Award No. 14125
Docket No. CL-14874

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5587) that:

1. Carrier violated the Clerks' Rules Agreement at Sioux City, Iowa, when it changed the assigned hours of Position No. 5764, Yard Clerk, to have an ending time of 2:00 A. M.

2. Carrier further violated the Clerks' Rules Agreement at Sioux City, Iowa, when it changed the assigned hours of Position No. 5764, Yard Clerk, to have an ending time of 4:45 A. M.

3. Carrier shall now compensate employe B. C. Bell, regularly assigned occupant of Position No. 5764, for two (2) hours at the straight time rate of pay of his position for each of the following days: August 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 26, 27, 28, 29 and 30, 1963.

4. Carrier shall now compensate employe B. C. Bell, regular occupant of Position No. 5764 for four (4) hours and 45 minutes at the straight time rate of pay of this position for each of the following days: September 3, 4, 5 and 6, 1963, and for all subsequent days that Position No. 5764 continues to have an ending time of 4:45 A. M.

EMPLOYES' STATEMENT OF FACTS: Employe B. C. Bell, who has a seniority date of December 3, 1947 in Seniority District No. 42, was regularly assigned to Yard Clerk Position No. 5764, Sioux City, Iowa; rate of pay: $19.6208; hours of service: 8:00 P. M. to 4:00 A. M., Monday through Friday, with rest days of Saturday and Sunday.

been conclusively held that your Board is not empowered to write new rules or to write new provisions into existing rules.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves two instances where the Carrier changed the assigned hours of Position No. 5764, Yard Clerk, to have an ending time after 12 Midnight and before 6:00 A. M.

The instant case turns on an interpretation of Agreement Rule 14 (c) and (d), which read as follows:

> "(c) Where three consecutive shifts are worked covering the 24-hour period, no shift will have a starting or ending time after 12 Midnight and before 6:00 A. M.
>
> (d) In no event may the starting time of any assignment be between the hours of 12:00 Midnight and 5:00 A. M., except by agreement between the Management and General Chairman. Only such assignments as are necessary to meet the requirements of the service may be established with ending time between 12:00 Midnight and 5:00 A. M."

Rule 14 (c) applies where there are three consecutive shifts involved. The Organization has presented no evidence in this case to indicate that we are here involved with anything other than a single shift assignment. Therefore, we hold that Rule 14 (c) has no application to the case at bar.

Rule 14 (d) is divided into two parts. The first sentence applies to starting time, and requires agreement between the Management and the General Chairman. Starting time is not involved in the present case, so the first sentence of Rule 14 (d) is not applicable to this dispute.

The second sentence of Rule 14 (d) applies to ending time. It does not require an agreement between the Management and the General Chairman. It does require that the assignment be one which is "necessary to meet the requirements of the service."

The burden of proof is upon the Employes to show that such necessity does not exist. They have failed to meet this burden and, therefore, the claim will be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of January 1966.

LABOR MEMBER'S DISSENT TO AWARD 14125, *DOCKET CL-14874*

Award 14125, Docket CL-14874, is based primarily, if not exclusively, on an assumption that there was but a single shift assignment at Sioux City, Iowa.

Rule 14(d) had been interpreted by Referee Schedler in a prior dispute between the same parties as here and the Board held that:

> "* * * It seems clear to us that 'such assignments' in (d) refers to those exceptions which have been established by mutual agreement between Management and the General Chairman."

Without mentioning that prior award in the instant case the Referee holds that:

> "The second sentence of Rule 14(d) applies to ending time. It does not require an agreement between the Management and the General Chairman. * * *."

It, therefore, appears that a conflict in Awards has been created merely on an assumption. If the prior Awards involving the same parties, rules, etc., become as much a part of the Agreement as though written therein, as has been held in Award 11790 and others, then, obviously, something more than assumption should have been required before a contrary interpretation was made on the same rule. Opposite Awards on the same questions do not serve to settle disputes. Instead, such unfortunate circumstances serve to create more disputes.

Rule 14 (d), as interpreted by prior Award 9246, should have prevailed and required a sustaining decision in this case.

I, therefore, dissent to this Award which was obviously arrived at by assuming something neither party pursued in the course of handling on the property or in their submissions, i.e., whether one or three shifts were involved.

D. E. Watkins
Labor Member
2-23-66

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S DISSENT TO AWARD 14125, DOCKET CL-14874

(Referee Hamilton)

I.

THE FACTS AND ISSUE

The claim places in issue Carrier's right, where it is necessary to meet the requirements of the service, to create a single assignment that has an ending time between Midnight and 5 A. M. without first obtaining the consent of the General Chairman.

The essential facts are not disputed. We are dealing with a single shift assignment, not with three successive shifts covering a 24-hour period. This is obvious from the fact the Employes rely on Rule 14 (d) alone, and never cite Rule 14 (c) which specifically deals with successive shifts covering 24-hour periods and unqualifiedly states that such shifts shall not be assigned with an ending time such as we have involved in this case.

Only this one assignment is mentioned by both Carrier and the Employes. The Employes frankly admit that for an undisclosed period of time before the first date of the claim, this same position had been "regularly assigned" with an ending time of 4 A. M. They concede that Carrier established the 4 A. M. ending time without agreement (page 31). They made no claim on account of the 4 A. M. ending time, and after admitting in their initial submission that claimant had been "regularly assigned" with that ending time, they belatedly contend for the first time in their rebuttal that the assignment of the 4 A. M. starting time was also a violation of the agreement.

Both parties cite Rule 14 (d) as controlling. Carrier bases its handling and defense of the claim squarely upon the plain provisions of that rule.

The Employes base their claim squarely upon **Award 9246** (Schedler) and cite that award as the source of their unique interpretation of Rule 14 (d). In submitting the claim on the property (page 14) the General Chairman asserted:

> **"The Board has held in Award 9246 that 'such assignments' in 14 (d) refer to those exceptions which have been established by mutual agreement between management and the General Chairman."[1]**

In Position of Employes, where our rules require that the Employes fully state "all relevant, argumentative facts", the Employes simply quote a brief extract from our **Award 9246** and then make the bald assertion that Carrier's unilateral assignment of an ending time between Midnight and 5 A. M. violated Rule 14 (d). They never cite Rule 14 (c), which would obviously be controlling if this were a three-shift, 24-hour operation.

The Employes do not deny in their submission to the Board that an assignment with ending time between Midnight and 5 A. M. was necessary in this case to meet the requirements of the service. In their rebuttal they affirmatively eliminate any question as to the fact that service requirements did necessitate the assignment by saying:

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[1]Emphasis herein by us unless otherwise indicated.

"The Carrier argues that the service requirements in connection with checking trains, particularly Train 7, necessitated an ending time between 12:00 Midnight and 5:00 A. M. for Yard Clerk Position No. 5764.

The question of service requirements is not involved here, however, **this dispute concerns only the question as to whether or not the Carrier is privileged to establish assignments with an ending time between the hours of 12:00 Midnight and 5:00 A. M. except by agreement between the management and the General Chairman."**

Thus, the controlling issue presented is whether Rule 14 (d) requires management to obtain the consent of the General Chairman before establishing other than a 24-hour position with ending time between Midnight and 5 A. M. where it is conceded that the requirements of the service necessitate such an assignment.

II.

RULE 14 (d) STANDING ALONE IS CRYSTAL CLEAR AND REQUIRES DENIAL OF THE CLAIM.

All parties agree that the only rule involved in this case is 14 (d), standing alone. No other rule is cited by either party as being relevant in any way to the dispute. Rule 14 (d) reads:

"In no event may the starting time of any assignment be between the hours of 12:00 Midnight and 5:00 A. M. except by agreement between the Management and General Chairman. **Only such assignments as are necessary to meet the requirements of the service may be established with ending time between 12:00 Midnight and 5:00 A. M."**

This rule is so clear on its face that we hesitate to resort to secondary rules of construction; but, there are secondary rules which clearly support Carrier. The first sentence restricts Carrier, in any event, from assigning a starting time between Midnight and 5 A. M., except by agreement with the General Chairman. The second sentence provides that such assignments as are necessary to meet the requirements of the service may be established with ending time between Midnight and 5 A. M., and it contains no restriction whatever regarding an agreement with the General Chairman.

Under a universally accepted rule of construction, the express requirement of an agreement with the General Chairman to set up starting times between Midnight and 5 A. M. and the absence of such a requirement with reference to ending times between these hours necessarily implies that no agreement with the General Chairman is required to set such ending times when they are necessitated by requirements of the service. Judge Wenke stated the rule as follows in **Award 4439:**

"In determining the rights of the parties it is our duty to interpret the applicable rules of the parties' Agreement as they are written. It is not our privilege or right to add thereto, and **when a rule specifically lists the situations to which applicable, it thereby excludes all those not included therein."**

See **Awards 7954** (Cluster), **8172** (Smith), **11165** (Sheridan), **11699** (Engelstein) and **11757** (Dorsey), among many others, for similar applications of this clear rule.

It is elementary, of course, that the clear provisions of a contract are controlling and this Board's powers are limited to the interpretation of the agreement as written.

AWARD 7166 (Carter)

> **". . . No such result was intended by the rules and this Board is not authorized to write such an intent into them in the form of an interpretation of the agreement.** If any change is to be made it must be by negotiation. . . ."

AWARD 10585 (Russell)

> **"This Board follows ordinary rules of contract construction, is bound by the provisions of the Agreement before it, having no power to add to or detract therefrom.** See **Award 2029** (Shaw); **6959** (Coffey); **7577** (Shugrue); **7631** (Smith); **7718** (Cluster); **9253** (Weston); **9314** (Johnson); **9606** (Schedler); **10008** (McMahon)."

AWARD 7294 (Carter)

> "The rule is not indefinite or ambiguous, and under such circumstances, the plain meaning of the rule controls."

III.

BOTH THE EXPRESS RULING OF THE BOARD IN AWARD 9246 AND THE POSITION TAKEN BY ALL PARTIES IN THAT CASE ESTABLISH THAT THERE IS NO MERIT IN THE CLAIM NOW BEFORE US.

A. The Issue In Award 9246 Was Whether 14 (c) Took Precedence Over 14 (d), And All Parties Agreed That Where 14 (d) Is Applicable No Agreement With the General Chairman Is Required:

As **Award 9246** plainly states, the Employes in that case based their claim squarely upon Rule 14 (c), which applies only to three-shift, 24-hour operations. In arguing that case to the Board, the Employes made abundantly clear their position that the claim could not be sustained if Rule 14 (d) were applicable. They based their whole case on the premise that Rule 14 (c) was a specific rule that took precedence over 14 (d), leaving the latter rule to apply only in cases where three-shift operations did not exist. At pages 21 and 22 of the record in that case, the Employes gave the Board this clear statement of the application to be given Rules 14 (c) and (d):

> "Throughout its Ex Parte Submission the Carrier is repetitious in its contention that Rule 14 (d) has precedence over Rule 14 (c) and continually points out to your Honorable Board that the last sentence of Rule 14 (d) contains no specific exceptions, and should, therefore, be applicable where three-shift positions are worked with one following the other. . . .
>
> Carrier states there is no exception contained in the last sentence of Rule 14 (d) and attempts to use that last sentence to

justify the violation of Rule 14 (c). The Employes contend there is no exception contained in Rule 14 (c) pertaining to around-the-clock assignments. **Rule 14 (d) applies to assignments other than those covered by Rule 14 (c).** . . .

The Employes contend that the Carrier violated the provisions of Rule 14 (c) and that Rule 14 (d) is not applicable; therefore, *they respectfully request your Honorable Board to render a sustaining award.*"

The Employes emphasized in vigorous arguments that 14 (d) was not applicable in that case and, therefore, Carrier was precluded from unilaterally establishing an ending time between Midnight and 5 A. M. under applicable provisions of 14 (c). **That position of the Employes is diametrically opposed to the stand they have taken in the instant case. Here they contend that 14 (d) instead of being inapplicable, is the controlling rule which prohibits Carrier from establishing such an ending time unilaterally.**

The Labor Members' Reply to the Carrier Members' Dissent to **Award 9246** is equally clear in establishing that the Employes there fully agreed that Carrier could act unilaterally in establishing ending times under Rule 14 (d), but could not do so where 14 (c) is applicable. The Labor Members' statement asserts:

"That Rule 14 (c) is a special rule governing the assignment of starting or ending time 'where three consecutive shifts are worked covering a 24-hour period', is clear. **Consequently, Rule 14 (c) prevails over general Rule 14 (d) when the circumstances fall within the provisions of the former, as was the case here.**

There is also another well established rule of contract interpretation that is controlling here, i.e., 'that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section.' Award 2490. Rule 14 (c) prohibited the assignment of a starting or ending time 'after 12 Midnight and before 6:00 A. M.' where 'three consecutive shifts are worked covering the 24-hour period.'"

Now, obviously, if 14 (d) had prevented Carrier from acting unilaterally and without agreement with the Employes in order to establish an ending time between Midnight and 5 A. M., it would have supported the claim of the Employes in **Award 9246** and they would have been citing it in their favor, instead of emphatically insisting that it was not applicable and that specific Rule 14 (c) "prevails over general Rule 14 (d)." There would have been no occasion for 14 (c) to prevail over 14 (d) in that case if 14 (d) had precluded unilateral action by Carrier, as Employes now assert it does.

It is manifest from a review of the record in **Award 9246,** that the parties to that dispute were in complete accord that wherever Rule 14 (d) can be properly applied, Carrier can act unilaterally in establishing ending times between Midnight and 5 A. M. if requirements of service necessitate such action. The primary issue in the case was whether the last sentence in 14 (d) can be applied where three-shift operations mentioned in 14 (c) exist. With respect to the meaning and application of the two rules, that is the only question which the Board could decide in that case, for it was the only question before it.

B. **The Ruling Of The Board In Award 9246 Precludes Payment Of This Claim In Any Event:**

While the ruling of the Board in **Award 9246** is confusing and erroneous, in the opinion of the Carrier Members, the express holding was that Rule 14 (d) is merely an exception to 14 (c). This is contrary to the characterization of 14 (d) by both parties to that record. They all characterized Rule 14 (d) as a general rule with a general application in any case where 14 (c) is not applicable.

Award 9246 expressly held that:

> ". . . The last sentence in (d) refers to how such assignments may be established with an ending time contrary to the prohibitions in (c). . . ."

The Award thus limits the application of 14 (d) to the creation of an exception to 14 (c). That being the case, wherever (c) is not applicable, (d) cannot be applicable either. As an exception to Rule (c), (d) would apply only in cases where (c) applies. Since it is conceded in this case that (c) is not applicable, **(d) cannot be applicable either, if we are to accept the express ruling made in Award 9246.**

This brings us to the clear and universally recognized rule that in the absence of a rule imposing a restriction, Carrier is free to exercise all management prerogatives. Certainly, absent some rule or agreement imposing a restriction, Carrier can assign any starting or ending time that it sees fit, irrespective of the requirements of the service. See **Awards 12419** (Coburn), **12358** (Dorsey), **6001** (Daugherty), among others.

Thus, if the erroneous dicta in **Award 9246** is to be perpetuated and applied in this case instead of overruled as palpable error, the instant claim nevertheless has no merit whatever, and Carrier is free to assign any starting or ending time it may choose for single positions which are not a part of continuous, 24-hour operations.

G. L. Naylor
R. A. DeRossett
C. H. Manoogian
W. M. Roberts