

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37061
Docket No. CL-37387
04-3-02-3-422

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Delaware & Hudson Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12906)
that:

- I) Claim of the System Committee of the TCU (GL-12906) (DH01/008A) on behalf of Claimant(s): James Penzone and Karen Higgins, as well as the successors, if any, to their assignments.
- (a) The Carrier violated the D&H/TCU Rules Agreement, effective September 26, 1990, as revised, particularly Rules 1 (Scope), 5, 13 and other Rules, when, at the D&H/CP Binghamton, NY Locomotive Repair Facility, on a daily basis the Carrier allows, permits and/or requires employees of Omnitrax, or other strangers, to perform duties of, but not limited to: maintaining locomotive records (data entry, packing slips, trucking papers for material shipped, such as traction motors, wheels, air brake parts, etc., filing and storing of records, including SAP records, F.R.A. cab cards, 2005 daily inspection reports and any other records relating to D&H/CP locomotives repaired at the Binghamton Diesel Facility, payroll edits or changes required for D&H/CP contract diesel shop employees (including any vacation printed schedules and forms) , paperwork for scrap pick-up and payment, Customs papers for locomotives shipped to the Binghamton Diesel Facility from outside the USA for

repair, stocking, arranging and inventory of material, UPS shipment and pick-ups, as well as all other D&H/CP Rail related data entry and duties administrative in nature.

- (b) The involved duties being claimed have been exclusively and historically assigned to, and performed by the D&H Clerical Employees (TCU) at the Binghamton, New York, Locomotive Repair Facility location, until the Carrier arbitrarily removed them from covered positions and assigned them to the involved strangers.
- (c) The Carrier previously advised the Organization that the clerical duties performed by the TCU represented employees would not be performed by the involved strangers;
- (d) The Claimants are both incumbents of positions at the Binghamton, NY Locomotive Repair Facility, are qualified to perform the claimed duties had they been asked to do so and should now be allowed an additional eight (8) hours punitive pay, based on the rate of their respective position, commencing sixty days retroactive from the date of this claim and continuing for each and everyday thereafter, until this violation is corrected;
- (e) In order to terminate this claim all the involved duties must be returned to Employees covered by the Clerical Agreement;
- (f) This claim is presented in accordance with Rule 28-2, is in order and should be allowed as presented."

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 March 12, 2001, the Organization initiated a claim alleging that the Carrier allowed strangers to the Agreement to perform certain clerical work previously performed by the two Claimants at the Carrier's Binghamton, New York Diesel facility. The Organization seeks eight hours of punitive pay for each Claimant covering each day that the alleged violation occurred, commencing with 60 days prior to the claim.

The Organization specifically argued that the Carrier violated Rule 1(b) which provides:

"This contract shall govern the hours of service, rates of pay and working conditions for employees of the Carrier engaged in work in positions to which this agreement applies as provided in Rule 32; i.e., Clerks Grade I, II, and III Positions and/or clerical duties shall not be removed from the application of Rules of this Agreement except by agreement between the parties signatory hereto or as provided herein."

According to the Carrier, it entered into a contractual arrangement with Omnitrax to coordinate, manage, and oversee the maintenance and repair of locomotives at the Binghamton facility. When Omnitrax employees and contractors began working at Binghamton in September 2000, the Carrier did not furlough any clerical employees.

During the appeal on the property, the Organization wrote extensively about the erosion of clerical positions at Binghamton. The Organization pointed out, and the Carrier acknowledged, that there were 50 percent fewer clerical positions at

Binghamton in 2001 than in 1990. The Organization specified that the Carrier abolished a stores clerical position in March 1992 and it eliminated another clerical position when the incumbent retired in July 1992.

In its claim, and on the property, the Organization alleged that the Carrier transferred the following tasks from Claimants to Omnitrax: maintaining locomotive records; payroll edits; paperwork for scrap pick-ups and payments; customs papers; stocking, arranging and taking inventory of materials; handling UPS shipments; and, miscellaneous data entry work. In a written statement, the two Claimants attested that Omnitrax retained two temporary employees to count and tag locomotive parts on August 27 and 28, 2001. One of the Claimants also wrote that an Omnitrax Manager locked her out of the Carrier's payroll software program at approximately 10:30 A.M. on May 9, 2001.

The Carrier responded that the Claimants continue to perform payroll edits, the filing and storage of maintenance/repair records, and the documentation associated with scrap pick-ups and payments. With regard to the remaining items of work, the Carrier contended that the work was eliminated. The Carrier denied that it handles locomotive parts because, the Carrier asserted, Omnitrax owns the locomotive parts and they do not become the Carrier's property until the parts are affixed to locomotives.

Rule 1(b) is a "positions and work" Scope Rule. The Carrier may not remove work previously performed by clerical employees and transfer the work to persons not covered by the Agreement without the Organization's consent.

The Organization bears the burden of proving the Scope Rule violation. The burden of proof in this case is problematic because the Carrier did not abolish positions or furlough any clerical employees coincident with the appearance of Omnitrax at the Binghamton facility. Stated differently, if clerical employees lost 16 hours of work per day, one would expect a reduction in clerical forces. The two Claimants remained fully employed which suggests that if they lost any work to strangers to the Agreement, the quantum of work was small, if not, minuscule.

Nonetheless, a Scope Rule violation can occur without a reduction in force, but it is more difficult for the Organization to satisfy its burden of proof.

In Third Division Award 33444, the Organization furnished a plethora of documents and voluminous evidence showing a transfer of work from covered clerical employees to persons not covered by the Agreement. In contrast to the evidence underlying Award 33444, the instant record contains only sparse and anecdotal evidence which is insufficient to satisfy the Organization's burden of showing a transfer of work from Clerks to Omnitrax employees or contractors. The record does not contain any attestations from clerical workers that the litany of work described by the Organization was previously performed by Clerks and, subsequent to September 2000, is being performed by Omnitrax employees and contractors. One statement, prepared by the Claimants, covers work allegedly performed by Omnitrax contractors on just two dates. The statement hardly constitutes sufficient evidence that Omnitrax employees or its contractors are performing work previously assigned to the Claimants on a daily basis. One Claimant charged that an Omnitrax Manager barred the Claimant's access to a payroll program on one day. A one time, transitory denial of access to a program does not prove that the Claimant is no longer performing the work. Indeed, the Carrier effectively rebutted the charge by demonstrating that the Claimant still performed payroll edits and changes after September 2000. In sum, the record contains only bare and unsubstantiated assertions that the Carrier transferred clerical work to Omnitrax.

The Board notes that, on the property, the Organization demanded both a joint check of work and that the Carrier produce the contract between the Carrier and Omnitrax. The Carrier responded that a joint check would not help resolve the dispute and that, absent Omnitrax' permission, it could not produce the Carrier-Omnitrax contract. The Carrier hinted that it might be able to furnish portions of the contract if the Organization provided more information concerning why the contract was relevant.

The Board need not decide whether the Carrier should have engaged in a joint check of work or produced the contract for two reasons. First, the record reflects that the Organization did not vigorously pursue its demands. After the Carrier stated that it would not participate in a joint check and, that it would not produce the contract, the Organization did not renew its demand or articulate how a joint check would uncover work transferred to Omnitrax when the record contains no statements from Clerks describing work purportedly removed from the

craft. Second, the Organization must, at least, show a prima facie loss of work before the arrangement between Omnitrax and the Carrier becomes relevant. Only after the Organization shows a decrease in clerical work do the terms of the Carrier-Omnitrax contract become significant making it necessary to determine if the two entities have a direct purchase arrangement. (See Public Law Board No. 6337, Award 1 and Special Board of Adjustment No. 1074.)

In conclusion, the claim must be denied due to lack of proof.

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 22nd day of June 2004.