NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23532
THIRD DIVISION Docket Number CL-22633

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
[The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8607) that:

(1) Carrier violated the terms of the Agreement between the Parties when it failed and refused to use Block Operator-Clerk W. J. Busch, the senior available qualified employe to fill a vacancy at penalty rate on Sunday, March 7,1976, at WS Tower, Butler, Pennsylvania, and

(2) Carrier shall now compensate Claimant W. J. Busch eight (8) hours' pay at overtime rate for the date of March 7,1976.

OPINION OF BOARD: Block Operator-Clerk W. J. Busch was the regular incumbent of the 1st trick position at WS Tower Butler, Pennsylvania; hours of assignment 7:00 AM - 3:00 PM, Monday to Friday, with regular rest days. Saturday and Sunday. On Sunday March 7,1976 (Claimant's rest day) a vacancy arose on the second shift position at WS Tower which could not be filled at straight time rates. Consonant with the registration requirements of Rule 26 *infra*, Claimant had placed his name on the list of employes desiring to work that position on an overtime basis. It is not disputed that on March 7, 1977 Claimant was the senior qualified regularly assigned employe in WS Tower who was on the record as desiring such work. However, Carrier elected not to use Claimant because if he had been called and had worked the vacancy on the second shift on Sunday, March 7 he would have "outlawed" under the Hours of Service Law at 8:00 AM on Monday, March 8 after only one (1) hour of service on his regular scheduled first trick assignment because the Hours of Service Law, applicable to Claimant on those dates forbids Carrier from using him for more than nine (9) hours service in any twenty-four (24) hour period. Instead Carrier called and used an employe holding furlough status who had performed 40-hours of work in his work week and paid that employe at the time and one-half rate to cover the second shift vacancy in WS Tower on Sunday, March 7, 1976. Thereafter, Claimant worked his regular first trick assignment on Monday, March 8, 1976 and filed the present claim seeking eight (8) hours at the overtime rate as damages for the alleged violation of his rights under Rule 26.

The respective position of the Organization and Carrier were set forth in the correspondence on the property as follows:

"ATTENTION - Mr. J. P. Arledge, Ass't Dir. Labor Relations

Dear Sir:

Please consider this as an appeal from the decision of Division Manager C. E. Heck in the claim on behalf of Mr. W. J. Busch, Butler, Pa., for 8 hours' pay at overtime rate for March 7, 1976.

The facts in this case are that Claimant Busch holds regular position of Operator at WS Tower, Butler, Pa., hours of assignment -7 AM to 3 PM, rest days-Saturdays and Sundays. Claimant is properly registered in accordance with the provisions of Rule 26 of Clerks' Agreement for 2nd trick position (3 PM to 11 PM) at WS Tower and such position was vacant on Sunday, March 7, 1976. Instead of utilizing Claimant Busch on the vacant position, furloughed employee L. T. Morrow was called and used on the 6th day of his work-week at overtime rate of pay.

In view of this violation of Rule 26 of the Clerks' Agreement, It is respectfully requested that the claim be paid.

Please list this case for discussion during our next regular conference.

Very truly yours,

EJR/fw /s/ E. J. Reynolds"

"Mr. E. J. Reynolds, General Chairman
Bro. of Railway, Airline & Steamship Clerks,
Freight Handlers, Express & Station Employees
I.206 W. Mt. Royal Ave., Balto., Md. 21217

July 29, 1977
File: 2-CG-11131

Deer Sir:

Referring to our conference on March 23, 1977 concerning claim of Mr. W. J. Busch, Butler, Pennsylvania, for eight (8) hours' pay at overtime rate on March 7, 1976, your file J-4992.

"The claimant held regular assignment as First Trick Operator, 7:00 a.m. to 3:00 p.m., Monday through Friday, at WS Tower, Butler, Pennsylvania. He was properly registered under Rule 26 to fill overtime vacancies on the second trick position at WS Tower. On Sunday, March 7, 1976, a vacancy developed on the second trick at WS Tower which could not be filled at the straight time rate. A furloughed employee, junior to the claimant, was called and used on overtime to fill the vacancy.

The foregoing record shows that had the claimant been used on Sunday, March 7, 1976 to fill the second trick vacancy at WS Tower, he could not have, under the Hours of Service Law, been used on his own first trick assignment Monday, March 8, 1976. In view of the provisions of Rule 26(7), there is no basis for the claim and accordingly it is declined.

Very truly yours,

/s/ B. C. Massie"

The controlling Agreement language in Rule 26 reads as follows:

"RULE 26

Filling Vacancies - Penalty Rate.

(a) When a vacancy is to be filled under the provisions of Rule 24-3, it will be filled at a penalty rate by calling the senior available qualified regularly assigned employee in the office where the vacancy occurs who is on record as desiring such work. Such employees will be called and used in seniority order as provided below:

(1) All supervisors shall maintain for each position, a list of employees desiring to work that position on an overtime basis.

(2) An employee may, at any time, place his name on such list but will not be considered available for call for the vacancy starting less than twenty-four (24) hours after he has placed his name on the list.

(3) An employee may remove his name from the list at any time prior to being called to fill the vacancy.

"(4) An employee may not refuse to accept a call while his name is on the list.

(5) An employee will not be required to remain at home awaiting call and failure of Carrier to reach him will not be considered to be a refusal.

(6) The lists will be open to inspection by any authorized representative upon request.

(7) An employee will not be called for a vacancy when such work conflicts with the hours of his regular assignment.

(8) An employee will not be called to fill a vacancy if such call will result in the employee working more than sixteen (16) consecutive hours or starting three (3) tours of duty within a twenty-four (24) hour period.

(9) An employee who fails to work his regular assignment due to sickness, vacation or being granted permission to lay off will not be allowed to work a vacancy at overtime rate within a period of twenty-four (24) hours after starting time of his regular assignment.

(10) An extra employee may place his name on the overtime list after he has worked on five (5) days during his work week. His name will be automatically removed from the list immediately after 11:59 p.m., Sunday."

It is obvious that Claimant could have physically worked both the second shift vacancy on March 7 and his own regular assignment on March 8 ie, the hours did not overlap and he would not have been required to cover two positions at one and the same time. The Organization insists that this is sufficient to avoid the exception language in Rule 26(7) and therefore Claimant's entitlement to be called under 26(a) was not obviated by Rule 26(7) ie there was no conflict between his working the second shift hours and the hours of his regular assignment. We cannot agree that the language in Rule 26(7) clearly and unambiguously applies only to physical time conflicts with the hours of the regular assignment. Rule 26(7) does not limit conflicts solely to physical conflicts. We would be adding words to the Agreement to do so here. Those considerations compels a conclusion that the phrase "when such work conflicts with the hours of his regular assignment" does not mean only physical time overlaps but also the unavoidable or inevitable conflicts which would have occurred as a result of the Hours of Service Law on the hours of Claimant's regular assignment if he had been called and worked the vacancy. We are persuaded that such an Interpretation of the specific language of the Agreement before us is more reasonable than that sought by the Organization, therefore, we shall deny this claim.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1982.