Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37982
Docket No. CL-38850
06-3-05-3-282

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
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(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization that:

1. Carrier violated the Working Agreement when it allowed or assigned a stranger to the TCU Agreement to perform the procedures of sorting mail and delivery of mail for Building "B" at 3001 Lou Menk Drive, Ft. Worth, Texas on July 7, 2000 and continuing until such time work is returned to the TCU Clerks at Ft. Worth, Texas.

2. Carrier must now compensate clerical employees, senior qualified, for eight (8) hours pay at the straight time rate of Wage Grade 6 beginning July 7, 2000 and continuing each and everyday thereafter until such time as the 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 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. The instant claim is dated August 25, 2000. It is the Organization's contention that, beginning July 7, 2000, the Carrier assigned all mail sorting and delivery of mail at Building B to contract workers. The occupants of Building B had been reassigned from other areas served by covered clerical employees, the Organization alleges. Mail which was previously sorted and delivered by the clerical craft at other locations for these employees prior to their reassignment is now handled at Building B 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: Employes 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 employes 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. The Carrier states that Building B in the headquarters complex was opened in 1992. The Carrier's Medical Department and the Safety and Rules Department were initially housed in the building. Mail for this new facility was delivered by contract courier where it was handled by exempt or contract personnel. The Carrier emphasizes that clerical employees have never been used to perform any work in Building B since it first opened in 1992 to the present.

The Carrier further states that, over the years, it has elected to rearrange some of its departments and personnel among the various buildings within the headquarters complex. Some employees from other buildings were moved into Building B, while other employees from Building B were relocated to the space vacated by employees who moved to Building B. According to the Carrier, the number of employees in each building has remained approximately the same and the amount of mail handling work being performed by Clerks in each building has not been reduced.

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 employes 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 employes 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 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 employes 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 at various locations at the Carrier's headquarters was transferred to Building B, 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 in Building B since it 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. The Carrier 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 employes, 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 performed mail handling work in Building B since it opened in 1992, the quantum of mail handling work being performed by Clerks in the Carrier's headquarters complex was not reduced by the transfer of BNSF employees to Building B. The Carrier asserts that the quantum of mail handling work remains exactly the same. The Carrier argues that the Scope Rule was not intended to be expanded to cover work now performed by outside parties or exempt employees. 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 to Building B on or around July 7, 2000. 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 August 25, 2000, it was timely presented within 60 days after the event that 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. Clerks have never delivered or sorted mail at Building B, the record shows. Such work has always been performed by contract courier or by exempt employees. Moreover, there was no probative rebuttal to the

Carrier's material assertion that it has continued to maintain without diminution in hours or earnings the Agreement-covered positions and work performed throughout the headquarters complex. 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 Building B, 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 then 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 Building B, 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.

Our conclusions in this regard are bolstered by Section 1(D) of the Scope Rule, which states:

> "D. The foregoing listing does not restrict inclusion within the scope of this agreement any positions covered by the agreements superseded by this agreement, nor shall the listing be construed to require the transfer of work now being performed by employes not covered by this Agreement to employes covered by this Agreement. An officer or employe not subject to this Agreement may perform any covered work which is incidental to his regular duties." (Emphasis added)

We concur with the Carrier that the foregoing language acts as a limitation on the Organization's ability in this case to gain covered work performed by non-covered employees. The jurisdictional parameters of this "positions and work" Scope Rule have been clearly circumscribed. It is the Board's responsibility to apply the contract language as it has been written. Adopting the Organization's

position would contravene the language of Section 1(D) of the Scope Rule. Therefore, the claim must be denied in its entirety.

## 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.