NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20842
Docket Number U-20904

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7621) that:

1. Carrier violated the Clerks' Agreement when, on April 1, 3, 7, 8, 15, 22, and 29, 1973, it required and/or permitted Carrier officers and others (not covered by the Clerks' Agreement) at Little Rock, Arkansas, to perform the work of calling Agents and Telegraphers for vacancies as they occur, in violation of Rules 1, 24, 25, 26, and related rules of the Clerks' Agreement (Carrier's File 205-4808).

2. Carrier shall now be required to compensate Mrs. Jean Saracini for a two (2) hour call, pursuant to Rule 25 (f), for Tuesday, April 3, 1973 (her regularly assigned work day).

3. Carrier shall now be required to compensate Mrs. Jean Saracini for 5 hours, 20 minutes at punitive rate, pursuant to Rule 26 (a), for April 1, 7, 8, 15. 22, and 29, 1973 (her regularly assigned rest days).

OPINION OF BOARD: In this dispute, Carrier is charged with violating Rules 1, 24, 25 and 26 of the Agreement when it permitted employees other than Claimant to perform the work of calling Agents and Telegraphers for vacancies on seven specific dates. It is conceded that six of these days were rest days and the seventh an assigned work day of Claimant. Demand is made for compensation to Claimant as set forth in the Statement of Claim.

Petitioner and Carrier each cite several principles, buttressed by many prior Awards, which are claimed to be pertinent to this dispute. Some are, some are not. We shall attempt to resolve this matter by dealing with these issues separately, citing pertinent record facts where appropriate.

THE STATEMENTS

In support of its position that the disputed work was "historically and traditionally" performed by Carrier officers for many years, Carrier appends 24 signed statements from officers and dispatchers, as Exhibits. Petitioner contends that since these Exhibits were not submitted during the processing of this dispute on the property they are improperly submitted now and, being new matter, cannot be considered by the Board during the appellate process.

Prior Awards in support of this principle are legion and this Board has consistently sustained such objection. The logic is simply that Petitioner, never having seen these statements on the property, had no opportunity to factually controvert them

"Ordinarily one who mends his hold after an appeal has been taken to this Board will be permitted no advantage to be gained thereby." See Award 3950 (Carter) among many others.

Accordingly, we will sustain this objection and rule that these statements are no part of the merits of this dispute. Parenthetically, it should be pointed out that these Exhibits are not of paramount importance, for Petitioner concedes the position of Carrier on this issue.

CLAIM OF PETITIONER'S SOLE RELIANCE ON SCOPE RULE

Carrier refers the Board to the same principle regarding "new matter not handled on the property", citing many precedents, in support of its contention that since Petitioner relied "solely" on the Scope Rule during the processing of this claim on the property, it cannot now de novo assert violation of Rule 24 relating to "Work on Unassigned Days". The applicable principle, as we have pointed out above, is sound; the record evidence, however, does not support this contention factually.

Initially, Claimant submitted claim letters referring to violations of "Scope Rule 1 and related rules of the Agreement." Such claims were obviously vague, albeit all but one of the claimed dates of violation were "rest days". Petitioner's letter of August 16, 1973 was similarly vague, but did allege violation of Scope Rule 1 and Rules 24, 25 and 26. However, Petitioner's letters of October 2, 1973 and October 26, 1973 raised specific issues dealing with work on "assigned rest days" under Rules 24, 25 and 26, and referred to work on "off duty and/or assigned rest days", plus the fact that reference was made to Claimant as the "incumbent" under

Rule 24. Additionally, it is conceded by Carrier that "all claims in this dispute are rest days except April 3, 1973, which was an assigned work day for Claimant."

Accordingly, based on the record evidence, we cannot conclude that the alleged Scope Rule violation was the "sole issue" raised by Petitioner on the property. Not only is this conclusion borne out by the correspondence on the property, but the clear thrust of the instant claim, absent the Scope Rule, relates to "work on assigned rest days" and this aspect is fully within the purport of Rule 24.

We must therefore reject Carrier's contention on this point.

SCOPE RULE CR? THE MERITS

We acknowledge the established principle, cited by Carrier and supported by many prior Awards, that the Scope Rule being general in nature (as it is here), the work in dispute must be shown to have been performed solely and exclusively by the covered employees by custom, tradition and prevailing past practice; and that the burden of such proof is on Petitioner. Furthermore, that Petitioner must establish probatively a system-wide practice of assigning such work exclusively to clerks.

Petitioner asserts violations of Scope Rule 1 of the Agreement, but fails to produce competent evidence of relevancy sufficient to meet the probative tests above set forth. Award 12903 (Coburn) is cited by Petitioner In support of its contention that "work once placed under an Agreement cannot be removed." However, in the latter case Carrier's "exclusivity" defense was not considered because the supporting affidavits were not presented during the progress of the claim on the property. Accordingly, the Referee found "no competent evidence" that the work in question had been assigned to and performed by others. This is not the case here and, accordingly, the foregoing award is clearly distinguishable on its facts.

Thus, we find no basis upon which to conclude that Petitioner has established any violation of the Scope Rule here Involved. Accordingly, we dismiss this part of Petitioner's claim, for lack of proof.

THE EXCLUSIVITY CONCEPT

Carrier urges that the work involved in this dispute was not reserved exclusively to any craft or class. Specifically, it

argues that this claim is invalid because such work was not exclusively assigned to Claimant but was also assigned "to the employees who performed it."

The record evidence does not support this contention. The work in question was assigned solely to Claimant on a full time basis during her regular tour of duty. Carrier concedes in its submission that "No one else performed Claimant's duties." This is further evidenced by Carrier's directive of March 12, 1973, implemented by its further directive of April 28, 1973, which read as follows:

LROCK - MARCH 12, 1973

Mr. C. E. Clark-

Reference to the Arkansas Division telegraphers.

We have one extra day each week on Monday nights at North Little Rock erd /sic/ trick - (Locust St. Tower) 1100 p.m. to 700 a.m.

I have extra telegrapher, G. D. Lindsay, lined up to protect the job tonight. Will leave it up to your office to provide relief and protect the extra work hereafter.

W. E. Butler /S/

W. E. Butler

* (Emphasis added)

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GURDON, ARK.
April 28, 1973

AGENTS AND
TELE-CLERKS : BENTON
MALVERN
HOT SPRINGS
ARKADELPHIA
GURDON
HOPE

The following procedure will be established immediately in regards to above employees needing to be off.

You will first contact me or leave word for me that you will need to be off and when. This may be done by calling EXT. 2368 or 2369 or my phone number 246-8575. After contacting me you may make the necessary arrangements through J. Saracini EXT. f2207 for relief personnel. All concerned be governed accordingly,

cc: Mr. W. T. RAY
J. SARACINI

L. A. JOHNSON /S/

L. H. JOHNSON

*(Emphasis Added)

It will be noted from the foregoing that a copy of the April 28th directive went directly to Claimant. In fact, it is not disputed that the particular work in issue was assigned specifically to Claimant as of March 13, 1973. We cannot conclude, therefore, that the work in question was specifically "assigned" to any other employees.

Carrier cites several Awards In support of the asserted "exclusivity" doctrine, each of which is clearly distinguishable from the facts here involved.

In Award 12047, two employees performed the disputed work at the same location and the Agent (not Claimant) was performing his regular assignment. The Rule on "work on unassigned days" (Rule 24 here) was therefore held inapplicable.

In 12896, the Scope Rule was involved and, being general in nature, the exclusivity concept was properly applied.

In 13197, the Scope Rule and Rule 41 (Rule 24 hare) were involved . Nevertheless, it appears that the exclusivity concept was applied. However, analysis of the facts there involved and Award 9944 cited therein reveal that the basis of the denial of each claim was the finding that "the employees have failed to prove that Claimant was exclusively assigned to the claimed work during his regular work week . . ." As has been. shown above, in the instant dispute the factual situation is directly to the contrary.

Similarly, in 18498, the same situation existed and precisely the same language as in 13197 was used in denying the claim. Obviously, this case is not in point for the same reason as above stated.

In 13284, the claim was denied because the duties in question were "only a fractional part of the duties of the Clerk's position." This is not the case here; nor does the record evidence support the position that the disputed work was "only a fractional part" of Claimant's assigned duties.

In 15072, Claimants "were not the sole employes doing this work on weekdays and thus the sole employes entitled to do it on Sundays and Holidays."

In 15628, Claimant performed isolated tasks incidental to his primary functions. It was there held that "to take an isolated task such as this and call the Claimant on his rest days to perform it, is a strained and tortuous construction of the applicable Agreement which we are not prepared to make."

In 16255, the disputed work was in fact performed by several employees other than Claimant "on a Monday - Friday basis."

In 18115, the Rule governing "blanking of positions on holidays" was involved and "exclusivity" was applied. Such Rule is not our concern here.

In 19356, an employee other than Claimant "was doing the same work that he did on his regular days on the days in question". In fact, here the "other employe" was found to be "the regular employe."

In 19471, two employees were involved and it was not established that the employee other than Claimant did not in fact perform the disputed work on his regularly assigned rest days.

In 19672, the claim was dismissed "In view of Article 23 and the lack of any evidence . . . ." Article 23 specifically permitted others not in the same class to perform the disputed work. Such Rule is not involved here.

And finally, in 19219 it was held that " the Organization need not prove exclusivity" but must prove that the relief employee performed "the disputed work only on Claimant's day off, and not throughout the rest of his work week assignment." We have no such "relief employee" in the dispute before us, who performed Claimant's work in the manner indicated above.

In summary, therefore, we are compelled to the conclusion that Carrier's assertion of the exclusivity concept, as it relates to the record facts in the instant dispute, is not supported by precedent.

Additionally, we quote from the following prior Awards, cited by Petitioner, on the principle that the exclusivity concept is not relevant to disputes under the 'Work on Unassigned Rest Days" rule.

Thus, in Award 18346, which dealt with the exact language as is here contained in Rule 24, it was held that "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."

In 18856, the facts evidenced a clear violation of the same Rule since there was insufficient evidence that anyone but Claimant was the "regular employe" and, no extra or relief employee being available on week-ends, such work belonged to Claimant. Therefore, in the circumstances of this case, reliance on the exclusivity concept is misplaced. (Award 17619 and others)."

To the same effect, see 18092, 18245, 19039, 19267, 8414, 5622 and 5475, among many others.

Specifically, with respect to the application of "exclusivity" to Rule 24, "we would respond to that by saying that Rule 25(j), the Work on Unassigned Days Rule, is specific and prevails over any general rule, including the Scope Rule. (See Award 18245)." See Award 19267.

THE EBB AND FLOW PRINCIPLE

Carrier asserts the "ebb and flow" principle in relation to situations where officers and other excepted employees may at times perform functions of a clerical nature as an integral part of their duties and responsibilities;

We acknowledge this principle and the many supporting precedents cited by Carrier, but we fail to see its applicability here.

Firstly, the "ebb and flow" principle is rather general in nature and, as indicated by prevailing precedent cited above "the Work on Unassigned Days Rule is specific and prevails over any general rule , . ." See 19267 quoted above.

Secondly, we do not hold here that the work in question is exclusively within the province of schedule clerks under the Agreement, or that Carrier so intended. On the contrary, the application of the exclusivity concept or the "ebb and flow" principle is not essential to our determination of the merits of this dispute under the clear and unambiguous language of Rule 24.

Thirdly, the record evidence establishes, as has been specifically demonstrated above, that the disputed work was in fact assigned to Claimant five days a week and that she performed these tasks exclusively for all practical purposes. Carrier disputes this by asserting that "Carrier officers have performed this work for many years" and that such work "has not been reserved for exclusive performance by employes subject to the Clerks' Agreement."

These denials are general in nature and, in fact, not disputed by Petitioner. However, they are insufficient to controvert the record facts pertaining specifically to Claimant and specifically to the assigned duties which she alone regularly performed on a full time basis. As will be demonstrated hereafter, Rule 24 is clear and unambiguous and is precisely applicable to the disputed work as related to Claimant.

Fourthly, there is ample evidence to indicate the "flow" of the disputed work to Claimant, as witness the specific directives of Carrier. Other than the fact that such work was occasionally performed by others, we find nothing in the record, no specific directive or assignment, to establish the "ebb" of such duties from Claim-
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Accordingly, based on all of the foregoing reasons, we find no basis here for applying the "ebb and flow" principle.

FURTHER CONTENTIONS OF CARRIER

Carrier refers us to its management prerogatives and its right to abolish positions and reassign work as deemed necessary, unless specifically restricted by the Agreement. It urges the further contention that the fact particular work has been assigned to a specific position or class of employees in the past is not proof that such work is reserved exclusively to such class of employee.

We have no quarrel with either of these contentions, except to point out that in the resolution of this and all other disputes we are obviously bound by the language of the Agreement between the parties, as written. However, in the posture of this dispute, we do not deem it necessary to give detailed consideration to the above contentious in view of the specific issues here involved. These issues relate specifically to Claimant and specifically to the applicability of Rule 24.

Carrier cites additional prior Awards supporting its contention "that no craft has an exclusive right to minor crew calling duties." We have carefully searched the record and find no reference to "minor crew calling duties" by either the Carrier or the Organization during the processing of this claim on the property. Nor does the record indicate how, if at all, such concept applies to the specific full time duties assigned to Claimant and which she alone performed during her regular tour of duty.

RULE 24

This issue is without question the major issue involved in this dispute and, in view of the foregoing findings and established precedents, is the sole basis upon which this claim can be sustained. Specifically, this is the 'Work on Unassigned Days" Rule under the Agreement, and we quote it precisely:

> "(a) 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."

Carrier's memorandum during argument before the Board contains, inter alla, the following statement:

> "on the other hand . . . where the alleged right to particular work is predicated on the Unassigned Day Rule, it is the assignment of the work actually made by Carrier that Controls, and it is irrelevant whether the work is exclusively reserved to the craft by the Scope of the parties' agreement."

We concur fully in the foregoing statement of controlling principle and apply it to this dispute.

Carrier asserts further that in order for Claimant to prevail it must be established that she was the "regular" employee and that the disputed work was "exclusively" assigned to her during her regular work week.

The fact that Claimant, and Claimant alone, was the "regular employee" performing the disputed work cannot seriously be questioned. The record evidence, as we have pointed out above in detail, clearly establishes that the disputed work was in fact specifically assigned solely to Claimant (see Carrier's directive previously quoted verbatim) and, as conceded by Carrier, that "No one else performed Claimant's duties." Further that such duties were assigned to and performed by Claimant on a full time basis during her regular work week.

We have also demonstrated above, by record evidence and established precedent, that the "exclusivity" concept is not applicable here, except in so far as it may conceivably apply to "other" employees performing such work during their regular work week. This is precisely the basis on which we distinguished the various cases cited by Carrier on this issue. In simple fact, the record evidence in this dispute fails to disclose such "other" employees. Nor can we accept Carrier's statement that such assignment to Claimant was designed merely to "assist" other employees. The record evidence speaks to the contrary.

In the context of this dispute, therefore, we fail to see who else but Claimant could be considered the "regular" employee. Nor can we ascertain any factual basis justifying any conclusion other than that the disputed work was assigned solely to Claimant on a full time basis during her regular tour of duty.

We conclude, therefore, on the basis of all of the foregoing findings, the record evidence and controlling authority, that Claimant is fully and specifically within the clear and unambiguous language of Rule 24. In short, there being no "available extra or unassigned employe" the disputed work was required to be performed "in all other cases, by the regular employe." Claimant, on the dates in question, was such "regular employe." See Award 6019 (Parker).

Accordingly, we will sustain the claim.

Finally, on the question of compensation, Petitioner cites Rules 25(f) and 26(a), and in the latter connection uses the term "punitive rate". We fail to see the relevancy of such term. Both Rules provide for similar payment, and the parties are of course bound by the terms of the Agreement. (See Award 5579 (Whiting)).

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 Agreement was violated to the extent indicated in the Opinion.

A W A R D

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October 1975.