

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36418
Docket No. CL-36476
03-3-00-3-734

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Duluth, Missabe & Iron Range Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12681) that:

1. Carrier violated the TCU Clerical Agreement at the Ore Docks in Duluth on Thursday, December 4, 1997 and each and every day thereafter, when it required and/or permitted Carrier Officer and/or others, not covered by the Clerks Agreement, at the Duluth Ore Docks to perform the work of updating the Ore Docks parts manual and entering that information into a Data Base.
2. Carrier shall now be required to compensate the senior available extra or unassigned clerk, without forty (40) hours of straight time work per week, eight (8) hours pay at the pro rata rate of the Preventative Maintenance Clerk position, or if none are available, the senior available regularly assigned clerk eight (8) hours pay at the punitive rate of their regular position or at the punitive rate of the Preventative Maintenance Clerk position, which ever is higher, for Thursday, December 4, 1997 and each and every day thereafter that the violation is allowed to continue.”

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.

On February 1, 1998, the Organization initiated a claim contending that the Carrier permitted supervisors and others, who are not covered by the applicable Clerical Agreement, to perform work consisting of updating and revising the Ore Dock Parts Manual, entering such information into a computerized data base and setting up a computer program covering preventive maintenance. In the claim, the Organization sought, on behalf of the Senior Available Extra Unassigned Clerk, 40 hours per week at the straight-time rate of the Preventive Maintenance Clerk position beginning on December 4, 1997 and for each day thereafter so long as the alleged violation continued.

The Organization specifically charged that the Carrier's purported assignment of the disputed work to Supervisors and strangers to the Agreement was a violation of Rule 1(c) which reads:

"Positions or work coming within the scope of this agreement belong to the employees covered thereby and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, except by agreement between the Parties signatory hereto."

The Organization related that until 1995, a Preventive Maintenance Clerk updated the parts manual and entered the updated information into a computerized data base in a program called "ELKE." The Organization further recounted that when the Carrier abolished the Preventive Maintenance Clerk position in 1995, the Carrier transferred and reassigned the work to two clerical employees: one stationed at Duluth and the other working at Two Harbors, Minnesota. The Organization further charged that, beginning on December 4, 1997, a Supervisor of Operation and Maintenance began to input data into a new computer system called "Main Saver," which replaced ELKE. The Organization submitted print outs allegedly showing that the Supervisor updated pages in the parts manual by inputting the revised information into the data base. The

Organization argues that once the disputed work was assigned to Clerks, persons not covered by the applicable Clerical Agreement could not perform the disputed work without an agreement with the Organization. Stated differently, the Organization alleges that the disputed work accrued to the class and craft of Clerks pursuant to Rule 1(c). The Organization also argues that the advent of Main Saver did not give the Carrier a license to reassign the work to strangers to the Agreement. A change in the method of performing the work, the Organization asserts, does not take the work outside the ambit and protection of the positions and work Scope Rule.

The Carrier explained that it replaced ELKE with Main Saver because the new computer system was not only a preventive maintenance system, but also a maintenance planning program. The Carrier acknowledged that the Operations and Maintenance Supervisor spent approximately 30 minutes per week working directly with Main Saver primarily to setup the program, develop a plan for storing the information and then testing the capabilities of the new program. According to the Carrier and statements written by several Officers, Supervisors had performed the same initial setup work when the ELKE system was introduced in 1986-1988. The Carrier related that after Main Saver was established and running smoothly in March 1998, the Carrier assigned the data entry work to the successful bidders of two newly created clerical positions. The Supervisor further explained that after he familiarized himself with Main Saver, he trained Clerks how to input data into the system and thereafter, they did so on a daily basis. The Carrier submits that the Supervisor continues to perform corrective action orders, but Supervisors had also accomplished such corrections throughout the years that the ELKE system was in operation. While two Clerks denied that they inputted the data into Main Saver, which appears on the printouts submitted by the Organization, another Supervisor retorted that the input work was performed by another clerical employee. The Carrier contends that it did not violate Rule 1(c) because not only did the Organization fail to prove that any work was removed from the clerical craft, but it also failed to prove that strangers to the Agreement are performing work reserved to the clerical craft by the Scope Rule.

Because Rule 1(c) is a positions and work Scope Rule the Organization need not prove that Clerks, covered by the Agreement, historically performed the disputed work to the exclusion of all others across the system. Nevertheless, under the positions and work Scope Rule, the Organization must show that clerical employees performed the disputed work, that the work was removed from the clerical craft without the

Organization's consent, and that the work is now being performed by strangers to the Agreement.

The Board carefully scrutinized the voluminous record herein. In essence, we can divide the disputed work into two components. First, the preparatory work associated with establishing Main Saver. This work is a once in a decade project. Second, the task of inputting data to Main Saver. This work is routine, regular and recurring.

The record reveals that the Supervisor of Operations and Maintenance spent time setting up, testing and troubleshooting the new Main Saver computer program. This preparatory work was never assigned to Clerks, so the work never accrued to the clerical craft under Rule 1(c). (See Public Law Board No. 4070, Award 24) When the Carrier implemented the ELKE system, Supervisors performed exactly the same preparatory tasks. Thus, past practice definitively shows that Supervisors may perform the program preparatory work.

With regard to the data entry work, the Organization failed to satisfy its burden of proving that the Carrier removed work reserved to the clerical craft by the positions and work Scope Rule.

More specifically, the Organization did not prove that the Carrier abolished any clerical position coincident with the introduction of Main Saver. While it is not necessary for the Organization to show the abolishment of a position to prove a Scope Rule violation, the volume of work that the Organization claims was transferred to Supervisors and strangers would probably result in the loss of, at least, one position. In this case, the Organization's burden of proof becomes even more difficult because not only did the Carrier not abolish any positions, it actually established two positions. Starting in March 1998, the Carrier properly assigned the data entry work to the incumbents of the two newly established clerical positions. After familiarizing himself with the maintenance system, the Supervisor trained Clerks to perform day to day data entry work on Main Saver except for occasional corrective orders.

Next, the Organization did not demonstrate that the work of using the program to generate corrective work orders is work covered by Rule 1(c). The Carrier stated, without any refutation from the Organization, that Supervisors had routinely performed similar, if not identical work, under the ELKE system. The line of demarcation between supervisory work and the subordinates' work did not change. In sum, after the advent

of Main Saver, Supervisors continued to perform the same supervisory work that they had in the past and clerical employees performed the same clerical work that they had in the past. Therefore, the Organization failed to prove that any work was removed from covered employees.

The Board notes that the record contains a salient factual dispute about whether a Supervisor or a clerical employee inputted certain preventative maintenance information into Main Saver (which appears on the printouts that the Organization submitted into this record). Two clerical employees denied performing the work. In contrast, the Carrier identified another clerical employee who purportedly performed the work. This factual dispute is irreconcilable. More significantly, the Organization retains the burden to come forward with sufficient evidence for the Board to resolve the factual dispute in its favor.

In sum, because the Organization failed to meet its burden of proof, the Board must deny this claim.

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 17th day of March 2003.