Award No. 18346
Docket No. TE-18304

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

NORTHWESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Northwestern Pacific Railroad Company, that:

CLAIM NO. 1

CAR. FILE: TCU 709
COM. FILE: N.218.3

1. Carrier violated the terms and intent of the current TCU Agreement, commencing January 27, 1968 and continuing each Saturday and Sunday thereafter, when it required or permitted the occupant of Position No. 53, 1st Telegrapher-Clerk, Eureka, California, to perform on those dates work which was and is performed regularly on the other five days of each week by the occupant of Position No. 1, Agent-Car Distributor, and did not reclassify Position No. 53 or pay the occupant of it the established higher rate for performing said work.

2. As a consequence of these violations, Carrier now shall be required to:

(A) Restore the performance of such work on his Saturday and Sunday rest days to the occupant of Position No. 1;

(B) Commencing January 27, 1968, and continuing each Saturday and Sunday thereafter until violation has been terminated, pay Mr. O. W. Barrett, regular assigned incumbent of Position No. 1, or his successor, eight (8) hours at overtime rate for Saturdays, and three (3) hours at overtime rate for Sundays, when overtime work is called for, Position No. 1.

(C) Commencing January 27, 1968, and continuing each Saturday and Sunday thereafter until violation has been terminated, pay Mr. P. C. Frey, regular assigned incumbent of Position No. 53, or his successor, the dif-

ference between the rates of Position No. 1, and Position No. 53, for eight (8) hours each date.

CLAIM NO. 2

CAR. FILE: TCU 711
COM. FILE: N.217.3

1. Carrier violated the terms and intent of the current TCU Agreement commencing February 10, 1968, and continuing each Monday thereafter, with the exception of February 19, when it required or permitted a yard clerk to perform on those dates work which was and is performed regularly on the other five days of each week by the occupant of Position No. 52, Third Telegrapher.

2. As a consequence of these violations, Carrier now shall be required to:

(A) Allocate performance of said work on his rest day to the occupant of Position No. 52;

(B) Commencing February 10, 1968, and continuing each Monday thereafter until violation has been terminated, pay Mr. R. E. Redfield, regular assigned incumbent of Position No. 52, or his successor, eight (8) hours at overtime rate of his position.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The dispute involved herein is based on various provisions of the collective bargaining Agreement, effective August 1, 1945, as amended and supplemented, between the parties. The claims were handled on the property in the usual manner up to and including conference with the highest officer designated by the Carrier to handle such claims.

The two claims incorporated into this submission to your Board were handled separately, but simultaneously on the property because of their similarity. Both claims involve unassigned day work which is being performed by other than an available extra or unassigned employe, or the regularly assigned employes. Claim No. 1 also requests that the employe who is performing such unassigned day work be paid the difference between the rate of his assigned position and the higher rate of the agent-telegrapher-car distributor's position, the occupant of which normally performs the work.

Carrier denied the claims on the ground that the work which is being performed on the days in question does not belong "exclusively" to the employes who normally and regularly perform such work on their assigned work days.

(b) ISSUES

Succinctly stated, the issue in this dispute is:

5. Due to the continued decline in business, on April 16, 1967, position of Telegrapher-Car Distributor at Eureka was abolished and, under agreement provisions, the Agent's position was reclassified to Agent-Telegrapher-Car Distributor. This position, assigned Mondays through Fridays, worked on an 8 hour overtime basis on Saturdays and on a call basis on Sundays.

The car distribution work on Saturdays was less than 50% of that required on week days as shown by loading statement. The 1st trick telegrapher's work also was very light on Saturdays, as there were no messages being sent by the Agency clerical forces who work a five day week, also, none from the Traffic office which is closed on Saturdays and Sunday.

On January 27, 1968, the 1st Telegrapher Clerk was assigned the car distributing duties on Saturdays and, when required, on Sundays; thereafter it was not necessary for the Agent-Telegrapher-Car Distributor to work overtime on Saturdays or Sundays.

6. Claim No. 1 was submitted by Petitioner's Local Chairman in letter dated March 23, 1968 (Exhibit A-1) and was denied by Carrier's Superintendent in letter dated April 18, 1968 (Exhibit A-2).

By letter dated May 7, 1968 (Exhibit B-1) Petitioner's General Chairman appealed to Carrier's Vice President and General Manager claim as shown in Statement of Claim. By letters dated May 17 and June 13, 1968 (Carrier's Exhibits B-2 and B-3), after conference, Carrier's Vice President and General Manager denied the claim.

7. Claim No. 2 was submitted by Petitioner's Local Chairman in letter dated April 14, 1968 (Exhibit C-1) and was denied by Carrier's Superintendent in letter dated April 24, 1968 (Exhibit C-2).

By letter dated May 7, 1968 (Exhibit D-1) Petitioner's General Chairman appealed to Carrier's Vice President and General Manager claim as shown in Statement of Claim. By letters dated May 17 and June 12, 1968 (Exhibits D-2 and D-3), after conference, Carrier's Vice President and General Manager denied the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: In compliance with the limitations of our statutory jurisdiction we confine our consideration of the dispute to the evidence adduced and the issues raised on the property.

CLAIM NO. 1

Prior to January 27, 1968, Claimant Barrett, occupant of Position No. 1 (Agent-Telegrapher-Car Distributor) performed all the car distribution work at Eureka, California. He did this work on his regularly assigned work days (Mondays through Fridays) and on an overtime basis on his rest days (Saturdays and Sundays).

Position No. 53 (First Telegrapher-Clerk), occupant P. C. Frey, had regularly assigned work days Thursdays through Mondays with rest days Tuesday and Wednesday. The position was filled on the rest days by the occupant of a "swing" relief assignment. Since January 27, 1968, Carrier has

required the occupant of Position No. 53 to perform, in addition to the regularly assigned duties of that position, the car distribution work on Saturdays and Sundays — work which theretofore has been solely performed, when required, seven (7) days per week by the occupant of Position No. 1.

The only issue properly before us is whether Carrier by its requiring the occupant of Position No. 53 to perform the car distribution work on Saturdays and Sundays instead of the occupant of Position No. 1 violated the following provision of Rule 3:

"Work On Unassigned Days.

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

The Carrier's defenses proffered on the property are:

1. Denial of the Claim by Superintendent dated April 18, 1968:

"Mr. O. W. Barrett is regularly assigned to Position No. 1, Agent Telegrapher-Car Distributor, Eureka, to work 8:00 A. M. to 5:00 P. M., 1 hour for lunch, daily except rest days, Saturday and Sunday — rate $3.7751.

Commencing January 27, 1968, 1st Telegrapher Clerk at Eureka, in addition to his telegraphic work, performed car distributing, on Saturdays and, occasionally, on Sundays.

In your letter of March 23, 1968, you refer to the provisions of Rules 2 and 3 of the current agreement. These provisions do not support the claim.

Car distributing **is not exclusively work** belonging to telegraphers, or to the position of Agent Telegrapher-Car Distributor. It is partly performed by clerks and, on some railroads, entirely by clerks. It also can be performed by telegraphers to fill out their duties. (Emphasis ours.)

In regard to that portion of your claim in behalf of P. C. Frey, incumbent of 1st Telegrapher Clerk, wish to call your attention to the fact that he does not perform the duties of agent. He only performs the duties of a telegrapher clerk, and fills in his time with car distributing work."

2. Denial of the Claim by Vice President and General Manager, dated May 17, 1968:

"It is the carrier's position that **car distributing is not the exclusive work of telegraphers,** nor of the agent telegrapher-car distributor. The fact that the 1st telegrapher clerk performs car distributing duties on the rest day of the Agent-Telegrapher-Car Distributor is not a violation of the Telegraphers' Agreement."

3. In letter to the General Chairman from Vice President and General Manager, dated June 13, 1968, relative to discussion in conference held on June 5, 1968:

"The facts are stated in my letter of May 17, 1968.

Nothing was developed in the conference which would change the position of the management, as stated in my letter to you of May 17, 1968, and as was stated in Superintendent Mackie's letter of April 18, 1968.

Claim is denied."

Rule 3, Work on Unassigned Days, is a provision of the National Forty Hours Week Agreement and has been the subject of interpretation and application in a multitude of Awards issued by this Board. The Awards support the following findings:

I. Rest day work of a regularly assigned position is contractually vested in the regularly assigned employe **unless** it is: (1) part of a regular relief assignment (see Rule 3 – Regular Relief Assignments); or (2) it is performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week (see, Rule 3 – Work on Unassigned Days, supra). Carrier's requiring any employe to perform the work, other than one in the specific and exclusive prescribed status, is violative of the Agreement; and

II. Whether the work of the regularly assigned position required to be performed on a rest day (unassigned day) is work not exclusively reserved to any craft or class is immaterial and irrelevant. The Work on Unassigned Days rule **deals with the work regularly assigned to a position.**

For the foregoing reasons, since the car distribution work was regularly assigned to Position No. 1, we find that under the facts of record Carrier violated the Agreement by requiring its performance by the occupant regularly assigned to Position No. 53 on the unassigned rest days of Position No. 1.

As to Claim No. 1 we will: (a) sustain paragraph 1 of the Claim; (b) deny paragraph (A) of the Claim for lack of jurisdiction; (c) sustain paragraph 2(B) of the Claim which Carrier did not put at issue in the handling on the property; and (d) deny paragraph (C) of the Claim which was abandoned by Petitioner in its handling of the dispute on the property.

CLAIM NO. 2

Claimant was the regularly assigned occupant of Position No. 52 (Third Trick Telegrapher) at Eureka, California, hours 11:00 P. M. to 7:00 A. M. from Monday through Friday — his Friday assignment terminating at 7:00 A. M. on Saturdays. His first rest day was from 11:00 P. M. Saturday to 7:00 A. M. Sunday, herein called his Sunday rest day; and his consecutive second rest day was from 11:00 P. M. Sunday to 7:00 A. M. Monday, herein called his Monday rest day. On his Sunday rest day his position was filled

by regular relief assignment; and, on his Monday rest day Carrier usually blanked the position. We are here concerned only with occurrences on the Monday rest days commencing February 10, 1968, when Carrier required a Yard Clerk to call crews — work which Petitioner claims was regularly assigned to Claimant on his regularly assigned work days; and, to the occupant of the relief assignment on Claimant's Sunday rest day.

Petitioner contends that Carrier's failure to assign the required work of crew calling to Claimant on his Monday rest day violated Rule 3, Work on Unassigned Days. The rule is set forth in our discussion of Claim No. 1, supra.

The Superintendent in his denial of the Claim, dated May 17, 1968, proffered the defense that the work of calling crews was not exclusively reserved to Telegraphers. For reasons stated in our discussion of Claim No. 1, supra, we find this defense without merit.

Also in his denial the Superintendent stated:

> "In regard to train crews — whenever there is a telegrapher on duty, he calls the crews, **except for the period from 11 P. M. Sunday until 7 A. M. Monday.** This condition has been in effect for over seven years.
>
> I also wish to call attention to the fact that only a minimum of work is involved in this claim. For example, on the shift from 11 P. M. Sunday, April 7th to 7 A. M. April 8th, yard clerk called 2 men at 5:30 A. M. for Run No. 300. It would not have taken him over five minutes to make these telephone calls. For the shift of April 14th, he called an extra work train crew of five men at 6:30 on April 15th. This would not have taken over 15 minutes."

The first paragraph we construe as an admission by Carrier that the work of calling crews from 11:00 P. M. to 7:00 A. M. was work of Position No. 52. As to the amount of time devoted by the Yard Clerk to calling crews on the unassigned seventh day of Claimant's work week we find it immaterial in the interpretation of the Rule 3 – Work on Unassigned Days. The Rule deals with work of a position. If work of a position is required to be performed on an unassigned day, the right to the work is contractually vested in the regular employe, except when it is "performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week." The Yard Clerk who performed the work here involved does not come within either of the exceptions. We find Carrier's requiring the Yard Clerk to call crews, under the circumstances set forth in the facts of record, violated the Agreement.

In its denial of the Claim Carrier averred, and Petitioner did not controvert, that the Yard Clerk did not call crews on each of the Monday rest days (unassigned days) of Position No. 52. We will, therefore, sustain paragraph 2(B) of the Claim only to the extent of compensating Claimant for the days on which the Yard Clerk did call crews — the days to be determined from a joint check of Carrier's records. The amount of compensation for each day on which a violation occurred will be as prayed for in paragraph 2(B) of the Claim, Carrier not having raised issue as to it as a proper measure of damages, its assertion being that the work time involved was minimal.

We will deny paragraph 2(A) of the Claim for lack of jurisdiction.

It was argued on Carrier's behalf that our awarding that a joint check of the Carrier's records be undertaken to fix the days of Carrier's violations is beyond our jurisdiction because it in effect develops the employe's claim and shifts the burden of proving violative actions and compensatory damages from Petitioner to the Carrier. We reject the argument for the following reasons: (1) the claim is a continuing one for each Monday commencing February 10, 1968; (2) Carrier averred that the action complained of, which we found violative of the Agreement, did not occur on every Monday subsequent to February 10, 1968; (3) the days on which violation occurred can be made certain from Carrier's records kept in the usual course of business; (4) the days of violation being thus fixed the sum of compensation can by computation be made certain (compare with Rule 55 (b), (1), Federal Rules of Civil Procedure); and (5) only such a check can dispose of the continuing claim with finality. The proceduer which we have directed is protective of Carrier's affirmative defense — as to which it bears the burden of proof — that its violative actions did not occur on each and every Monday subsequent to February 10, 1968, as alleged in the Claim. Carrier did admit it took such actions on some of the subsequent Mondays.

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 Carrier violated the Agreement.

AWARD

Claim No. 1 sustained in part and denied in part as set forth in the Opinion, supra.

Claim No. 2 sustained in part and denied in part as set forth in the Opinion, supra.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1970.

**CARRIER MEMBERS' DISSENT TO AWARD 18346,
DOCKET TE-18304 (Referee Dorsey)**

This Award is expressly based on the conclusion that the involved work was in fact assigned exclusively to the positions of the Claimants, and hence the dates that the Claimants were not assigned to work the positions were

unassigned days for such work (compare Award 18115, Referee Dorsey, where a similar claim was denied because the involved work had not been exclusively assigned to the Claimant's position).

During the second panel discussion of the case, the Referee insisted that the question of Carrier's right to assign the work to the positions of the employes who actually performed it on the claim dates, either on the basis of staggering of assignments as was done in Award 6949 or on any other basis, was simply not involved as Carrier had not raised such issue in the handling of the case on the property. We respectfully submit that this conclusion of the Referee is erroneous. We believe that a fair reading of the entire record of handling on the property indicates that Carrier did take the position that this work was regularly assigned to the positions of the employes who performed it and hence the Unassigned Day Rule was not involved. We further submit that Petitioner failed to prove that the assignment of the work to different positions as made by Carrier was prohibited by any provision of the agreement. For these reasons we must dissent to the finding that the agreement was violated.

We must also dissent to that part of the Award which directs Carrier to make a joint check of its records in order to prove the dates the alleged violations occurred. In numerous consistent and well reasoned awards this Board has recognized that in the absence of an agreement provision requiring such action, Carrier is not obligated to open up its records or search them as a means of developing a claim. See Awards 9343 (Begley), 10435 (Miller), 11156 (McMahon), 11776 (Hall), 12739 (Coburn), 15337 (Woody), 15759 (Harr), 16490 (Perelson), 16675 (McGovern) and others. After noting that the dates on which the alleged violative acts occurred could be made certain by a search of Carrier's records and further that the sum of compensation could be made certain by "computation", the Referee attempts to justify the requirement of a joint check on the theory that the joint check is "protective of Carrier's affirmative defense — as to which it bears the burden of proof — that its violative actions did not occur on each and every Monday." Certainly we know of no authority for the proposition that Carrier's denial of Claimants' contention that a violation occurred on every Monday amounts to an affirmative defense that has the effect of shifting the burden of proof to Carrier. No authority is cited for the proposition that by the simple expedient of making a false claim that a violation occurred on every day or every Monday, a claimant can shift the burden of proving the occurrence of alleged violations to Carrier. As a matter of fact, the only authority cited in the paragraph which attempts to justify the joint check is "Rule 55 (b) (1), Federal Rules of Civil Procedure". Rule 55 (b) (1) merely authorizes the clerk of a Federal court to enter a default judgment, after an entry of default, where the claim is for a sum certain, or for a sum which can by computation be made certain, and **the default is for want of appearance.** However, the clerk can take such action only "upon request of the plaintiff and **upon affidavit of the amount due.**" (Emphasis ours.) See 6 Moore's Federal Practice 1811, also Draisner v. Liss Realty Co., Inc. (CA DC 1954) (211 F. 2d 808, 19 FR Serv. 55, c. 1, Case 1, cert. den. (1954), 348 U.S. 877.

If we are free to draw analogies between technical Federal court procedures and the procedures of this Board, the only implication that can be drawn from Rule 55 (b) (1) is that the rule has no bearing whatever where a Carrier asserts a defense as it did in this case, and in any event no claimant would ever be entitled to payment without placing before this Board a statement of actual amount due.

Each Claimant had the burden of proving every essential element of his claim, including the extent of damages. See 25A C.J.S Sec. 144, P. 10. An essential allegation of the claim here was that certain alleged violative acts occurred on certain dates. Carrier denied that the acts did occur as alleged. Calling Carrier's denial of that fact an affirmative defense does not affect the burden of proof. We have seen the term "affirmative defense" used in many different senses, but we have seen no authority for applying the term to a mere denial that alleged violative acts occurred on the dates alleged by a claimant. The usage of the term which is commonly accepted by legal lexicographers is shown by the following extracts from well known publications:

Words and Phrases, "Affirmative Defense"

"An 'affirmative defense' is a plea interposed as a basis for proving some new fact. F. V. Smith Contracting Co. v. City of New York, 128 N.Y.S. 351, 353, 70 Misc. 132."

Black's Law Dictionary, Third Edition, "Affirmative Defense"

"In code pleading. New matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it. Carter v. Eighth Ward Bank, 67 N.Y.S. 300, 33 Misc. 128."

G. L. Naylor
R. E. Black
H. F. M. Braidwood
P. C. Carter
W. B. Jones

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 18346, DOCKET TE-18304

The Dissent represents the only error in the handling of this case by the Adjustment Board.

This was a simple case where the Carrier sought to effect a small saving by "assigning" performance of certain items of work on rest days of the two positions in question, contrary to the well settled intent of the "Work on Unassigned Days" rule.

The Referee properly applied the Rule, as it has been applied for twenty years, to the facts of the case. The frenzied efforts of the Carrier Member to convince the Referee that the act of violating the rule changed that act into something else were properly rejected.

It should be clearly kept in mind that the rule deals with **work on unassigned days** of the employe who does the work on his **assigned days**; it does not deal with **unassigned work** as the author of the Dissent attempted to establish first with the Referee and now in the guise of a dissent.

So long as Referees continue to be unimpressed by such sophistry this Board will continue its usefulness to the industry.

C. E. Kief
Labor Member

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.