Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37759
Docket No. CL-37356
06-3-02-3-138

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
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(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12804) that:

1. Carrier violated the TCU Clerical Agreement in the Transportation Department at Proctor, on Saturday, August 26, 2000, and each and every day and shift thereafter, when it required and/or permitted persons, employees of an outside contractor not covered by the Clerical Agreement to perform the work of transporting train crews.

2. Carrier shall now be required to compensate the senior 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 Ore Sorter position or if none are available, the senior qualified available regularly assigned Ore Sorter, eight (8) hours pay at the punitive rate of the Ore Sorter position for each shift on Saturday, August 26, 2000, and continuing for each and every shift on every day, seven days per week, 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.

The Organization filed the above claim on October 22, 2000. In that claim, and in support of its position, the Organization contended that:

> "The work in dispute is assigned to the claimants by both Rule 1 and bulletin, as well as custom and practice, and claimants and their predecessors have historically performed such work."

In its November 30, 2000 denial of the claim, the Carrier maintained that by custom and practice "many different parties" had transported crews, and that the predominant method since 1985 had been to hire "outside service." The Carrier later provided supporting documents in the form of vouchers and an outside contractor's bid statement. The Carrier did not concur that the work at issue – transporting crews – was reserved to the clerical craft. Rather, it argued, the Ore Sorter bulletin states, "transports crews as needed and any other duties as may be required."

That denial was appealed on December 14, 2000. In its appeal, the Organization reiterated the language of Rule 1(c) in which the Agreement provides that:

> "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 thereto."

In that appeal, the Organization also noted that the Carrier admitted that the work at issue had been assigned to Clerks, and that the fact that it may have been on an occasional basis did not abrogate the Carrier's obligation to continue to assign

it to Clerks. The Organization also protested the Carrier's statement that the vast majority of the transport duties in question had been performed by others not party to the Clerical Agreement.

The Carrier denied the Organization's appeal on February 9, 2001. In that denial, the Carrier contended that, absent a showing of exclusivity, the Organization could not now claim that the work at issue was reserved to TCU-represented employees. Moreover, the Carrier insisted that Ore Sorters continue to do occasional crew hauling on an as needed basis. Thus the Carrier emphasized its position that the work of crew hauling has by custom and practice been shared among both clerical and non-clerical employees.

In rebuttal to the Carrier's denial, the Organization noted that the Ore Sorter positions bulletined prior to January 2001 included the phrase "transports train crews as needed (all rail crews to and from interchange yards). . . ." It pointed out that in January 2001 (after the filing of this claim) the Carrier removed that phrase from the job bulletin. The Organization argued that the Carrier's unilateral removal of job duties from the position description did not legitimately remove those duties from the scope coverage of Rule 1.

On February 28, 2002, in response to the Organization's appeal of its December 6, 2001 denial of the present claim, the Carrier offered to arrange a "joint check" of available Carrier records in order to clarify the situation at the heart of the current dispute. The Organization accepted the Carrier's offer, and explained that it believed that a joint check would involve a joint review of "any records that may have any relevance in the dispute such as randomly selected dates of crew van logs for both clerical and non-clerical employees at [Proctor, Minnesota]." In subsequent correspondence, the Carrier provided the Organization with various van logs covering scattered dates in February and June 2002. The parties reached no agreement on the matter, except to concur that the logs so provided neither strengthened nor weakened the Organization's case.

The Board reviewed the record carefully, including the extensive correspondence and exchange of supporting documents on the property. We are in accord with the finding of Award 1 of Public Law Board No. 3085 regarding the interpretation of Rule 1 (c) on the Burlington Northern which states:

> "The sum and substance of the foregoing line of precedent is that positions and scope rules like Paragraph C of Rule 1 have an adhesive quality by which work once assigned to employes clearly covered thereby becomes vested in those employes and may not thereafter be removed unilaterally from them and given to other employes. Thus, unlike Paragraph A standing alone, Paragraph C is not merely backward looking . . . but can, under the described circumstances, bring within the work reservation effect of Rule 1 'new work' . . . adhere[ing] to them by assignment and performance. . . . "

In the present case, unrebutted evidence on the record confirms that, at least prior to January 2001, the description of the Ore Sorter position assigned to the Ore Sorters transporting of "all rail crews to and from interchange yards" and other train crews as needed. Therefore, that is work that by right remains the work of TCU-represented employees and cannot be removed from them except by Agreement.

That said, however, the Board notes that the initial joint check of the Carrier's van logs did not appear to confirm (or disprove) the Organization's allegations in this claim. Nevertheless, the Organization asserted that a subsequent joint check of the van logs supplied by the Carrier in August 2002 appears to confirm that "on 124 occasions" the hauling performed was of crews to and from the locations involved in the present dispute. However, the record is devoid of evidence concerning the time involved in making those trips, and it is not entirely clear that these trips involved all rail crews.

The Board finds that the Parties should review the joint check and, where possible, determine which trips involved all rail crews. As set forth above, those trips remain the work of the Ore Sorter position. We note that there is no evidence on the record to support the magnitude of the damages claimed. In Third Division Award 32180, the Board found that, in the absence of the precise amount of work involved, "two hours per shift at the pro rata rate" was a reasonable measure of losses sustained by the Organization. The Board concurs with that finding. The amount of the claim paid will be entirely dependent upon the determination by a joint check of the available van logs, but shall be no more than two hours per shift at the pro rata rate for each shift on which the violation occurred.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of March 2006.

National Railroad Adjustment Board
Third Division Award No. 37695 Docket MW-37759
Carrier Member's Dissent

In the instant case, Amtrak leased space on its station platform to Transportation Displays Incorporated, for the installation advertising. This lease included not only the right to install advertising materials, but the necessary equipment on which to display those advertisements.

There is no dispute that on a small part of the equipment installed by TDI for the display of their advertising material the name of the city (Baltimore) and the direction to New York and Washington was indicated. However, we are at a loss to understand the majority's decision that the inclusion of this information on TDI's display equipment constitutes a violation of BMWE scope rule.

As set forth in the record, the advertising equipment is not owned by Amtrak, was not installed exclusively for Amtrak's benefit, nor at Amtrak's instigation. Clearly, under these circumstances, the work is not reserved to the craft under the agreement.

Furthermore, for the majority to determine that the BMWE should have been consulted about the performance of work on the display equipment owned by TDI, or offered the opportunity to participate in the fabrication of that display equipment, is absurd.

Amtrak BMWE employees do not have rights to perform work on equipment not owned by Amtrak. The decision of the majority in this case to afford them penalty compensation for work to which they have no rights is palpably erroneous.

We therefore dissent to the majority's opinion in this case.

L D Miller

L. D. Miller
Carrier Member