

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21861

Docket Number CL-21042

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station **Employees**

PARTIES TO DISPUTE: (

(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7731) that:

1. The Carrier violated the Agreement with an effective date of March 3, 1970, when it established at its Balmer Yard, Seattle, Washington, Car **Checker** D-14 position with a work week of Tuesday through Sunday and blanked the position on Monday.

2. Cliff **Chisholm**, regular assignee to the first shift position of Car **Checker** D-14, Balmer Yard, Seattle, Washington, be paid an additional day's pay at the rate of time and one-half for each Monday **commencing** June 11, 1973, **and** to continue until such time as the violation is corrected.

OPINION OF BOARD: A significant portion of the record is devoted to the question of whether this Board is precluded from consideration of the claim because it was filed some lengthy period of time (almost 3 years) after the asserted violation. The **Employees** assert that Carrier ignores the fact that the matter constitutes a continuing violation - which may be filed at any time. We are unable to treat the Organization's assertions in this regard as cavalierly as Carrier suggests. Awards of this Board have recognized the "continuing violation" concept, and that concept must have some meaning and application - as held in recent Award 21782. But, our **disposition** of the dispute on its merits makes it unnecessary for us to examine the "continuing violation" concept in detail as it applies to this dispute.

Claimant was assigned as Car **Checker (D-14)** Tuesday **through** Saturday. He was relieved on his Sunday rest day by **Edwards (Relief** Position No. 12) and D-14 was not manned, as such, on Monday. The Organization asserts that the work assigned to Position D-14 is a seven (7) day position.

Claimant asserts that the incumbent of Position Car Checker **D-12** was supposed to perform certain D-14 work on Mondays, but his Workload did not permit it. Thus, other **employees** performed the work **on** Mondays.

The **Employees** assert that the Agreement:

- "1. Prohibits the establishing of a sir-day position with a work week of Tuesday-through Sunday, with the position blanked on Monday.
2. Requires the establishment of a seven-day position when work is assigned to a position six days per week, Tuesday through Sunday, and such work is required or needed on Monday."

Pertinent portions of Rule 29 provide:

"SIX-DAY POSITIONS. Where the nature of the work is such that **employees** will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday. It is understood that sir-day positions will be filled six days per week except as provided in Rule 33.

SEVEN-DAY POSITIONS. On positions which have been filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday. It is understood that seven-day positions will be filled seven days per week."

It is argued, therefore, that a sir-day position must be physically filled six days per week (one day of relief and Sunday blank). Further, it is urged that a seven-day position is required if duties **or operations are necessary seven** days per week, and it must be filled seven days per week.

Relief is provided as per Rule 29 E:

"(1) **REGULAR RELIEF ASSIGNMENTS.** 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 assignment in six or seven-day service or

"combinations thereof, or to **perform** relief work **on** certain days and such types of other work on other days as may be assigned under individual agreements. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week.

(2) Assignments for regular relief positions may on different days include different starting times, duties and work locations for **employees** of the same class in the same seniority district, provided they take the starting time, duties **and work locations** of the **employee** or **employees** whom they are relieving."

and 43 A which provides that relief **Employees:**

"...will work the same assigned hours, and at the same rate, as those of the employee he is relieving. ..."

Notwithstanding the contents of the **Employees' submission** here, the August 8, 1973 claim on the property asserts that the D-14 Car Checker is a "6 day a week position." But, in the December 7, 1973 appeal, Claimant states that the position is a seven (7) day position.

Carrier contended, on the property, that the position in question was six (6) days and that it was bulletined as such, but in its Submission it states that the advertising **bulletin** "**..mistakenly** indicated it was to protect a six-day position. It should have indicated a seven-day position was involved..."

We feel that the issue of import to us is, as stated by Carrier, "**...is...there...**any rule or agreement between the parties which prohibits the Carrier from employing three clerks - one holding a relief assignment, the other two holding regular, staggered five-day assignments - to perform car checking service needed seven days a week on the first shift at **Balmer** Yard."

Carrier relies, to some extent upon the "Note" to Rule 29:

"NOTE: The expressions 'positions' and 'work' used in this rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of the individual."

Moreover, it argues that D-14 duties (car checking) are being performed
- not blanked - seven days a week, including Monday.

We have, of course, considered the dispute in light of the above positions, contentions and alterations - and have confined our review to matters which are properly before us. **The** record before us is, indeed, voluminous and presents a number of considerations.

One of the most significant questions presented, however, is whether we may ignore a precedent award which was adopted less than three (3) months prior to the panel argument in this case. The case presented here is but one of five disputes on the same topic presented to four Referees. As of the date this Award is adopted, the other matters have also been determined.

The Organization vigorously dissented to Award 21428, and labels it as palpably erroneous. It has long been held that an Award between the **same** parties, which decides the same issues, should be followed, unless **palpably** erroneous. We have considered Award 21428 in light of the record here. Regardless of what might have been our Award had we considered the matter in the first instance, and despite the predilections we might have to decide the issue to the contrary, we cannot conclude that Award 21428 is palpably erroneous. Accordingly, we are compelled to deny the claim.

Similar results have been reached by other Referees. In Award No. 23 "Special Board of Adjustment Established Pursuant to Appendix **K**", the Referee "painstakingly reviewed the findings of Third Division Award No. 21428, between these same parties" and found that it correctly applied the provisions of Rule 29, and:

"...although it applied to a six-day rather than a seven-day position, nonetheless, the reasoning of that Award is clearly applicable to the instant claim...this Board does not consider the Award palpably erroneous."

See, also, Awards 21.782 and 21783 for identical results, citing Award 21428 and the above-mentioned Award No. 23.

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

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 18th day of January 1978.