Award No. 8026
Docket No. CL-7764

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

WESTERN WEIGHING AND INSPECTION BUREAU

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Bureau violated the rules of Agreement with the Brotherhood effective September 1, 1949:

(a) When on or about May 23, 1950, concurrently with abolishment of one of four regular assigned Inspector positions at El Paso, Texas, it unilaterally transferred the work of calling Inspectors required for service on Saturdays from its employes to Agents of the Southern Pacific Texas Pacific and/or the P. S. & F. Railway, and

(b) When on some date subsequent to May 23, 1950 (exact date not known to the Employes) it unilaterally substituted an arrangement of rotating Inspectors for service requirements between two Inspectors who were called on Saturdays irrespective of location and territorial assignments of the three regular Inspectors,

(c) That T. A. Steele, Agent, El Paso, be allowed compensation under the Call Rule 35 for time lost for each Saturday beginning May 10, 1952 (date this violation was initially called to Management's attention) and forward until the rule violation is corrected as set forth in Section (a) hereof, and

(d) That occupants of the three Inspector jobs be allowed wage loss under the Call Rule 35 commencing Saturday, May 10, 1952, or date claim was initially presented to Management, and forward until the rule violation is corrected as set forth in Section (b) hereof.

NOTE: Reparation due employes under this Section (d) to be determined by joint check of Carrier's payroll and other necessary records.

EMPLOYES' STATEMENT OF FACTS: The historical background of the conditions at El Paso, Texas, was that the Inspectors assigned to Positions Nos. 33, 34 and 35 were always assigned to a local railroad freight office where they maintained their desk, files, seals, etc. Beginning September 1, 1949, these three positions were assigned Monday through Friday with

cooperate when it was his turn to work Saturdays and because of his attitude we had no alternative but to utilize the services of the other two Inspectors.

As to the allegation that our Inspectors have territorial assignments, the record is clear that this is not the case. All in all, the claim as presented to your Honorable Board is premised entirely on assumptions or what the Employes would like to have us do but is not based on any factual evidence to show that the terms of our Working Agreement have not been complied with. Therefore, in the light of the information we have presented to your Honorable Board there can be but one conclusion and that is this claim must be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Respecting part (a) of Organization's claim, Bureau states that "for years past it has always been the policy of the carrier's employes to notify our Inspectors what was necessary to inspect carload shipments of freight * * * the reason for this being that the individual railroads * * * have in their possession the original waybills covering shipments for El Paso, Texas and because of this they are in a position to know when inspections are necessary. Surely our Agent at El Paso, Texas, whose office is not in any of the railroad's local freight offices, is in no position to have available any information regarding shipments requiring inspection."

Both parties to this dispute make reference to Docket CL-7534, decided by Award 7786, with the same Referee, covering the same parties and the same individuals.

In that Award we said:

> "Bureau offers as a counter argument, that the headquarters for these three Inspectors is its Agent's (T. A. Steele) office in El Paso. One of Organization's exhibits (1-B) in the record is a bulletin from Mr. Steele dated November 4, 1949 addressed to the Inspector, and stating, in part: 'It will be necessary, however, for each of the railroads at El Paso to use this office as a joint or receiving office for all calls received from consignees covering requests for damage inspection, which will make it necessary that each of the inspectors phone the Bureau office daily at 10, 2 and 4 o'clock, so that they can be furnished the information covering any calls received during the day.'"

Furthermore, at page 32 of the record in this case, appears a letter, dated December 9, 1952 from Bureau's Manager F. A. Piehl to organization's Chairman, a portion of which reads as follows:

> "* * * it seems to me that if it is Mr. Ivey's turn to work (on Saturday) all that need be done is to have the **railroad agents telephone Mr. Steele**—then Mr. Ivey could contact Mr. Steele by telephone and in so doing he would know whether the Saturday work was necessary * * *." (Emphasis ours.)

And at page 29 of the docket in CL-7534, decided by Award 7786, are the following quotes from a letter dated May 21, 1953 from Mr. Piehl to Organization's General Chairman:

> "* * * their (Inspectors) headquarters are in reality our Agency (Agent Steele) Office at El Paso * * *.
>
> "* * * their (Inspectors) headquarters as such is in Mr. Steele's office * * *."

It is abundantly clear from the record that the headquarters of the three Inspectors is Agent Steele's office, that he is the Bureau official to whom both the Inspectors and the railroad agents report at various times and for various reasons.

It is also evident that prior to May 23, 1950, when the position was reassigned to a Monday through Friday schedule, Bureau maintained position of Import Inspector No. 193 on a Tuesday through Saturday assignment, who determined from all local freight offices, on Saturdays only, if any inspections were necessary, and, where required, Inspector 193 made the necessary inspections.

We must conclude, therefore, that Bureau violated the Scope Rule of the applicable Agreement when, on or about May 23, 1950, it assigned this work of calling inspectors to railroad agents not covered by the scope of the applicable Agreement. Award 2387.

With respect to part (b) of the claim, we again refer to this portion of Award 7786:

> "*Bureau states that prior to the present system, Inspectors did* not have specified consignees to call upon, and in order to eliminate 'this uneconomical and inefficient system', effective November 7, 1949, the Bureau unilaterally and without protest from the Organization, established a list of the consignees each Inspector was to handle. Since then, the list has been changed many times, as stated by Bureau's Manager: **'In order to keep the work equal a list of warehouses or industries furnished each inspector has been and must be changed from time to time due to seasonal movement of various commodities, business fluctuating, also warehouses and industries moving from one location in the city to another.'** " (Emphasis ours.)

This Board, in holding that Bureau's action in thus realigning the work assignments of the three Inspectors was not violative of the Agreement, predicated its action on that portion of Bureau's statement, above, to which emphasizing has been added.

It is Organization's contention that Bureau's practice of rotating overtime on unassigned days is a direct violation of Rule 34 (i); that the three Inspectors have separate assignments and are entitled to perform work attached to their regular assignment on Saturdays.

Bureau, on the other hand, contends (and this was before adoption by this Board of Award 7786) there were no territorial assignments for the Inspector positions; that the three Inspectors "work interchangeably within El Paso in order to meet the requirements of our service."

While this Board upheld, in Award 7786, Bureau's right to realign the work assignments of these Inspectors, it was predicated on certain basic causes there set forth by the Bureau.

It is argued in behalf of Bureau that Award 6980 of this Division, same parties but a different location, held "the Bureau could rotate work on unassigned days between employes."

However, the facts here differ sharply from those in Award 6980. In the latter situation, Bureau had a rotation system for Saturday and Sunday work since 1933—13 years before the Clerks' Organization was certified as the bargaining agent; furthermore, the rotation system was established by the Bureau at the request of the employes involved. While Award 6980 is a denial Award, the claim denied was that the seniority rules had to be observed in the operation of the rotation system.

None of those conditions exists here. There is no proof that the rotation of Saturday work among the three Inspectors here was requested by them; it was initiated by unilateral action of the Bureau May 23, 1950. Also, there is no showing of its existence for many years, as in Award 6980; neither is it shown that the rotation system was mutually agreed to by Bureau and Organization here involved.

One of the five points in the conclusion to Award 7786, relied upon by Bureau, states:

> "3. In carrying out its prime obligation of supplying its constituent Carriers with the services they properly expect of it, Bureau had the right to do what it did in the instant case."

What did the Bureau there do?

Bureau answers in that Docket:

> "In order to keep the work equal a list of warehouses or industries furnished each Inspector has been and must be changed from time to time **due to seasonal movement of various commodities, business fluctuating, also warehouses and industries moving from one location in the city to another.**" (Emphasis ours.)

That's what Bureau did "in the instant (7786) case."

We quote conclusion No. 4 from Award 7786:

> "4. In support of this conclusion, we cite two prior Awards of the Division:
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> "Award 5331 (Robertson):
>
> 'Except insofar as it has restricted itself by the Collective Bargaining Agreement or as it may be limited by law, the assignment of **work necessary for its operations** lies within Carrier's discretion. It is the function of good management to arrange the work, within the limitations of the Collective Agreement in the interest of efficiency and economy.' "

From the record made in the case here before us we reaffirm that which has so often been upheld by this Division, namely, that except insofar as it has restricted itself by the Collective Bargaining Agreement or as it may be limited by law, the assignment of work necessary for its operations lies within Bureau's discretion.

Inescapable, however, is Rule 34 (i):

> "Where work is required by the Bureau to be performed on a day which is not a part of any assignment, it may be performed by an available unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

To that extent (Rule 34 (i)) Carrier has "restricted itself by the Collective Bargaining Agreement."

We have not overlooked argument offered in behalf of Bureau that one Inspector can perform all the inspection work necessary at El Paso on Saturday—and there is no denial from Organization on that point—but this is not an equity proceeding. Bureau must look to its rights under the Agreement to negotiate such problems and not engage in unilateral action when the Agreement itself is so restrictive, as here.

Part (b) of the claim, therefore, will be sustained.

For the reasons hereinbefore cited as a basis for sustaining part (a) of the claim, we will sustain part (c).

With respect to part (d) of the claim we will remand it to the parties for joint check and determination predicated on our conclusions respecting part (b) of the claim.

While the name of Inspector A. E. Ivey does not appear in Organization's claim, except by indirection as one of "the three regular inspectors", we have examined the record and argument of the parties as they refer specifically to him. Inspector Ivey lived in a trailer outside the city of El Paso. He did not have a telephone, although one was available within a reasonably short distance which Ivey could use to place a call, but the owner of the phone would not accept responsibility for or receive incoming calls for other persons. Bureau had suggested that when it was his turn to work Saturday under its rotation system, Ivey phone the Bureau to learn if any inspection work was required of him on that particular Saturday. Bureau states in the record it was willing to reimburse Ivey for the cost of such calls. Ivey agreed to call provided that if, on any such Saturday he found there was no inspection work to be performed by him, he should be paid a "call" of three hours at pro rata rate.

If Inspector Ivey had a telephone in his trailer, or lived in a house and had telephone service there would have been no problem. We most certainly uphold a man's right to live where he pleases and to install a phone or not, as he pleases. But when he chooses, as Mr. Ivey has chosen, he removed himself from the means of communication Bureau found effective in notifying or calling the other two Inspectors. Ivey had at least a moral obligation, then, to be reasonable in placing himself within reach of the means of communication Bureau sought to employ, especially if he was interested in working his turn on Saturday. Mr. Ivey, however, chose otherwise and we therefore conclude adopted a most unreasonable attitude.

In assigning part (d) of this claim to the parties we direct that if credit is to be given Bureau for the Saturdays worked under the rotation plan by the other two Inspectors, credit must also be given the Bureau for those Saturdays Inspector Ivey might have worked under the rotation plan but on which he was absent by electing to live in a trailer, without a telephone.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement has been violated.

AWARD

Claim (a), (b) and (c) sustained.

Claim (d) remanded to the parties, as per Opinion, to determine reparations by joint check.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of July, 1957.

DISSENT TO AWARD NO. 8026, DOCKET NO. CL-7764

The undersigned dissent from the erroneous findings of the Majority in this Award with respect to:

(1) Part (a) of the claim, wherein they held that the Bureau was in violation of the governing Agreement when, on Saturday rest days of the Bureau's Agent, it arranged for Inspectors, when called for service on their rest day, to be called by representatives of the Carriers for whom inspections are required, rather than through such Agent.

The attention of the Division was directed to the fact that this portion of the claim was not handled on the property at the lower level, hence constituted the claim's amendment in its upward progression. We have many times held that to so amend a claim is in violation of the Railway Labor Act, as amended, and this Board's Circular No. 1, and that such amended claim was not properly before this Division for adjudication (**Award 5502**—Whiting).

The Record is clear that all Bureau inspections, at any time, are made at the instance of the Carriers and on their on-the-ground instructions, and that there is little need for such inspections on Saturdays, hence Bureau's elimination of the duplication of effort on such Saturdays, i.e., have the Carriers contact the Inspectors, rather than have Carriers contact the Agent and the Agent, in turn, contact the Inspectors, cannot be in violation of any Agreement rule (**Award 6839**—Ferguson), and especially not without a substantive showing that such contacting of the Inspectors is reserved exclusively to such Agent by bulletin or rule, which is not the case here.

(2) Part (b) of the claim, wherein they hold that the arrangement of rotating the Inspectors for this Saturday service constitutes an Agreement violation. The attention of the Division was directed to the fact that the duties of the several Inspectors were identical and that the points of inspection were interchangeable as between them (see **Award 7786**, by this same Referee, involving these same parties and point), hence it is not understandable how any one Inspector can be held to have the exclusive right to make inspections at any one point to the extent that he, and he alone, can be regarded as the "regular employe" under the Unassigned Day Rule (**Awards 5912**—Douglass, and **6077**—Begley; also see **Award 6711**—Donaldson). While Rule 34 (i) stipulates that work on an unassigned day, when not performed by an available unassigned employe, shall be performed by the "regular employe" and does not specifically provide for such work performance on a rotation arrangement, it is clearly obvious that each of the involved Inspectors is a "regular employe" under that rule, hence the Bureau's practice of using such regular employes on a rotation arrangement, as was approved in **Award 6980**—Whiting, involving these same parties at a different point, is only reasonable and permits an even distribution of overtime service required. In this instance, it is attempted to make a distinction as to practices at specific points, whereas in **Award 7784**, in which this same Referee participated, we declined to make such a distinction and held the Agreement was not sectional in its application but system-wide.

(3) Part (c) of the claim, wherein the Bureau's Agent was allowed compensation under the Call Rule 35 for time lost, for the reason that this portion of the claim was not handled on the property at the lower level, hence was amended in its upward progression in violation of the Railway Labor Act, as amended, and this Board's Circular No. 1, and was not properly before this Division for adjudication.

(4) Part (d) of the claim, wherein payments to the Inspectors for wage loss under the Call Rule 35, on basis of Part (b) being sustained, was remanded for settlement on the property on the apparent basis that Carrier be credited for such payments as made for the Saturday work involved, and then compensate each of them, excluding Ivey who made himself unavailable, under that rule for such Saturdays as work was performed at points in their respective assignments. Our showing as to Part (b) of this claim is evidence of the erroneousness of the conclusion of the Majority here. Additionally, it is evident that the finding with respect to this part of the claim is incomplete

because it makes no provision for the performance of Saturday work at points which the Majority have held are exclusive to Ivey's assignment, who, by his own action, made himself unavailable for call.

/s/ C. P. Dugan
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp