Award No. 85
Case No. 83

PUBLIC LAW BOARD NO. 1790

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

and

Norfolk and Western Railway Company

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement between the parties when it abolished the position of Chief Clerk at Gambrinus, Ohio, April 23, 1976, and assigned the work thereof to a position which is partially excepted from the Agreement.

2. G. H. Mercier shall now be paid eight (8) hours pay, at the Chief Clerk's rate beginning April 24, 1976 and continuing, for each and every workday, until the violation is corrected.

FINDINGS: By reason of the Agreement dated July 22, 1976, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

On or about April 9, 1976 there was a Chief Clerk position at Gambrinus Yard covered by all of the rules in the Agreement. At the same time, there was also a Chief Clerk position at the freight agency at Canton, Ohio which was exempt from bidding, bumping and certain other rules of the Agreement. The yard and agency offices were consolidated commencing April 20, 1976 and the Chief Clerk position at Gambrinus Yard was abolished effective at the close of business on Friday, April 23, 1976. Work of that position was assigned to the Canton, Ohio Chief Clerk position transferred to Gambrinus Yard. The occupant of the partially covered Chief Clerk position elected not to transfer to Gambrinus and he exercised his seniority. The former occupant of the abolished covered position was appointed to the partially covered position. Claimant was regularly assigned to the extra board at Gambrinus Yard.

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Employes contend that the Carrier had no right to abolish the covered position without negotiation. Even though exceptions to the Scope Rule exist, such exceptions must be established by mutual agreement. Since additional excepted positions may be added only by written agreement between the Carrier and the General Chairman, continue the Employes, the Carrier may not abolish a covered position and arbitrarily transfer the work of that position to a partially covered position.

There is no question that the Carrier has the right to transfer a position from one location to another. And the Carrier has the further right to abolish a covered or partially covered position, providing all or a substantial portion of the work of the abolished position is not transferred to a position or an employe not covered by the Agreement. The question here is whether or not the Carrier may transfer the work of a covered position to an employe in a partially covered position.

It is the Carrier's position that there is no rule or agreement prohibiting the assignment of the work of the abolished covered position to the occupant of the partially covered position. In the absence of such a rule or agreement, the Carrier has such a right.

Once a covered position is established, the work of that position belongs to an employe within the Scope Rule of the Agreement. The Carrier may not unilaterally transfer that work to whomever it chooses outside the Scope Rule. And this is true whether the work of the covered position is transferred to an employe totally excepted from the Scope Rule or is partially excepted. This principle is derived from the application of accepted rules of contract interpretation, where there is no contract language explicitly permitting or prohibiting the Carrier from doing so.

In Third Division NRAB Award No. 11983 the Board held that "positions or work once within collective agreements cannot be removed therefrom arbitrarily and the work assigned to persons excepted from the agreement". The same principle logically applies where the covered work is arbitrarily transferred to a partially excepted employe.

This Claimant actually suffered no loss or earnings because of the abolition of the covered position and the transfer of the work to the partially covered position. She has continued to perform service from the extra board. Punitive damages are not ordinarily approved.

But Carrier should not be permitted to violate provisions of the Agreement with impunity. This Board has no authority to order the Carrier to reestablish the covered Chief Clerk position. In the absence of such authority, a sustaining award without an assessment of a penalty is an exercise in futility. Carrier could continue to disregard this finding and contract violation. Where there is a wrong there is a remedy.

Employes are requesting that the Claimant be paid eight (8) hours at the rate of the covered Chief Clerk position beginning April 24, 1976 and for each and every work day thereafter until the violation is corrected. More than two years have elapsed since the claim was first presented. Proceedings under the Railway Labor Act are slow and tedious. It will best serve the need to discourage continued and additional such contract violations to allow compensation to the Claimant for a total of 100 days at the rate requested.

For the reasons herein stated, the Board finds that the Carrier violated the Agreement, that the claim has merit and that the Carrier shall pay the Claimant a sum equal to the total of 100 work days at the daily pro rata rate of the Chief Clerk position abolished on April 23, 1976 and eight (8) hours at the applicable rate for each day after the date of this award that the Carrier continues to so violate the Agreement.

AWARD

Claim is sustained in accordance with the opinion. Carrier is directed to pay the claim within thirty (30) days of the date of this award and within each thirty (30) days thereafter that the violations continues.

PUBLIC LAW BOARD NO. 1790

DAVID DOLNICK, Chairman and Neutral Member

S. G. BISHOP, Employe Member

J. D. GEREAUX, Carrier Member

DATED: October 25, 1978

Mr. Dolnick

Interpretation No. 1
Award No. 85
Case No. 83

PUBLIC LAW BOARD NO. 1790

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

and

Norfolk and Western Railway Company

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement between the parties when it abolished the position of Chief Clerk at Gambrinus, Ohio, April 23, 1976, and assigned the work thereof to a position which is partially excepted from the Agreement.

2. G. H. Mercier shall now be paid eight (8) hours pay, at the Chief Clerk's rate beginning April 24, 1976 and continuing, for each and every workday, until the violation is corrected.

BACKGROUND FACTS:

On October 23, 1978, the Neutral and Employe members of this Board adopted an award which reads as follows:

> Claim is sustained in accordance with the opinion. Carrier is directed to pay the claim within thirty (30) days of the date of this award and within each thirty (30) days thereafter that the violation continues.

The opinion, contained in the Findings, sets forth the facts in ample detail, which need not here be repeated. "The question here", the opinion states, "is whether or not the Carrier may transfer the work of a covered position to an employe in a partially covered position". Speaking to that question, the Board said:

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> Once a covered position is established, the work of that position belongs to an employe within the Scope Rule of the Agreement. The Carrier may not unilaterally transfer that work to whomever it chooses outside the Scope Rule. And this is true whether the work of the covered position is transferred to an employe totally excepted from the Scope Rule or is partially excepted. This principle is derived from the application of accepted rules of contract interpretation, where there is no contract language explicitly permitting or prohibiting the Carrier from doing so.

Carrier's request for an interpretation of Award No. 85 is contained in a letter dated November 8, 1978. In that letter, Carrier contends that the Chief Clerk "position at Gambrinus to which the work of the abolished position was assigned is subject to the Scope Rule of the Master Agreement and that the incumbent thereof must pay union dues ...". Continuing, Carrier states that "since the Award has not cited any rule(s) or agreement provision(s) in support of the statement that this Section 5 position is not ... within the Scope Rule of the agreement ...", the Carrier requires interpretations with respect to the following:

> 1. Does the Award mean that the assignment of work, formerly done by the occupant of a fully covered position to the occupant of a partially excepted position within the coverage of Rule 1 - Scope of the Master Agreement, is prohibited by some rule(s) or agreement provision(s) and, if so, please designate the rule(s) or agreement provision(s), specifying the language of such rule(s) or agreement provision(s) supporting that prohibition; and
>
> 2. Does the Award mean that by some rule(s) or agreement provision(s) the kind of work which may be assigned to a partially excepted position within the coverage of Rule 1 -

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Scope of the Master Agreement is prescribed or restricted, and, if so, please designate such rule(s) or agreement provision(s), specifying the language of such rule(s) or agreement provision(s) supporting that prescription or restriction.

Rule 1(a) (Scope) lists by title the positions covered by that Scope Rule. The position of "Clerks" is so specifically listed. The position of "Chief Clerk", as such, is not so specifically listed. In all probability, the term "Clerks" was intended to also cover the "Chief Clerks".

Rule 1(b) - Scope - which deals with exceptions to positions covered in the Scope Rule, reads as follows:

(b) For the purpose of providing for exceptions from the application of some or all of the provisions of this Agreement, the

Parties have entered into a Supplemental Agreement dated April 1, 1973, and designated "Supplemental Agreement 'A'," which Supplemental Agreement sets forth certain positions and employes covered by the scope of this Agreement (except as provided for in Section 1 of Supplemental Agreement "A"), which shall not be subject to some or all of the provisions of this Agreement and designates the provisions to which they shall not be subject. Said Supplemental Agreement shall be, and is hereby, adopted in full and made a part of this Agreement with the same force and effect as though it were fully set forth herein.

In excepting certain positions and employes as designated in Supplemental Agreement "A", it is the intention of the Parties that seniority shall not govern the filling of such positions but that the Management shall have the right to select persons whom, in its own judgment, it considers best qualified to fill such positions.

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(c) The positions listed in Addendum No. 1 are not within the scope of this Agreement.

(d) Subject to the conditions set forth in Addendum No. 2 the positions listed therein are within the scope of this Agreement.

Pursuant thereto, the parties entered into Supplemental Agreement "A" which became effective April 1, 1973. The parts of that Supplemental Agreement pertinent to the issue in this interpretation read as follows:

> . . . This Supplemental Agreement has for its purpose the designation of certain positions and employes covered by the Scope of the Master Agreement (except as provided in Section 1 of this Supplemental Agreement) which shall not be subject to some or all of the provisions of the aforesaid Master Agreement and the designation of the provisions of the said Master Agreement to which they shall not be subject. This is the Supplemental Agreement "A" referred to under the term "Exceptions" in the Master Agreement.
>
> This Supplemental Agreement is intended to be, and is, made a part of the said Master Agreement with the same force and effect as though it were fully set forth therein.
>
> It is understood and agreed as follows:
>
> SECTION 1. The Master Agreement shall not apply to laborers on coal and ore docks; laborers on elevators (except at Lamberts Point), piers, wharves or other facilities not a part of regular forces; laborers on coal piers at Lamberts Point except as provided for in Memorandum Agreement dated February 12, 1959; laborers at Material Yard at Roanoke, nor to individuals paid for special service which only takes a portion of their time from

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outside employment or business; or to individuals performing personal service not a part of the duty of the Railway.

SECTION 2. When making appointments to excepted positions, consideration shall be given employes to whom the Scope Rule of the Master Agreement is applicable.

* * *

SECTION 5. Only Rules 1, 26(a), 26(b), 56, 57 and 58 of the Master Agreement are applicable to the positions designated below and to those that may be transferred pursuant to Sections 4(b) above or established pursuant to Section 8 below, and to the employes now or hereafter appointed thereto. The Union Shop Agreement (excluding Section 2) is applicable to employes appointed to positions now or hereafter designated in this Section 5.

We are not here concerned with any of the excepted positions in Section 1. The Chief Clerk position at Canton, Ohio was one of the positions excepted under Section 5 above. That excepted Chief Clerk position was in the freight agency at Canton, Ohio, which was retained. The Chief Clerk position at Gambrinus Yard, approximately three miles from Canton, which was subject to all of the rules of the Master Agreement, was abolished. Upon consolidation of the yard and agency offices, the work of the exempt Chief Clerk was transferred to Gambrinus Yard.

DISCUSSION AND FINDINGS:

The purpose of an Interpretation is to clarify the meaning and intent of an adopted award. It is the opinion of the neutral member of this Board that the questions submitted by the Carrier for interpretation of Award No. 85 do not address themselves to the meaning and intent of Award No. 85. They rather seek to negate that award, which the Board has no authority to do.

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The Carrier seems to imply that the only time the Carrier may not assign "work formerly done by the occupant of a fully covered position to the occupant of a partially excepted position within the coverage of Rule 1" is when a rule or rules specifically prohibits such a transfer. We held in Award No. 85 that such an assignment may not be made "whether the work of the covered position is transferred to an employe totally excepted from the Scope Rule or is partially excepted". And we also said that this was so "where there is no contract language explicitly permitting or prohibiting the Carrier from doing so". Carrier's questions are redundant.

It should be noted that the Chief Clerk at Canton, Ohio is covered by the Master Agreement under Rule 1 - Scope - for no conceivable purpose other than the right to return to a covered position whenever he voluntarily or involuntarily is relieved of his excepted position and the maintenance of certain limited benefits under Rule 26(a) and (b) that Chief Clerk may retain and continue to accumulate seniority rights which will enable him to so return to a covered position when the occasion arises and to retain that privilege he must continue to pay periodic dues to the Organization. Rule 56 preserves his vacation rights. Under Rule 57 his sick and compassionate leave benefits remain valid. And Rule 58 preserves his jury duty pay. In all other respects, the Master Agreement does not apply to the Chief Clerk at Canton, Ohio. Except for these minimal benefits, that Chief Clerk is in all respects a managerial employe.

These minimal benefits under the Master Agreement do not authorize the Carrier to abolish at will a covered position and transfer the work to an employe holding an excepted position. Coverage of the excepted position under the Scope Rule is very limited. For the purpose of preserving work for covered employes, the application is no different than if a covered employe's work is transferred to a totally excepted employe.

In Award No. 85, we referred to Third Division NRAB Award No. 11983 and we quoted the well established principle it enunciates. That principle is equally applicable where covered work is voluntarily transferred by the Carrier to a partially excepted employe, such as the Chief Clerk at Canton, Ohio. Carrier's right to establish the partially excepted Chief Clerk position at Canton, Ohio does not include a right or a privilege to transfer

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covered work of the Chief Clerk position at Gambrinus to the partially covered Chief Clerk position at Canton, Ohio, even though the work of that Chief Clerk was transferred to Gambrinus Yard. The fact is that the Carrier appointed an employe to perform that work. He was not assigned under the applicable seniority rules of the Master Agreement.

Accordingly, it is the meaning and intent of Award No. 85 that the Carrier had no authority to transfer the work of an abolished fully covered Chief Clerk position to a Chief Clerk partially covered even though no specific rule either allows or prohibits such a transfer.

PUBLIC LAW BOARD NO. 1790

DAVID DOLNICK, Chairman and Neutral Member

S. G. BISHOP, Employe Member

J. D. GEREAUX, Carrier Member

DATED: June 5, 1979

Carrier Member's Dissent to Award 85

Public Law Board No. 1790

This claim was presented on behalf of a regularly assigned extra clerk (guaranteed 40 hours per week) because the Carrier abolished a fully covered chief clerk position and assigned the work of such position to a partially excepted position.

At page 2, the Board observes:

> Once a covered position is established, the work of that position belongs to an employe within the Scope Rule of the Agreement. The Carrier may not unilaterally transfer that work to whomever it chooses outside the Scope Rule. And this is true whether the work of the covered position is transferred to an employe totally excepted from the Scope Rule or is partially excepted. This principle is derived from the application of accepted rules of contract interpretation, where there is no contract language explicitly permitting or prohibiting the Carrier from doing so.

Initially, the statement that work of a position cannot be removed, "Once a covered position is established" is contrary to this Board's decisions in Awards 12, 77, 87 and 90. In those awards, the Board correctly held that the Carrier could assign work to others when clerks did not perform such work exclusively on a systemwide basis.

Secondly, assigning work of an abolished, fully covered position to a partially excepted position is quite different from assigning the work to an employe of another craft, to a non-employe, or to an unrepresented employe. The language of the Agreement under which partially excepted positions exist, reads in pertinent parts:

> This Supplemental Agreement has for its purpose the designation of certain positions and employes covered by the Scope of the Master Agreement (except as provided

> in Section 1 of this Supplemental Agreement) which shall not be subject to some or all of the provisions of the aforesaid Master Agreement and the designation of the provisions of the said Master Agreement to which they shall not be subject.
>
> * * * *
>
> SECTION 5. Only Rules 1, 26(a), 26(b), 56, 57 and 58 of the Master Agreement are applicable to the positions designated below and to those that may be transferred pursuant to Sections 4(b) above or established pursuant to Section 8 below, and to the employes now or hereafter appointed thereto. The Union Shop Agreement (excluding Section 2) is applicable to employes appointed to positions now or hereafter designated in this Section 5.

Neither the applicable agreements nor any logic supports the Board's treatment of the partially excepted position (assigned the work of the abolished fully covered position) as being outside the coverage of the Scope Rule; nor can the occupant of the partially excepted position be deprived of the right to perform work assigned to that position. The Board has attempted in this award to restrict the work which the Carrier may assign to a partially excepted position, but it could neither find nor cite any agreement provision supporting its decision.

Section (7) of the Agreement under which this Public Law Board was established provides:

> "(7) The Board shall not have jurisdiction of disputes growing out of request for changes in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules and working conditions, and shall not have the right to write new rules."

The conclusion is inescapable that the Board has exceeded its jurisdiction by writing a new rule.

Thirdly, the theory advanced in the concluding sentence of the

paragraph of the award quoted on the first page hereof ignores the universally accepted principle discussed in the following awards:

Award 6001, Third Division:

> Fourth, although we believe that an agreement between a carrier and an organization represents a mutual undertaking to observe the spirit as well as the letter of the agreement, and that harmonious, cooperative union-management relations involve considerably more than mere observance of the letter of the agreement (e.g., it involves consultation between the parties on each side's problems affecting the other, even when the problems are not specifically covered by the agreement), we hold also to the view that, from the standpoint of strict construction of an agreement's terms, management's rights and prerogatives vis-a-vis a labor organization and its members with whom it has dealings remain unimpaired except in so far as these rights have been restricted or removed by government or have been voluntarily limited or relinquished by agreement with the organization. In a word, a carrier is free to act in respect to its employes unless the specific provisions or the general intent and meaning of an agreement restrict or prohibit the exercise of such freedom.

and Award 1241, Fourth Division:

> This conforms with the fully established principle that what the management does not bargain away, it retains. In Award 944, Referee Carey, we reflected this in our Opinion: "We can only interpret the contract as it is and treat that as reserved to the Carrier which is not granted to the employes by the Agreement."

No rule or agreement exists which governs the job content of a partially excepted position and, therefore, the Carrier's rights to assign work to such positions has not ". . . been voluntarily limited or relinquished by agreement . . .".

In the concluding paragraph on page 2, the Board states:

> In Third Division NRAB Award No. 11983 the Board held that "positions or work once within collective agreements cannot be removed therefrom arbitrarily and the work assigned to persons excepted from the

> agreement". The same principle logically applied where the covered work is arbitrarily transferred to a partially excepted employe.

It is not understood how the principle annuciated in Award No. 11983 can be relied upon by the Board in this award and ignored in its Awards 12, 77, 87 and 90. In Award 90, where part of the work of a fully covered position was assigned to an employe of a contractor, the Board held:

> In March, 1976, the TOfC ramps at Radford and Lynchburg, Virginia, were closed. The preparation of waybills, freight bills and detention bills formerly handled at Radford and Lynchburg was assigned to clerical employes working in Carrier's Agency at Roanoke, Virginia. Other clerical work, formerly performed by the Claimant at Radford, was thereafter performed by employes of General Motors Lines when that traffic moved over the Roanoke Ramp.
>
> The record shows without contradiction, that General Motors Lines has operated Carrier's TOFC Ramp at Roanoke under contract since 1971. Prior thereto that Ramp was operated by Pitzer Transfer Company for approximately 14 years. Employes of both General Motors Lines and Pitzer have consistently and continuously performed clerical work connected with the traffic moving over the Ramp. And the clerical work absorbed by employes of General Motors Lines in connection with traffic hauled between Roanoke and Radford is no different than the clerical work performed by such employes at Roanoke in the past.

How can an employe of General Motors Lines (outside the Scope of the Master Agreement) perform "clerical work" while the occupant of the partially excepted position "covered by the Scope of the Master Agreement" be denied that right?

The penalty prescribed by the Board also exceeds its jurisdiction and runs counter to the numerous awards rendered by the various divisions of the National Railroad Adjustment Board. The Board states at page 3:

> This Claimant actually suffered no loss or earnings because of the abolition of the covered position and the transfer of the work to the partially covered position. She has continued to perform service from the extra board. Punitive damages are not ordinarily approved.

while holding in Award 30:

> Claimant has suffered no monetary loss. His claim is in the nature of punitive damages. Based upon the facts in this case, this Board has no authority to assess punitive damages.

The claimant was fully employed during the period covered by the claim. Also, the claimant is junior in seniority to the employe appointed to the partially excepted position, and would not have been awarded such partially excepted position on the basis of seniority had it been one subject to the advertisement and bidding rules.

For the reasons set forth above, I dissent to Award 85 of Public Law Board No. 1790.

John D. Gereaux
Carrier Member

PUBLIC LAW BOARD NO. 1790

SPECIAL CONCURRING OPINION
AWARD NO. 85, INTERPRETATION NO. 1
AND EMPLOYEE MEMBER'S ANSWER TO
CARRIER MEMBER'S DISSENT TO
AWARD NO. 85 (CASE 83)

It appears to me that with one exception this Award and Interpretation correctly disposes of the dispute involved.

The exception lies in the third and fourth paragraphs on page 3 of the Award in that portion of the "findings" dealing with the penalty for violation of the Agreement.

By allowing only 100 days' pay for the two and one-half year period April 24, 1976 through October 23, 1978, I believe the Referee primarily assessed a form of punishment against the Claimant because "Proceedings under the Railway Labor Act are slow and tedious." Needless to say, the Claimant filed his grievance within the specified time limits set forth in his Working Agreement and from that point on the system was the culprit in the slow and tedious process.

In all other respects, I consider the Award and Interpretation to be well reasoned and correct.

The dissent of the Carrier Member registers his disappointment in the fact that the Referee did not agree with his contentions. In consolation, I can point out that out of the same substances one mind will extract nourishment, another dismay, and so the same disappointments in life will chasten and refine one man's spirit and antagonize another's. The dissent consists primarily of a restatement of the arguments presented by the dissenter to the Referee and not accepted. The dissent changes nothing and does not detract from the Award which is based upon sound logic and the application of the Agreement (Scope Rule), and history, tradition, custom and practice.

Respectfully submitted,

S. G. Bishop
Employee Member
Public Law Board No. 1790

Rockville, Md.
July 19, 1979