

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37758
Docket No. CL-38508
06-3-04-3-488

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-13056)
that:

- 1A. Carrier violated the Working Agreement when it allowed or assigned a stranger to the TCU Agreement to perform mailroom duties, which heretofore were assigned to Position 5025 Mail Clerk at the AOB Building.
- 1B. Carrier must now compensate any TCU employee working Position 5025 eight (8) hours pay at Wage Grade 6 straight time rate beginning May 3, 2000, and continuing each and everyday thereafter until such time as work removed is returned to the scope of the TCU Agreement.
- 2A. Carrier violated the Working Agreement when it allowed or assigned a stranger to the TCU Agreement to perform mailroom duties, which heretofore was assigned to Position 6061 Mail Clerk at the AOB Building. Clerical employee D. S. Brown, eight (8) hours pay at the straight time rate for May 10, 2000.
- 2B. Carrier must now compensate any TCU employee working Position 6061 eight (8) hours pay at Wage Grade 6 straight time rate beginning May 3, 2000, and continuing each and

every day thereafter until such time as work removed is returned to the scope of the TCU Agreement.

- 3A. Carrier violated the Working Agreement when it allowed or assigned a stranger to the TCU Agreement to perform mailroom duties, which heretofore was assigned to Position 6063 Mail Clerk at the AOB Building.
- 3B. Carrier must now compensate any TCU employee working Position 6063 eight (8) hours pay at Wage Grade 6 straight time rate beginning May 3, 2000, and continuing each and every day thereafter until such time as work removed is returned to the scope of the TCU Agreement.
- 4A. Carrier violated the Working Agreement when it allowed or assigned a stranger to the TCU Agreement to perform mailroom duties, which heretofore was assigned to Position 5168 Mail Clerk at the AOB Building.
- 4B. Carrier must now compensate any TCU employee working Position 5168 eight (8) hours pay at Wage Grade 6 straight time rate beginning May 3, 2000, and continuing each and every day thereafter until such time as work removed is returned to the scope of the TCU Agreement."

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 Scope Rule dispute consolidates claims submitted in September 2000 on behalf of four incumbents of mail room positions at the Carrier's Fort Worth, Texas, headquarters. Each challenges the Carrier's reassignment of some aspects of mail handling duties at certain of its headquarters buildings.

On May 3, 2000, the Carrier directed United Parcel Service (UPS) to stop delivering packages addressed to its Administrative Office Building (AOB) at 2500 Lou Menk Drive and instead drop them at the Network Operations Center (NOC) Dock at 2600 Lou Menk Drive, about one block away where various contract workers were assigned to receive, sort and distribute them. The Organization asserts that "... the incumbents ... have always sorted and delivered packages addressed to 2600 Lou Menk Drive." Accordingly, it maintains that the Carrier's changes in mail delivery procedures violated the governing Scope Rule, pertinent parts of which provide as follows:

"RULE 1 – SCOPE

* * *

- A. Work now covered by the scope of this Agreement shall not be removed except by agreement between the parties.

* * *

- C. Positions and work includes the following:

* * *

- 5 Clerks...

* * *

- (b) **NONCLERICAL:** Employees engaged in sorting tickets, waybills . . . gathering or delivering mail or other similar work. . . .”

The Carrier takes a sharply different view of the facts and argues that the historical background of mail handling is of critical importance in analyzing these claims. Its system headquarters complex, it states, encompasses numerous buildings housing a number of departments, with the two facilities involved in these claims located some distance apart. It states that over the years mail on the property has been handled in a variety of ways - at some buildings entirely by exempt personnel and outside contractors, at others by both covered Clerks and exempt personnel, and at still others by all three groups. It is adamant, however, that at no building, including the AOB and NOC, have TCU-represented Clerks ever exclusively handled mail.

According to the Carrier, when the AOB opened in July 1999, work was transferred there from both Building B and the Marketing Building. At Building B exempt personnel and outside contractors - but no covered Clerks - had handled mail since its opening in 1992. At the Marketing Building mail handling had always been shared among Clerks, outside contractors and exempt personnel. The NOC opened in March 1995, and the Carrier states that Clerks were always used at that location to assist in the mail room, but they have never handled mail, including UPS deliveries, at the NOC dock.

UPS packages addressed to the NOC, according to the Carrier, were briefly delivered to the AOB where they were received by anyone available - exempt employees, Clerks or outside contractors. They were then held until arrangements could be made for delivery to the NOC. To avoid double handling and eliminate delay, the Carrier in May 2000, issued the directive triggering these claims and ordered the UPS to begin delivering packages addressed to 2600 Lou Menk Drive directly to the NOC at that address rather than to the AOB at 2500 Lou Menk Drive.

The case presents not only substantial disagreement between the parties on the controlling facts but also on the applicability of various prior Third Division Awards. By application of Special Board of Adjustment Under Appendix “K”

Award 99 and others, the Organization argues that Rule 1 has "an adhesive quality by which work once assigned to the employees clearly covered thereby becomes vested in those employees and may not thereafter be removed unilaterally from them and given to other employees." Thus, based upon the nature of the Rule as a "positions and work" Scope Rule explicitly comprehending mail handling, the Organization argues that all of the disputed work at issue as it existed on the effective date of the Rule is reserved exclusively to the clerical craft and its removal and transfer to outsiders is a violation of the Agreement.

The Carrier also invokes a number of prior Third Division Awards in support of its position, including Special Board of Adjustment Under Appendix "K" Award 88. In that case, the Carrier emphasizes, the Board found the then new Scope Rule to be a "positions and work" Rule, but stated that it did not relieve the Organization "of the burden of proving the extent of the reservation by evidence of past practice where the Rule does not describe with sufficient particularity the type and amount of work performed by a listed position as of December 1, 1980." Additionally, the Carrier states, Special Board of Adjustment Under Appendix "K" Award 116 set forth the standard to be met in proving a violation under a positions and work scope provision:

"... Rather than having to show that the disputed work previously was performed exclusively on a system-wide basis by Agreement-covered employees, as under the old 'general' Rule, under the new Rule the Organization must demonstrate unilateral removal and assignment to strangers to the contract of a significant portion of that work...."

The myriad fact patterns discussed by an equally large number of Referees over the past two decades have necessarily freighted up this Scope Rule with refinements and qualifications. Some of the nuances can be glimpsed hiding behind the skirts of the parties' arguments here. On the one hand, for example, the Organization appears to correctly argue that Rule 1.C.5 "by its own terms" brings mail handling work within the reach of the Rule. As authority, it cites several prior Awards, including Public Law Board No. 3085, Award 1 (the Carrier's removal from Clerical workforce and reassignment to Mechanical craft of daily billing report work used to evaluate shift production at car shop violated Scope Rule.)

The Carrier emphasizes a vein of cases setting forth the standards that the Organization must meet to make its case. Among other arbitral authority, it argues, under Award 88 the Scope Rule has been consistently interpreted and applied as requiring Organization to demonstrate unilateral removal and assignment to strangers of a significant portion of that work which was actually performed as of December 1, 1980.

It is not surprising that in a matter of such importance to both sides the parties should swing for the fences. It is at the same time also appropriate that both parties be held to the strictest standards of proof as well. Based upon a careful review of this record, the Board finds that the Carrier's decision to discontinue accepting packages at the AOB that were bound for the NOC did not violate the Scope Rule. Our reasons follow.

The Organization bears the burden of demonstrating both that the task of signing for receipt of UPS deliveries falls within the scope of "gathering or delivering mail or other similar work not requiring clerical ability . . ." and that the Carrier wrongly removed a significant portion of such covered work when it ordered UPS deliveries to be made directly to the NOC to which addressed. There is nothing in this record that effectively refutes the Carrier's detailed material assertions that at the AOB, mail has been handled as "shared work" by exempt personnel, outside contract employees and TCU-represented employees ever since the facility opened in July 1999. Thus, to credit the Organization's contentions would be subversive to the well established principal that representations not rebutted on the record by reliable proof must stand as accepted fact. In the face of the Carrier's extensive rebuttals, the Board is unable to conclude that the Organization carried its evidentiary burden in demonstrating that the Carrier's actions went beyond permissible limits in May 2003 when it began having UPS deliveries taken directly to the proper address without transiting the AOL mail room. On that basis, the claim must be denied.

AWARD

Claim denied.

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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 21st day of March 2006.