

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37980
Docket No. CL-38589
06-3-04-3-594**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 13073) that:

1. Carrier violated the Working Agreement when it allowed or assigned a stranger to the TCU Agreement to perform mail delivery which heretofore was assigned to: Position 005 Support Clerk, Position 007 Marketing Support; and Position 001 Mail/File Clerk, all located at the Marketing Building, Ft. Worth, Texas.
2. Carrier must now compensate employees T. Bentley, B. Melhouse and I. Vidaurri eight (8) hours pay at the straight time rate beginning August 1, 1999, and continuing each and every day thereafter until such time work removed from listed positions is returned."

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 is one of a series of claims filed by the Organization alleging that Rule 1, the parties' Scope Rule, was violated as a result of the Carrier's reassignment of certain mail handling duties at the Carrier's Fort Worth, Texas, headquarters. Three consolidated claims, each dated September 13, 1999, have been presented in this particular case. The claims contend that clerical employees assigned at the Marketing Office Building (MOB) handled and delivered mail at that location until August 1, 1999, when the new Administration Office Building (AOB) opened nearby. According to the Organization, the Carrier relocated approximately 57 BNSF employees from the MOB to the AOB and at the same time implemented changes in the mail delivery procedures. Mail that was previously handled and delivered by the Claimants for the 57 BNSF employees at the MOB is now handled at the AOB by strangers to the Agreement. In the Organization's view, this constituted a removal and transfer of mail handling work that comes within the clear and unambiguous provisions of the Scope Rule. It provides, in pertinent part, 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 assorting tickets, waybills, car movement slips, etc.; operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers, adjusting dictaphone cylinders and work of a like nature; gathering or delivering mail or other similar work not requiring clerical ability; office boys, messengers, chore boys, and other employees doing similar work or performing manual work not requiring clerical ability. However, such work is covered by this Agreement."

The Carrier contends that additional facts are highly relevant and must be considered for a full and complete understanding of the instant case. After opening the AOB in 1999, the Carrier states that it elected to rearrange some of its personnel among the various buildings within the headquarters complex. Some employees from other buildings in the complex were moved into the AOB, while other employees were relocated to the space vacated by employees moving to the AOB.

One of the buildings in the headquarters complex from which employees were transferred to the AOB was the MOB. The Carrier asserts that mail for the MOB has always been delivered to this facility by contract courier. Moreover, mail within the building was picked up by Clerks, contract employees and exempt employees, depending upon the department. The Carrier further states that when it elected to transfer some BNSF employees from the MOB to the AOB, it backfilled the space vacated in the MOB with approximately the same number of employees from other locations. The Carrier strongly argues that the amount or quantum of mail handling work being performed by Clerks in the MOB has not been changed or reduced. Moreover, the Carrier emphasizes that Clerks have never delivered mail between the various buildings of the headquarters complex, nor have they performed mail delivery work in the AOB.

The arguments presented by the parties in support of their respective positions are just as divergent as the factual predicates presented during the claim handling process. The Organization contends that the Carrier impermissibly assigned clerical work to strangers to the Agreement. The Organization argues that Rule 1, the Scope Rule, reserves work for clerical employees in two ways. First, it has been held that Rule 1A reserves work for clerical employees on the basis of

work and positions that existed on December 1, 1980, when the Rule was implemented. (Special Board of Adjustment Appendix K, Award No. 88.) This "freeze frame" concept was later amplified to include a second basis for coverage, the Organization asserts. In Public Law Board No. 3085, Award 1, the Board held that Rule 1C preserves new work to the clerical craft once such work is performed by employees covered by the Agreement:

"Thus, unlike Paragraph A standing alone, Paragraph C is not merely backward looking to December 1, 1981 but can, under the described circumstances, bring within the work reservation effect of Rule 1 'new work' or work not actually being performed by Agreement-covered employees as of December 1, 1980. Moreover, whereas Paragraph C for the most part merely lists the titles of positions in general language, without any description of the work performed by the employees occupying such positions, Section 5(a) of Paragraph C is most specific in describing the work of 'clerks' and most emphatic in stating that such work is 'covered by this Agreement.' In that respect, Section 5 operates not only as part of the 'position and scope' language of Paragraph C to vest in Clerks entitlement to work which adheres to them by assignment and performance, but also serves, by its own terms, to reserve specifically to Clerks covered by the BN/BRAC Agreement the work described therein."

The application of Rule 1, Paragraph C was reaffirmed by the decision in Special Board of Adjustment Appendix K, Award No. 99:

"... Paragraph C may bring such work within the reservation reach of Rule 1 under the following circumstances: 1) if the work is assigned to and regularly performed by employees in Sections 1 through 8 of Paragraph C or 2) if the work at issue is work described and reserved by the specific language of Paragraph C, Section 5."

The Organization contends that the application of the foregoing Awards dictates a finding in its favor. Here, the positions held by the Claimants are listed in Rule 1C, and mail handling work is specifically cited in Rule 1.C.5(b) of the

Agreement. It is work that is vested to the clerical craft. In the Organization's view, the Carrier may not remove the work from Agreement covered employees without the Organization's consent. Yet that is precisely what occurred when the mail handling work serving individuals located in the MOB was transferred to the new Administration Office Building (AOB) at the Carrier's campus in Fort Worth, Texas, and assigned to individuals who are strangers to the Agreement. As the Board stated in Special Board of Adjustment Appendix K, Award No. 101: "Merely moving the contractually reserved quantum of work to a new building does not alter its reserved status any more than decanting wine from old bottles into new containers changes the identity or quality of the wine."

The Carrier disagrees with the Organization's position and asserts that this claim should be rejected on both procedural and substantive grounds. As to the procedural issue, the Carrier takes the position that the Organization did not timely file the claim. The Carrier maintains that it has used couriers and exempt employees to deliver and handle mail since the Fort Worth headquarters first opened in 1992. The Organization knew or should have known of the alleged breach at that time and filed its claim within 60 days. Whether viewed as a time limit violation or acquiescence, the claim was filed too late and must be dismissed.

On the merits, the Carrier argues that the Scope Rule was not violated. It emphasizes that the burden was on the Organization to fully establish all elements of its claim. As stated in Special Board of Adjustment Appendix K, Award No. 116, the applicable standard of proof to be met in proving a violation of this Scope Rule is as follows:

"... 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...."

Also see, Special Board of Adjustment Appendix K, Award Nos. 88 and 149, as well as Third Division Award 37758.

In the instant dispute, the Organization failed to meet its evidentiary burden, the Carrier contends. Not only have Clerks never delivered mail in the AOB, the quantum of mail handling work in the MOB was not reduced. The amount of mail delivery work performed by the Claimants in the MOB both before and after the claim date was not changed. The Carrier argues that the Scope Rule was not intended to be expanded to cover work now performed by outside parties or employees of other crafts. The attempt by the Organization to expand its jurisdictional reach should be rejected, the Carrier avers.

Turning first to the Carrier's time limit objection, the Board finds that its arguments are misplaced under the facts presented in this record. In accordance with Rule 59; claims must be presented "... within 60 days from the date of the occurrence on which the claim or grievance is based. . . ." A fair reading of the claim supports the conclusion that the "occurrence" on which the claim is based was initiated when the Carrier transferred various individuals from the MOB to the AOB on August 1, 1999. As in Special Board of Adjustment Appendix K, Award No. 193, the instant claim alleges that the Carrier committed "a discernable and identifiable breach on an ascertainable date. The damages flowing from the Carrier's breach may be continuing but the breach, itself, was a singular event." Because the claim was filed by letter dated September 13, 1999, it was timely presented within 60 days after the event which precipitated the dispute.

On the merits, we find the Scope Rule in this case to be a "positions and work" Rule, and as such, when work is specified under Rule 1C, arbitral authority has interpreted the Rule to mean that it may not thereafter be removed from that position and transferred to an individual outside the scope of the Agreement without mutual concurrence. As the Organization correctly points out, the handling and delivery of mail is work expressly reserved to clerical employees by Rule 1C. This work may not be assigned to non-clerical employees except by agreement of the parties.

Nevertheless, the Organization is not relieved of its evidentiary burden under a "positions and work" Scope Rule. Mail delivery work at the AOB has never been performed by Clerks, the record shows. Moreover, the Carrier continued to maintain without diminution in hours or earnings the Agreement-covered positions and work performed thereunder at the MOB. Neither the language nor the work reservation intent of Rule 1 was violated in such circumstances. The Organization

did not establish that the Claimants had any pre-existing claim to the work at the AOB, nor was there evidence that they were deprived of any quantum of mail handling work when the Carrier rearranged some of its personnel among the various buildings within the headquarters complex. Had the Carrier abolished the Claimants' positions and transferred the work to a different location to be performed by strangers to the Agreement, as in Special Board of Adjustment Appendix K, Award No. 101, the outcome would be different. But here the contractually reserved quantum of work was not diminished. Clerical employees performed the same clerical work that they had in the past. Individuals for whom the Claimants handled mail may have been transferred to the AOB, but they were replaced by other individuals for whom mail delivery was required and continued to be performed. We must therefore conclude that the Organization failed to prove that there was a unilateral removal of reserved work from the coverage of Rule 1 of the Agreement.

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 25th day of October 2006.