

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37732
Docket No. CL-37288
06-3-02-3-301**

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
(Duluth, Missabe and Iron Range Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12879)
that:

1. Carrier violated the TCU Clerical Employees Agreement at Proctor on Tuesday, February 13, 2001, when it required and/or permitted a person, not covered by the Clerical Employees Agreement, Carman Del Kolenda, to perform the work of hauling a rail car truck from the Proctor Car Shop to Keenan. (TCU Exhibit 1A)
2. Carrier violated the TCU Clerical Employees Agreement at Proctor on Friday, March 2, 2001, when it required and/or permitted a person, not covered by the Clerical Employees Agreement, Dennis Lonke, to perform the work of hauling wheel sets from the Proctor Car Shop to Keenan. (TCU Exhibit 1B)
3. Carrier violated the TCU Clerical Employees Agreement at Proctor on Tuesday, March 6, 2001, when it required and/or permitted a person, not covered by the Clerical Employees Agreement, Dennis Lonke, to perform the work of hauling wheel sets from the Proctor Car Shop to Alborn, Minnesota. (TCU Exhibit 1C)

4. Carrier violated the TCU Clerical Employees Agreement at Proctor on Wednesday, March 7, 2001, when it required and/or permitted a person, not covered by the Clerical Employees Agreement, Dennis Lonke, to perform the work of hauling wheel sets from Alborn, Minnesota to the Proctor Car Shop. (TCU Exhibit 1D)
5. Carrier violated the TCU Clerical Employees Agreement at Proctor on Friday, March 9, 2001, when it required and/or permitted a person, not covered by the Clerical Employees Agreement, Dennis Lonke, to perform the work of hauling wheel sets from Keenan, to the Proctor Car Shop. (TCU Exhibit 1E)
6. Carrier shall now be required to compensate the senior qualified available extra or unassigned clerical employee without forty (40) hours of straight time work for the week, eight (8) hours pay at the pro rata rate of the Truck Driver position or if none are available, the senior qualified available regularly assigned clerical employee, eight (8) hours pay at the punitive rate of the Truck Driver position or the rate of his regular assigned position, whichever is higher, for Tuesday, February 13, 2001, Friday, March 2, 2001, and Tuesday, March 6, 2001, Wednesday, March 7, 2001, and Friday, March 9, 2001, which he would have received had he been allowed to perform the above mentioned work."

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.

This case involves five separate but consolidated claims. The first of these claims (File No. 01-530) was filed on February 19, 2001. That claim alleged that the Car Department "borrowed a truck from the north end Engineering Truck Department" and subsequently permitted a Carman to transport a rail car truck from the Proctor Car Shop to Keenan. The Organization asserted that such work – which, according to the Organization, has always been assigned to Asset Management Department (AMD) employees – has always been performed by Clerical TCU – covered employees, to the exclusion of any other craft or class.

Similar claims, with not measurably distinct fact patterns, were filed for four additional alleged incidents. Those claims were filed on March 4 and March 11, 2001 (three separate claims). In all five letters of claim, the Organization insisted that the Carrier had violated Rule 1 of the Agreement as a result of its decision to abolish four out of five AMD Truck Driver positions, thus leaving the AMD short handed.

The Carrier denied all five claims by letter of March 14, 2001. In its denial the Carrier protested that AMD Truck Drivers did not have "exclusive rights to handle company materials." Rather, the Carrier contended, other departments have, in the past, transported materials using their own trucks or trucks borrowed from departments with a truck more suited to the material being hauled.

On March 25, 2001, the Organization appealed the Carrier's denial. In that appeal the Organization emphasized that it was not filing a claim for all hauling by truck, but in these claims, specifically for the hauling of rail car trucks and wheel sets from the Proctor Car Shop to Keenan. The Organization noted that Rule 1(c) is a "position and work" Scope Rule. Accordingly, because, as the Organization insisted, no other craft had ever hauled rail car trucks or wheel sets, the Carrier could not remove such work from TCU-covered employees without violating Rule 1(c) of the Agreement.

In its denial of the March 25, 2001 appeal, the Carrier objected to the Organization's assertion that only TCU-covered employees had historically performed the work at issue. With respect to handling freight car trucks the Carrier contended that other departments had transported them to various locations on the Carrier's property. With respect to wheel sets, the Carrier acknowledged that TCU-covered employees had been used exclusively to move wheel sets between the Locomotive Department and the Car Department. It noted that work had decreased considerably since installation of the Wheel Truing Machine. However, it stated such exclusivity existed nowhere else on the property and TCU could not legitimately claim that it did.

In a subsequent appeal letter, dated October 5, 2001, the Organization reiterated its position and attached to its appeal 11 signed statements from current and former employees. Each statement stated in part:

"... it has always been the assigned duties of the [AMD] truck driver positions ... to pick up and deliver rail car wheel sets and trucks to various locations for the car department. ...

I myself was an incumbent to a truck driver position that had this duty as part of the duties, and I have previously performed this work."

In response to these statements, the Carrier provided the Organization with statements from a Manager of Maintenance in the Car Department and from an Engineer. Both statements supported the Carrier's position that other crafts or classes of employees had performed the work at issue in these claims.

The claims remained unresolved on the property and are properly before the board for adjudication.

The essential facts of the precipitating incidents are undisputed. The Carrier does not contest the Organization's allegations that other than TCU-covered employees performed the work at issue. The dispute lies over whether such work is rightfully reserved to TCU-covered employees. In order to prevail in this matter, the Organization need not prove system-wide exclusivity of the work at issue.

Rather, under a "position and work" Scope Rule, the Organization must prove that TCU-covered employees performed the particular work at issue at the location to the exclusion of other crafts or classes of employees. Thus, it must prove that it is work that cannot be removed from TCU-covered employees according to Rule 1(c) of the applicable Agreement. In this particular case the Organization has not done so.

The 11 statements signed by current and former TCU-covered AMD employees uniformly attest that the work at issue in these claims is/was part of their duties. However, none of those statements attests that only TCU-covered employees performed such work. By contrast, the two statements submitted by the Carrier state clearly that the work at issue was regularly performed by non-TCU employees as well as by TCU-covered employees as a matter of course. While it disputed the Carrier's evidence in argument, the Organization did not successfully refute that evidence in the on-property record before the Board. Thus, we have no choice but to deny the claims as presented.

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 23rd day of February 2006.