PUBLIC LAW BOARD NO. 2035

Parties: Brotherhood of Railway and Airline Clerks

and

Former Penn Central Transportation Company

Statement of Claim: "Claim of the System Committee (CL-603), that:

(a) Carrier violated the Rules Agreement, effective February 1, 1965, particularly the Scope Rule, 4-A-1(f), and the Side Letter Agreement, when it assigned and/or permitted the Agent at Alliance, Ohio, J. J. Hill, to perform clerical work which is normally performed by clerks at that location on February 19, 20, 21, 26 and March 1, 1973, and failed to call and use Claimant D. E. Basile for that clerical work on that date.

(b) The Claimant D. E. Basile now be allowed three (3) hours pay at the appropriate pro-rata rate of pay for each day: February 19, 20, 21, 26 and March 1, 1973.

(c) Claimant is qualified, was available and should have been called and worked.

(d) This claim has been presented and progressed in accordance with Rule 7-B-1 and should be allowed."

Discussion: Official Agent Hill, at Alliance, Ohio, an employee not covered by the Clerks' Agreement, on the claim days allegedly coded inbound waybills and prepared bills of lading and outbound waybills for forwarding to Cleveland FACC and Pittsburgh revenue accounting, made transmittal forms for outbound bills, stamped bills of lading, called customers to obtain releases on inbound carloads, as well as other tasks allegedly performed by clerks at that location.

The workforce at the Station Field Terminal consisted of Official Agent Hill working from 8:00 A.M. to 5:00 P.M. - Monday through Friday, and two clerks, one of whom worked 8:00 A.M. to 5:00 P.M. and the other from 2:00 P.M. to 10:00 P.M. - both working Monday through Friday. The Claimant worked a clerical position 6:00 A.M. to 2:00 P.M., Sunday through Thursday, in the Trainmaster's office.

The relevant Scope Rule states in part:

> "Group I - Clerks are defined in the following paragraph:
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> Clerk - an employee who regularly devotes not less than four hours per day to the writing and calculating incident to keeping records and accounts, writing and transcribing letters, bills, reports, statements, and similar work and to the operation of the following machines or devices or similar equipment.... "

Organization's Position

The Organization stated the claim is valid because the Carrier may not permit an employee occupying an "official" position to perform work encompassed within the Scope of the Clerks' Agreement. The Carrier here assigned clerical work of less than four hours to an "official agent" on the claim dates

The Organization stated a distinction must be noted an "official agent" and a working agent", the latter being subject to the terms and provisions of the Clerks' Agreement. The Carrier is in error when it stated that Agent Hill, an "official agent" has always performed the disputed functions at Alliance. He did not perform those duties, because they were performed by employees covered by the Clerks' Agreement.

The Organization further stated that the issue of "exclusivity" has no relevance to a dispute where an excepted employee is performing work covered by the Agreement. Nor is there any merit to the Carrier's discussion of "work days of the Agent" because an official agent may not perform the work in question, and therefore the issue of his work days is immaterial. The Organization states that Rule 4-A-1(f) is applicable because the official agent was utilized to do work which was part of the assignment of one or more of the Clerks in the Freight and Yard Offices. When the Carrier removed the work from the Clerks' assignments on the claim dates, it became unassigned work which accrued either to extra or unassigned employees who had not had 40 hours work that week, or to the regular employee.

The Organization added that since there were no qualified employees on the extra list to perform the work in question, the Claimant, as a qualified available regular employee, should have been assigned the work instead of Agent Hill. The Organization added that the Carrier's attempt to fence off its work by departments cannot compromise or defeat the provisions of Clerks' Agreement or the rights of the employees covered thereunder.

The Organization stated that the Claimant was monetarily aggrieved when Agent Hill performed work he was not contractually entitled to perform. The work was work which could have been performed at any hour of the day or night. It could have been done by the two clerks during their tour of duty, but if they were too busy then by overtime, or by utilizing an extra clerk. Since there was

no extra clerk available, the work could have fallen to the Claimant on an overtime basis at the expiration of his shift.

Carrier's Position

The Carrier contends that the claim lacks merit because the Scope Rule relied upon by the Organization does not vest or reserve any particular class of work to the job classifications listed in the Scope Article. Through numerous Awards, it has now been established that the Organization has the burden of proving that the work in question has been solely and exclusively performed by the involved employees by custom, tradition, and practice. The rule of "exclusivity" is well established on this property and has been for many years.

The Carrier stated that the disputed work functions have always been performed by the Agent at Alliance as incident to his primary duties. These duties have never been the exclusive duties of clerks at Alliance. The Carrier stated that it is significant that neither of the two clerks in the Station Department filed any claims alleging the work performed by the Agent accrued to them. The Carrier asserts the Claimant is in the Transportation Department and would not necessarily have any knowledge of the work performed in the Station Department.

The Carrier stressed that Agents perform these same functions at many locations in the Carrier's system and they are not duties exclusively performed by clerks.

The Agent performed the duties in question as incident to his other duties and many Awards have held this to be

permissible. The Carrier also noted that the Scope Rule defines an employee as one who spends not less than four hours per day in the performance of clerical work. Consequently, it is proper to have an employee who is not a clerk spend less than four hours a day on clerical work without breaching the Clerks' Agreement.

The Carrier stated that the work in question was performed on the regular work day of the two clerks, as well as on the work day of the Agent and the Claimant. The Claimant was therefore not available as an extra or as an unassigned employee to perform the work. He was not available to work and therefore not eligible to receive the three hours pay claimed on the named dates. The Carrier stated that the contract contains no provisions for penalty payments which are what the Claimant is seeking.

Findings: The Board, upon the entire record and all the evidence, finds that the employee and carrier are Employee and Carrier within the meaning of the Railway Labor Act; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds on the merits the Organization's position more persuasive except for the matter of damages.

The Board finds that a non-bargaining unit employee cannot properly perform bargaining unit work unless it was purely incidental to this non-bargaining unit duties and responsibilities. The various defenses advanced by the Carrier with regard to Scope, exclusivity and less than four hours work performed, are relevant only to the issue

or to the performance of work between different classes of bargaining unit clerical employees. The provisions cited by the Carrier give no carte blanc to it to assign clerical work encompassed by the Contract to employees not covered by the Agreement. To permit such action could clearly erode if not subvert the collective bargaining agreement.

The one award cited by the Carrier in support of having a supervisor perform bargaining unit work (Third Division Award 12434) was decided on the basis of de minimis because the supervisor spent about 20 minutes doing bargaining unit work. In this case, the Agent spent about 2½ hours per day performing the disputed work, concedely not de minimis and not work merely incidental to the Agent's other supervisory duties. It was clearly articulated clerks' work. With regard to the Carrier's assertion that Agents perform the same sort of work in other locations on this property, the Board must hold that in different locations, presumably smaller offices, other arrangements may be effected. However, the Board is ruling on the situation at Alliance and no other.

The Board, however, finds the Claimant's claim for three hours pay on the claim dates not well founded. There is no clear evidence that he was directly and immediately damaged or harmed by the Agent performing the work in question. The record suggests that the likelihood of the Carrier utilizing his services on an overtime basis to perform the work in question, was extremely remote and tangential. The Claimant has not made a persuasive case showing any causal relationship between him and any injury as a result of the contract breach. A Claimant has to prove causally that he has been damaged by the Carrier's dolictual conduct. There is no such showing in this record.