

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21394
Docket Number SG-21177

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(The Texas and Pacific Railway Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Texas and Pacific Railway Company:

On behalf of Communications Maintainer L. T. Gilmore for an additional eight (8) hours at time and one-half for each Saturday worked, eight (8) hours at one-half time for each Sunday worked, and eight (8) hours at straight time for each Tuesday he did not work, beginning October 29, 1973, account assigned a work week of Wednesday through Sunday at Avondale, Louisiana. [General Chairman file: 141. Carrier file: G 315-847

OPINION OF BOARD: This is a claim of the General Committee of the Brotherhood on behalf of Communications Maintainer L. T. Gilmore (hereafter "Claimant"). The Carrier had previously assigned its Communications Maintainer positions on a Monday through Friday work week with Saturday as a standby day and Sunday a rest day. Such a position was maintained in the New Orleans terminal area on the same work week schedule. On September 28, 1973 the Carrier advertised an additional Communications Maintainer position in the same area and territory with headquarters across the river from New Orleans. The new position had a work week of Wednesday through Sunday with Monday as a standby and Tuesday a rest day. Because the position was monthly rated the Brotherhood requested rebulletining of the position to show Saturday as a standby day and Sunday a rest day on the grounds the Agreement provides that on five day positions the days off must be Saturday and Sunday. The Brotherhood offered to apply the alternate week-end protection agreement of monthly-rated Communications Maintenance positions. The Carrier declined this offer. For its part the Carrier explained in some detail that the work load for the existing Communications Maintainer in the New Orleans Terminal Area had increased as a consequence of new and expanded communications facilities, including a new microwave system, Yard Car Control Speaker Systems at a number of locations. Moreover, the whole program of adding new equipment is part of the increasing use of communications with the Carrier's computer in St. Louis. As the operations become more dependent on Communications, the need for Communications Maintainers increases. The amount of equipment in New Orleans, according to the Carrier, had reached the point where Communications Maintainers were needed seven days a week. On this basis the claim progressed through the various levels with the Brotherhood repeating its offer of the alternate week-end protection agreement and the Carrier's declination. While on the property

the only time the Brotherhood attempted to rebut the **Carrier's** recitation of the technological changes that justified the action it was taking was in the General Chairman's letter of September **16, 1974** wherein it is stated **in** the last paragraph:

"Since **it** is evident the work load at New Orleans &es not support the need **for** continuous service positions, one additional **communications** position being **all that is** needed, we feel the seven day service protection **requirement can be met** by a **standard work week of Monday through Friday and an alternate weekend protection arrangement**. This would also **eliminate** the present inequity of the loss of all holidays that fall on Mondays on the **new** position."

Thereafter, in what **appears** to be its **final** letter on the property, the General Chairman's letter of December 17 directed his **arguments to** the Carrier's rejection of its alternate week-and protection **arrangement saying:**

"Since you do not provide vacation relief for monthly rated **Communications** positions, do not work these **men** on holidays (not **an assigned work day**), **nor do you** have anyone on the job **16** hours each **day** on other **days**, your reason as stated **above** for rejection of our offer for a reasonable solution **to the problem does not** appear sound."

With this state of the record, submission was made to this Board for adjustment of the dispute.

At the outset it **must** be **asserted** that the practice of this Board is well settled that **arguments and evidence that has not been made on the property cannot be** advanced for the first time here. This Board sits **in appellate review** and it is not equipped, **inclined or authorized** to evaluate positions and evidence that are not part of the record established between the parties on the **property**. We observe with approval the comment **made** to this **same effect** by the Brotherhood in its rebuttal submission to this Board, part of this record:

"Your Board has consistently **adhered** to the principle that new evidence or **argument not presented by the parties on the property cannot be considered by your Board.**"

We will have reason to make reference to this principle as we proceed in this Opinion.

The burden of proof in this claim rests with the Claimant and it is required to support its claim with substantial evidence. The first

conflict we observe **concerns** the facts **amounting** to a justification Carrier advanced in **support** of its **attempt** to stagger these two jobs. **In** following this course the Carrier was tracking the provisions of Rule **28** (a) which provides in part:

" . . . the work weeks may be staggered (sic) in accordance **with** the Carrier's operational requirements . . . "

Here the Carrier provided statements in explanation, though somewhat generalized, in support of its operational needs for seven day coverage of a **Communications Maintainer** at New Orleans. In response the Brotherhood offered assertions which contradicted Carrier's claim but provided no evidence. As a consequence the Carrier's explanation stands un rebutted and we must accept its **explanation** for the operational need for the **seven** day coverage. ✓✓

Unless the Carrier's actions have **run** afoul of other provisions **or** rules **relating** to staggering of **positions** under this **Agreement** we must conclude Claimant has not provided a basis for sustaining its claim.

In its **original** submission to this **Board** the Brotherhood cited Award **5393** (Donaldson) which dealt with a different agreement presumably but essentially the same Forty **Hour** Week Agreement. The Board made reference to Rule 11 (c) there which is the same as Rule **28** (e) **and** provides:

"All possible regular relief **assignments** with five days of work **and** two consecutive rest days will be established to do the work necessary on rest **days** of **assignments** in six **or seven-day** service **or combinations** thereof."

The board held **in** that Award that the record was devoid of evidence that Carrier had made an effort to carry out its obligations under this rule. The conclusion reached was that the Carrier obligated itself to resort on good **faith** to **handling** rest day work by relief assignments **where** possible. The carrier was **required to take** such a step **first and** then if it proved unadaptable and **insufficient** after trial would resort be made to the staggered work week. On this basis the **Board** held the Carrier breached the Agreement.

It is interesting that **Carrier** made a lengthy submission to this board **in** support of its position but it failed to join issue with the **above** Award. As we view this record the **Brotherhood, on behalf** of Claimant., has placed itself on the property in a position whereby it advanced its **proposal for** an alternate week-end protection agreement. **In** line with Award **5393**, above, the argument goes, the Carrier failed to meet the condition precedent of **putting** such an agreement into effect first before resorting to staggering **and** therefore it violated the Agreement.

We would have preferred to have had this issue raised with greater clarity on the property but under the **circumstances we cannot** say it was not raised **at all**. Insofar as the Carrier **failed to comment on this** argument directly, **in its submissions** before this **Board we have** no reason to **believe** it would have done so on the property.

We believe the Brotherhood's reliance upon this **Award is misplaced**. In Award 6946 (Carter) it was stated:

"It is only when carriers' operations require rest **days** to be worked that the rules governing rest **day** work come into play. **When** work on rest days of six and seven day positions is required, the **carriers are** obligated under Section 10-a to establish all possible relief assignments with **five days** of work. Such **regular relief** assignments are not required to be established except where carriers' operational **requirements make them necessary**."

The Award 6946 stated further:

"We have repeated and held, and correctly we think, that the assignment of regular relief positions and of work on **unassigned** days is not a condition precedent to the staggering of work weeks. The meaning of the 40 Hour Work Week Agreement is quite the **contrary**; the **Carrier may** procure the **performance** of all necessary work that it can **by** the staggering of work weeks before the assignment of rest **day work** comes into the picture. It is clear therefore that the Carrier did not violate the Agreement under the facts and circumstances shown in the present case."

Lastly, the **Brotherhood's** submission argues that the sole purpose Carrier had in establishing the new position was to have seven day coverage at the pro rata rate of pay and eliminate holidays that fall on **Monday** on the position. It is sufficient to point out that Carrier's **position on the** property negates this. **Moreover, we cannot agree that the** purpose of avoiding a penalty rate of itself invalidates staggering. **The** Carrier **cites** an impressive array of awards to this effect; we cite only: **Awards 13365** (Moore) and **15463** (Ives).

In its arguments before this **Board** the Brotherhood's representative **cited various** awards which are **noteworthy**. **Second Division Award 7041 (Eischen)** sustained a claim against this same carrier **on the grounds of the subsection** of the 40 Hour Work Week Agreement which is identical with Rule 28(f) of this Agreement. It is entitled "Deviation from **Monday-Friday** Week". The Board concluded in that case that the facts involved there were **"precise the type situation"** to which the rule was directed. We might observe the

facts here do not precisely fit **and** had this been raised on the property and developed as an issue between the parties we might be **more** enlightened as to its applicability.

In Award **11604 (Coburn)** the issue is raised whether the carrier could blank a rest day of the **regular** occupant of a seven day assignment and, in the absence of both the regular relief employe and a qualified extra man, transfer the work to others performing service at another location. Presumably the **argument** is that Communications Maintainer at the New Orleans Terminal is at a different location and on this basis the Claimant is entitled to a sustaining award. Had this issue been raised on the property we would be in a position to consider it here. It was not **and we conclude** it is beyond our reach. With respect to the issues raised in Awards **3814 (Douglas)**; **4552 (Menke)**, we **reach** the same conclusion.

We do not believe an omnibus objection that in effect asserts the Carrier's actions violated certain designated rules, even though made in a timely fashion during the progress of the claim on **the** property, is sufficient to permit the Claimant to raise arguments related to a **myriad** of issues before this **Board** for the first time. Here the Rules cited were **28** and **48 (b)**. The former embodies the **40 Hour** Work Week Agreement. In this Agreement it covers Pages **11, 12, 13, 14, 15, 16** and **17** embracing 15 subsections. The latter rule, **48 (b)** is of more manageable proportions but it includes six subsections.

We conclude that Claimant has failed to sustain his claim here for the reasons given.

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 **Employees** involved in this dispute are respectively Carrier and **Employees** 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

The Agreement was not violated.

A W A R D

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive **Secretary**

Dated at Chicago, Illinois, this 28th day of January 1977.