

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22024
Docket Number CL-21646

Robert J. Ables, Referee

PARTIES TO DISPUTE: ((Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station **Emploees**
(Chicago, Milwaukee, St. Paul **and** Pacific
(Railroad Company

STATEMENT OF CLAIM: **Claim** of the System **Committee** of the Brotherhood
(GL-8108) that:

1. Carrier violated the provisions of the Clerks' Rules Agreement at Minneapolis, Minnesota on September 2, 1974 when it failed to call **employe** W. L. Welch to perform the work of his position **on** a holiday..

2. Carrier shall now be required to compensate **employe** W. Welch an additional eight (8) hours at the time and one-half rate of Yard Clerk Position 14560 for September 2, 1974.

OPINION OF BOARD: There is no dispute **that:** claimant **is** a yard clerk working Monday through Friday, with Saturday and Sunday rest days; this is a five day position; it is not relieved on rest days; other clerks at a nearby yard perform required clerical work at claimant's yard on Saturday and Sunday and during those hours on Monday through Friday when **claimant** is not on duty; Monday, September 2, 1974, was a holiday, Labor Day; claimant was off work because of the holiday, and for which he (she) was paid; the position was blanked because of the holiday; **and,** on that holiday, during the trick regularly worked by the claimant, there was an interchange of a cut of 14 cars, 23 cars and another 14 cars performed with an engine from the nearby yard because the regular switch engine at claimant's yard had been annulled because of the holiday.

On these facts, the claimant requests pay for 8 hours at the time and one-half pay rate for September 2, 1974 because he was not called to work, as he should have been, to perform work actually done **on** his shift, which he, and only he, performs while he is on duty.

The organization argues essentially that the claim should be sustained because the company violated Rule 32(f) on overtime. This provides:

"**In** working overtime before or after assigned hours or on one of the nine (9) holidays specified in **Rule** 35(b), (if such holiday falls within the **employee's** work week) the employee regularly assigned to **position** on which overtime is required will be utilized. It is understood that the word 'regularly' as contained in this Rule 32(f) means that the employee who occupies a position either temporarily or permanently at the time overtime work occurs will be used for the overtime work."

The **employees** emphasize that holidays are to be treated as unassigned days and that **Rule** 29 for work on unassigned days gives priority to **the** regular employee, if work required by the carrier to be performed **on** a day which is not part of any assignment cannot be performed by an available extra or unassigned employee who would otherwise not have 40 hours of work that week.

The carrier denied the claim because the work done on the day in issue was no different than on any regular Saturday or Sunday and because clerical forces at the other yard regularly performed interchange work at claimant's yard outside claimant's assigned hours and on his assigned rest days. Therefore, according to the carrier, there was no requirement under the agreement to call in the claimant **on** an overtime basis, **particularly** as **the** work performed by the clerks in the other yard was incidental to the work they regularly performed, as well as being incidental to work in the claimant's position.

Not surprisingly, each side in this dispute has **cited** numerous awards to support its position.

The line of cases supporting the position of the carrier is impressive, particularly, very recent decisions on **similar** facts,. Comment **on** the awards primarily relied on by **the** carriers is required in view of the ultimate finding in **this** dispute **that** the carrier violated the agreement.

The carrier notes with approval the awards which support the conclusion that in a dispute concerning the unassigned day rule, the organization has the obligation to show that the work in dispute is performed by the claimant during his normal work week and that such work is not performed by other **employees** during the claimant's work week (Awards 13476; 13386; 16255; 17232; and 18498). More particularly, the carrier relies on recent Third Division Awards 19471 (Pitter); 19920 (Ritter); and 21662 (**Smedley**).

The awards cited by the carrier do support the conclusion that a claim under the unassigned day rule can be sustained only if the organization shows the **work** in dispute is done by the claimant during his **normal** work week and that such work is not **performed** by other **employees** during claimant's work week. Thus, it was properly found, for **example**, in Award 19920 (Ritter) that the claim should be denied because the employe who did the work of the blanked employe also did the same work during the claimant's regularly assigned--work week. The same referee in Award 19471 made the same findings, for the same reasons.

But the Ritter decisions and other similar awards relied **on** by the **carrier do** not reach the facts in this dispute and therefore cannot control the decision under this claim. In all such awards, the employe actually doing the work did the work not only on rest days of the claimant and during unassigned hours, but they did that work during the **employe's** assigned hours as well. Those are not the facts in this case because the clerks in the other yard do not do claimant's work during assigned hours.

The **Smedley** award is different. That referee, in Award No. 21662, on August 18, 1977, in a dispute between the same parties, decided that the claim should be denied **in** a situation where the other **employe** did **not** do the **same** work as the claimant when the **claimant was on duty**. He did it only on claimant's rest days. Thus, the facts are very close to this case.

In the troublesome area of deciding the respective rights of the parties under the unassigned day rule, it is predictable that authority can be found for either side of the question whether the carrier is obliged to call in the regular employe when the position is blanked on a holiday, even if the work done by another employe is performed on the claimant's rest days.

There is no honest way to distinguish the decision to sustain the claim **in** this dispute from the decision in the **Smedley** award because the facts are very close and the agreement and the parties are the same. Certainly there will be difficulty on this railroad property in **having** contrary awards on the same issue under the same or similar facts. But it is preferable in the overall interest of the parties to give the best direction to the parties, as this Board sees it, as to how the rule should be applied, rather than to follow the precedent set in another award, particularly as that decision is very recent and, therefore, could not have developed substantial precedent on this or other railroads.

In any event, the claim should be sustained under the unassigned day rule and the requirements to pay overtime because:

- Work was performed on a holiday;
- A holiday is not a rest day;
- A holiday is not an assigned work day;
- The only other thing a holiday could be when work is performed is **an** unassigned work day;
- The work performed by the **employees** in this dispute on the holiday was not work they performed when the claimant was on duty, unlike all the awards (except one) relied on by the carrier, thus, there is no requirement based on precedent inducing a denial of the claim;
- The work performed by the clerks in the other railroad yard was essential, even if incidental to their regular work, thereby satisfying the requirement in Rule 32(f) that when overtime is required the regular **employee** should be called to do the work, if the other **employees** with priority are not available; and
- The **40-Hour Week Committee** decided **that work on** an unassigned day should be performed by the regular **employee**.

Another consideration favoring the claim is that, if the claim were denied in this dispute, there would be no logical limits to the authority of the carrier to require other clerks to perform claimant's duties, even while he is **on** his regular shift. While this is not a dispute on scope or exclusivity of work, inevitably disputes would arise concerning respective rights of **employees** to work on particular **assignments** if the carrier were free to have other **employees** do required work not only on rest days and off-assigned hours, but on holidays, vacations, etc. No rule should be interpreted to have this effect if there is an arguable basis to conclude that the opposite result is justified.

Under all the circumstances, in an area of considerable uncertainty as to priorities and respective rights of the parties to work under the unassigned day rule, the better view under the facts in this dispute is that the unassigned day rule was intended to require the carrier to call the regular **employee** to do work which **the** carrier has **determined to be required on** a holiday. **As collec-** ----
tive bargaining unit work was performed, it may be accepted **that the** carrier did determine work was required on a holiday and **that the** work was **performed** on claimant's shift and that day was an unassigned day, therefore, the claimant, as the regular **employee** of **that** job; should have been called for overtime, as claimed.

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 violated.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulus*
Executive Secretary

Dated at Chicago, Illinois, this **28th** day of April **1978**.

