard steps in filling the vacancy created by Ms. Bonano’s absence. It asserts that the proper procedure is clearly spelled out in the Extra List.**

**The Carrier denies that it violated the Scope Rule, which in the Agreement between these Parties is general in nature. It contends that the work in question is not reserved exclusively to members of the TCU craft. Further, the Carrier asserts that it did not violate Rule 2-A-1, but fully complied with it. It notes that it advertised the temporary vacancy at least three times without receiving a bid. Finally, the Carrier argues that the Extra Board Agreement could not have been violated, because no Extra Board existed for the offices where the involved position was located.**

**This is certainly not a case of first impression. It is undisputed that Rule 1 of the Agreement between the Parties is general in nature. Accordingly, noted in Public Law Board No. 2792, Award No. 1:**

**“As the moving party in this Scope Rule the Organization has the burden of proving 1) the reservation of the work to Clerk-Stenographers 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 Clerk-Stenographers covered by the Agreement. The former burden is met by the Organization if it can point to clear, specific and unambiguous contract language. With respect to the latter burden, it has been established by a long line of precedent, which we are not at liberty to ignore, that the Organization must demonstrate by a preponderance of evidence the existence of a long-standing, mutually acknowledged and uniform practice of assignment to an performance of**

the dispute[d] work by the Agreement-covered employees, to the practical exclusion of all strangers to the Agreement.”

Third Division Award 29598, considered a case between these same Parties which is directly on point with the current matter before this Board wherein it stated that where, as here, the Organization has not met the tests set for by the aforementioned Award (supra):

“... In the typical case, the collective bargaining agreement involved is a system-wide agreement. The instant Agreement is no exception. In such a case, the analysis of the record has a system-wide perspective unless there is evidence that demonstrates the parties intended that a narrower approach be taken. No such evidence exists here.

While the customary, historical and traditional performance of the work is the typical means of analysis, it is by no means the only one. Evidence of the bargaining history, when available, is helpful in resolving questions about Scope coverage. Previous Awards of this Board have recognized unsuccessful attempts to negotiate a rule change as being strong evidence that the existing rules do not provide for the results sought.”

This Board has reviewed the record before us, and does not find that the Organization has met the considerable burden of persuasion imposed upon it in this case. Carrier has argued persuasively that it has previously contracted out similar work, and that it attempted to attract TCU bidders to the position to no avail. Accordingly, the Board has no choice but to deny the claim.

#### AWARD

Claim denied.

**Form 1**  
**Page 5**

**Award No. 33406**  
**Docket No. CL-34259**  
**99-3-97-3-809**

**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 13th day of July 1999.**