

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23540
Docket Number CL23254

John J. Mikrut, Jr., Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Express and station Employees
{ Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8927) that:

1. Carrier violated the effective Clerks' Agreement when it failed to use the regular employer, for work on a day which was not apart of any assignment to work overtime, using instead, an employee not covered by the scope of the Agreement;

2. Carrier shall now compensate Chief Clerks W. D. Painter, D. L. Riley and A. E. Grinnell for three hours' pay each at the time and one-half rate of their respective positions for September 30, 1978.

OPINION OF BOARD: The facts which are critical to the resolution of this latter are generally undisputed.

Claimants, three (3) Chief clerk3 in Carrier's Main Street Office Building in Greenville, Pennsylvania, contend that Carrier violated Rule 1(a) and (d) and Rule 4(b) of the Parties' Agreement by failing to assign said employees to perform overtime work on Saturday, September 30, 1978, but instead assigned such work ("prepare and mail out time sheets")1. to be performed by an employee who is otherwise exempted from coverage of the Agreement. There is no dispute that the work which is contested was clerical in nature and thus, under normal conditions, would have been performed by Claimants. Nor is there any dispute that the employee who performed the work was a fully-exempted employee and that he did, in fact, perform same.

1. Carrier describes this activity thusly: "... a management employee came to the office on Saturday, September 30, and spent less than one hour mailing the preprinted time returns to the foremen of the various outside work forces at outlying locations on the railroad. This was necessary so the foremen would have the time returns in their possession on Monday, October 2, 1978, the first work day of their work week, so there would be no interruption in the orderly flow of information for payroll purposes, thus eliminating a possible delay in the preparation of paychecks for these employees" (Carrier's Ex Parte Submission, pp. 3-4).

The record further shows that on September 26, 27, 28 and 29, 1978, the parties were engaged in a work stoppage in connection with a major dispute involving Organization and the Norfolk and Western Railway which, among other things, caused Carrier's Greenville, Pennsylvania offices to be picketed by various of Organization's members. On Thursday, September 28, 1978, the U. S. District Court for the Western District of Pennsylvania, in Civil Action No. 78-1089A, issued a Temporary Restraining Order enjoining Organization's actions regarding the work stoppage and said Order was made effective "... from and after 10:45 PM" of that same day. According to Organization, however, "(O)n this particular Carrier, all picketing and strike activity ceased on September 29, 1978, prior to 8:45 PM" (Organization Submission, p.3). Insofar as this instant dispute is concerned, however, Claimants were not recalled to perform clerical duties as an overtime assignment on Saturday, September 30, 1978, but instead were recalled to perform their regular assignment beginning on Monday, October 2, 1978.

Organization's basic position in this dispute is that Claimants were improperly denied the opportunity to work overtime on Saturday, September 30, 1978, because, according to Organization, prior Board rulings regarding the interpretation of Agreement Rule 1(a) and (b) and Rule 4(b) have determined that "... when work is required on the rest day of a five day position the Carrier is obligated to offer such work to the employee who perform it five days per week" (Third Division Awards 6689, 14379, 14703 and 16672). Organization further contends that, contrary to Carrier's assertion, Claimants are not required to advise Carrier of their availability to perform an overtime assignment, and that "... Carrier may not assume 'unavailability'" (Third Division Awards 22178 and 22446).

In addition to the foregoing, Organization also contends that Carrier, by its actions in this dispute, is attempting to punish Claimants for what Carrier believes was a violation of the Court's Temporary Restraining Order. According to Organization, any such determination, however, should properly be left to the Court itself to decide; and, moreover, any such consideration is irrelevant at this point because the Court Order directed that the "status quo" which existed prior to the work stoppage was to be maintained. Still yet further on this same point Organization also maintains that an agreement dated February 9, 1979, between Mr. Fred J. Kroll, Organization's International President, and Mr. Charles I. Hopkins, Jr., Chairman of the National Railway Conference Board, was to have dismissed "... without prejudice ... all claims and counter claims alleged in such litigation".

In response to Carrier's assertions, which will be discussed herein-after, Organization, in reference to a second letter of agreement between Mr. Kroll and Mr. Hopkins dated October 6, 1978, further contends that said agreement does not now prevent Organization from having this matter heard and decided by this Board because: (1) said Kroll/Hopkins agreement cannot supersede the Rules contained in the parties' basic Collective Bargaining Agreement;

(2) the intent of said agreement was to have employees return to work immediately after the cessation of the work stoppage, or as soon as possible thereafter, and the date of October 2, 1978 was specified therein so as to establish an outside time limit on this action; (3) the agreement itself was signed on October 6, 1978, and surely could not have been meant to apply to any situation which might have occurred prior thereto; and (4) if Carrier seriously believed that said agreement was to have served as a waiver to any prior agreement then Carrier would have appealed the instant dispute through the appropriate procedure as prodded therein.

As its final major area of argumentation Organization maintains that Carrier's position as presented herein is procedurally defective and therefore should be dismissed because: (1) Carrier has failed to file a rebuttal brief and, "... thus, they have forfeited their right to challenge or refute any evidence and argument submitted by the Organization" (Third Division Awards 14891, 15018, 16517, 16705 and 17062); and (2) at least two significant arguments which were included in Carrier's Submission were not presented to Organization while the claim was handled on the property and, as such, it is "new and cannot now be considered ..." by the Board.

Carrier's position in this dispute is equally as complex as that which has been proffered by Organization.

From the outset Carrier argues that "... this claim resulted from an emergency situation which was created by the work stoppage instituted by BRAC when BRAC struck... commencing Tuesday, September 26, 1978". Accordingly, Carrier contends that: (1) supervision, in this incident, acted in a prudent and good faith manner in order to meet the emergency situation which was caused by the employees; (2) any emergency situation which is created by the employees cannot be used later as a basis for supporting a time claim which is then made by the employees themselves; and (3) greater latitude is accorded to Carrier in cases involving an emergency situation (Third Division Award 9394).

The second significant area of argumentation proffered by Carrier is that "... Claimants registered their non-availability for a call for service by not returning to work in a timely manner, in accordance with the terms of (the Temporary Restraining Order issued by the U. S. District Court, effective at 10:45 PM on Thursday, September 28, 1978, enjoining them from engaging in, promoting, instigating or authorizing any sort of strike action against the Carrier". In support of this particular contention Carrier asserts that, despite Organization's proper receipt of the Court Order and despite the explicit terms thereof, "... officers of the BRAC instructed their employee members to ignore the Temporary Restraining Order and the employees dutifully followed these instructions, continuing their picketing and work stoppage, including the Main Street office building in Greenville during regular office hours on Friday, September 29". Because

of the above and further bemuse of the "... fact that *not one of the employees involved in the work stoppage notified the office supervisor in the Maintenance of Way Department office that the work stoppage was over or that the employees were available for work ...*", Carrier argues that "... Organization has failed to prove that the employees made themselves available for work following the work stoppage and that by failing to return to work on Friday, September 29 ... and by failing to notify their supervisor of their availability, these employees registered their non-availability for a call for service on Saturday." In concluding the above, Carrier maintains that "(T)his Board has held many times that the burden of proof rests upon the employee to make his availability known" (Third Division Award 16584).

As Its third and fourth areas of argumentation, which are based somewhat upon procedural considerations, Carrier maintains that: (1) Claimants had no contractual right to the disputed assignment because "... Claimants were returned to work on Monday, October 2, 1978, in accordance with Item 2 of the Letter Agreement between National Railway Labor Conference Chairman Charles I. Hopkins and BRAC International President Fred J. Kroll dated October 6, 1978"; and (2) the instant claim is not properly before this Board because Item 4 of that said Letter Agreement between Mr. Hopkins and Mr. Kroll provided that questions such as that which is involved in the instant dispute "... should be referred promptly to Messrs. Hopkins and Kroll for resolution, and (thus) the Organization has not submitted the question in this case to the proper forum."

Before delving into the merits portion of this award there are several procedural considerations which must be addressed. These are Organization's contentions that Carrier in its Submission has included arguments which were not presented on the property; and that Carrier's failure to file a rebuttal brief thus serves as a forfeit of Carrier's "right to challenge or refute any evidence and argument submitted by the Organization." Also to be addressed are Carrier's contentions regarding the applicability of the Hopkins/Kroll Letter Agreement of October 6, 1978, as it relates to the October 2 reassignment date as well as the appeal procedure specified therein.

As to Organization's contentions, the Board is of the opinion that much of the argumentation and evidence which has been submitted by Carrier in support of its respective position apparently was not presented to Organization when the claim was handled on the property. For obvious reasons, therefore, these arguments and evidence must now be rejected by this Board.

Regarding the matter of Carrier's failure to file a rebuttal brief, in view of the many issues which are involved in the instant dispute, the Board is averse to disqualify Carrier's entire case because of a procedural

deficiency. More importantly, however, the basis of Organization's position regarding this aspect of the dispute raises considerable doubts on the part of the Board particularly in light of the fact that several of the oases which Organization cites as being precedential do not appear to be on point with the specifics of the instant dispute itself (Le. --- in Award 14891 claim was Sustained because Carrier failed to file either an initial submission or a response to Organization's submission; in Award 16705 Carrier's claim was sustained because respondent failed to file either an initial submission or a response to Carrier's submission; in Award 15018 the procedural issue involved was the "untimely" submission which was dismissed and the matter was decided on the merits; in Award 16517 the procedural defect was Carrier's alleged failure to raise a particular defense on the property, not that Carrier had failed to file a Rebuttal Brief; and in Award 17062 the procedural issue, again, was Claimant's alleged failure to disclose certain information when the dispute was first handled on the property.)

Turning next to Carrier's procedural contentions, regarding the Hopkins/Kroll Agreement of October 6, 1978, the Board, in similar fashion, finds that these arguments cannot be supported. The rationale for this determination is as follows: (1) Item #2 of said agreement, though somewhat ambiguous in its construction, can reasonably be interpreted to mean that "BRAC represented employees who did not work because of the striking and picketing... may return to work on Monday, October 2, or as soon thereafter (after the strike) as the position they hold is scheduled to work" (Emphasis added by Board), (2) Organization's contention that other BRAC represented employees worked on their regularly scheduled shifts and that same employee worked on overtime assignments before October 2, 1978, has not been refuted by Carrier and this fact demonstrates that Carrier has not applied its policy consistently; and (3) the Hopkins/Kroll Letter Agreement merely provides that "...any dispute ... concerning the application of this understanding... shall be referred promptly to the Resident of BRAC and the Chairman of the National Railway Labor Conference for resolution," and thus does not prevent either party from invoking the regular grievance procedure for those disputes, such as that involved herein, which are alleged violations of both the Letter Agreement and the parties' Basic Agreement as well. Regarding this latter point, had the Hopkins/Roll Letter Agreement intended to supersede the parties' Basic Agreement then the drafters of said document should have articulated that intent clearly and specifically.

After having resolved the several procedural questions which have been raised by the parties, a resolution of the merits portion of the dispute appears to be somewhat anticlimactic since the record clearly supports Organization's position in this matter. In arriving at the above posited conclusion the Board has found the following factors to be determinative: (1) Carrier apparently recalled other BRAC represented employees to work overtime in advance of their regularly assigned shifts on or before October 2, 1978; (2) all picketing and related strike activity had ceased prior to 8:45 PM on September 29, 1978, thus leaving approximately eleven hours in which Carrier could have contacted Claimants regarding the overtime assignment; (3) Carrier is obligated to make a reasonable effort in attempting

to contact an employee regarding the availability of an overtime assignment (Third Division Award 17062); (4) in the instant dispute Carrier admittedly made no effort whatsoever to contact Claimant's as to their availability; and (5) Carrier may not assume an employee's "unavailability" in such assignments (Third Division Awards 22178 and 22446).

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.

A W A R D

claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

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

