

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23031
Docket Number CL-22925

Rodney E. Dennis, Referee

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-8766) that:

- 1) Carrier violated the Clerks' Rules Agreement at Winona, Minnesota on May 30 and July 4, 1977 when it failed to call employe H. Goeldner to perform the work of his position on these holidays.
- 2) Carrier shall now be required to compensate employe H. Goeldner an additional eight (8) hours at the time and one-half rate of Ticket Clerk Position No. 45910 for each of the dates listed in Item (1)."

OPINION OF BOARD: H. Goeldner, claimant in this case, was regularly assigned to the relief clerk position at Winona, Minnesota. His scheduled work days were Saturday through Wednesday, with Thursday and Friday as rest days. He was scheduled to work the ticket clerk position 45910 on May 30 and July 4, 1977.

On these two legal holidays, however, claimant's position was blanked. While claimant's position was blanked, the operator on duty on both days sold tickets.

Claimant alleges that ticket sales are a part of his responsibility as relief clerk and that as such, he should have been allowed to work the two holidays in question. Claimant subsequently filed a claim for eight (8) hours at time and one-half for May 30th and July 4th. Carrier denied the claim at all levels of the grievance procedure. The Organization has therefore pressed its claims to the Board for final resolution.

The Organization alleges that by allowing the operator to sell tickets when claimant's position was blanked. Carrier violated the controlling agreement, specifically, Rule 32 (F) Overtime, Decision No. 2 of the 40-hour Week Committee and Rule 29 - Work on Unassigned Days. Carrier refutes these allegations and argues that the first trick operator who sold tickets while claimant's position was blanked sold tickets on numerous occasions while claimant and others were working the clerk

position on a regular basis. Carrier argues that in order for the Organization to have a legitimate claim in this instance, it must prove that claimant had an exclusive right to perform all ticket selling. Given the practice at this location, that exclusivity cannot be demonstrated. The first trick operator sells tickets on an as-needed basis at all times, just as do the second and third trick operators.

The Organization argues that it does not have to prove exclusivity in the work involved. It need only prove that, had claimant been employed on the two holidays in question, selling tickets was a normal part of his regular duties.

While presenting a rather clear and concise issue, the case is the most recent in an exceedingly long line of cases decided by this Board by many different referees on the same or similar issues: work on unassigned days.

There has also been a long line of such cases on this property with this Organization. Over the years, this Board has been presented with many different arguments to support the respective positions of the parties. It has also reviewed these many cases with many different referees in attendance. Not surprisingly, this Board has rendered decisions on the issue that may appear to be conflicting. These apparently conflicting opinions, however, each had some basis for justification.

In those cases where the Board has split on a decision, reasoned dissents were written and made a part of the official award. These situations have been few in number, when one considers the large number of cases and referees over the years that have been involved with the issue. While this Board has not been successful in maintaining a consistent line of decisions on every issue presented to it, it has been mindful of the need to project a quality of decision making and a degree of predictability on all issues to the parties.

The success of arbitration as a dispute resolution forum in any industry is based on accepted principles of contract construction, intelligent interpretation of the facts presented, and fairness in the decisions rendered. If the parties have confidence in the system, it will work. Lack of confidence by either side will generally serve to frustrate the system and complicate the parties' day-to-day relationship.

The parties that use arbitration must also **be** able to predict what **may** happen to their case if it goes to arbitration. There must be some degree of consistency in decisions **in order for** this predictability to be present. This **Board is mindful** of the need for consistency **and** predictability and has diligently worked over the **years** to maintain it in the decisions it has rendered. **In all effort** to **maintain** a degree of consistency, the **Board** has developed **and** utilized **many** principles that are applied **in** every **case**. While the letter of some of our decisions **may** not **appear to the uninitiated** to be consistent with our previous decisions, the principles that we have used to arrive at these decisions are **generally** unanimously accepted by the members.

In arriving at a decision **in** the instant case, the **Board** has thoroughly reviewed the many cases cited by the parties on both sides of the issue. The issues **involved** here are the **same** that have **been** involved in many other cases **that** have come before this Board: Does the **Organization** have the burden **of** proving exclusivity in unassigned day cases? Which of the **employees** involved is the regular employee, as contemplated by contract?

The contract language in dispute **in** this case gives special status to the regular employee, the employee regularly assigned to a position.

Rule 32, Overtime; Decision **No. 2** and Rule **29** - Work on Unassigned Days all grant the regular employee the **extra** work, if it is required by Carrier.

In the instant **case**, **based** on the facts Presented in the record before us, it is difficult to conclude that claimant is not entitled to the **work in** question under all three of the cited rules. Claimant is the regular employee who **normally** would have been assigned to **work** the first trick on the day in question. Rule 32 grants overtime work on a holiday to the regularly assigned employee, if the holiday **falls** within the **employee's work** week. Claimant meets all of the **requirements** of Rule 32 essential to claim the work **in** question in this dispute.

The point that **must** be disposed of, however, that could stand **in** the way of a simple application to the case of Rule 32, as well as Rule 29 and Decision **No. 2** of the **40-hour Week Committee**, is the issue of **work which is not a part of any assignment**, or, stated another way, **the exclusivity argument**. The **Organization presented** a brief **in** this case that cited a **long list** of awards **dating** back twenty years that say that exclusivity is not an issue in unassigned day cases. The only issue is who is the regularly assigned **employee**?

Carrier has submitted previous awards in this instance that come down on the other side on the exclusivity issue. Suffice it to say, each of the awards **presented** contain a set of facts unique in itself. Frequently, the **Board** based its decision on the special facts contained in the record before it and not on the **cases** it had decided in the past. The instant case is no different.

The instant **case** presents a situation wherein an operator who normally works side-by-side with a ticket clerk and who, on occasion, as needed, assists the ticket clerk, was employed on two holidays as an operator. He **was** assigned, however, the ticket selling duties of the clerk while the clerk's position was **blanked**. This is not a situation that has arisen in **any** of the cases previously decided by this **Board**. The record of this case clearly establishes (**and** both sides agree and have so stated in the record) that the first trick operator assisted the ticket clerk when needed. It is **also** unrefuted that the operator may not, for extended periods of time (numerous days), be required to perform any of the clerk's duties. It is clear from this record that the operator in question here helped out the ticket clerk on a less than regular basis. It is difficult to conclude from the **facts of** this case that the operator could be considered the **regular** employee in this situation or that ticket selling, which is the disputed work in this instance, could be construed as a regular part of the operator's assignment to the degree that it would be legitimate for him to assume these duties on a **full-time** basis on a **day** when a clerk was not present to work.

The record does not indicate that the operator in question here performed ticket sales on **any** other basis than as **an** assist to the **regular** ticket clerk. He did not cover the work on rest days, on weekends, or on holidays, other than the two involved in this claim. In that regard, this case is distinguished from **all** others presented by Carrier in **support of** its position. In each of the cases supporting Carrier's position, the employee assigned the disputed work had done some or **all** of the work in question on a regular basis as a part of his assignment. In the instant case, the operator has only performed the work in question on a sporadic basis in order to help out or assist the ticket clerk. It is **extra work for** the operator, not a regular part of his duties. **One** would have to strain the rule of reason to conclude that selling tickets is a sufficient part of the first trick operator's assignment to support a ruling that the operator should be allowed to assume ticket sales for a holiday while the ticket clerk, who normally would **sell all** tickets, was blanked on the holiday. **This is** especially difficult in view of the protection granted to regular **employees in** the rules cited above.

As to the remedy requested by the Organization, we see no basis on which to support Carrier's accusation that to pay this claim would be in violation of the **agreement**. It is well settled that when **an employee has** been denied his contract rights, **thereby** losing income, a make-whole award is in order. He should be placed by a sustaining award **in** the same economic position that he **would** have been in **had** his rights not been violated. In the instant case, that is eight hours at time end a half for each holiday blanked.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and **all** the evidence, finds end holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved **in** this dispute are respectively Carrier end Employee 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this **28th day** of October 1980.