NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24601

THIRD DIVISION

Docket Number CL-24866

Robert Silagi, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

(Chicago Short Line Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9669) that:

1. Carrier violated the effective Clerks' Agreement when, commencing on April 17, 1981, it failed to afford the incumbent of Position No. 3, Yard Clerks. rest days of Saturday and Sunday without justification;

2. Carrier shall now be required to compensate Clerk A. Bone and/or his successor or successors in interest; namely, any other employe or employes who have stood in the status of Claimant as the occupant of Position No. 3, eight (8) hours' pay at the pro rata rate of Position No. 3 commencing with April 17, 1981, and for each and every Friday thereafter that a like violation exists; and four (4) hours' pay at the pro rata rate commencing with April 19, 1981, and for each Sunday thereafter that a like violation exists.

OPINION OF BOARD: This case involves the interpretation of Rule 37, Work Week, and in particular Rule 37/c) which states:

"Seven day Positions. On positions which have been filled seven (7) days per week, any two (2) consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

The facts which gave rise to the dispute are not contested. As its name implies Carrier is a small railroad which employs but two Yard Clerks, one in Carrier's South Chicago Station, designated Position 3, and the other in Carrier's South Deering Station, designated Position 4. Both are bulletined as seven-day positions. Position 3 has assigned hours from 7:00 A.M. to 3:30 P.M. with rest days of Friday and Saturday. Position 4 was assigned hours from 8:30 A.M. to 5:00 P.M. with rest days of Sunday and Monday. Rest day relief for these two positions was provided by a furloughed employe. Because of the cessation of business at the South Deering Station by its lone customer, Carrier abolished Position 4 effective April 9, 1981. About two months later, when the customer resumed shipments, Carrier reinstated Position 4. The incumbent of Position 4 returned to his former assignment at the same location with the same hours, days of rest and duties. Five days before the incumbent of Position 4 resumed his duties the Organization filed the instant claim.

The Organization contends that the Carrier was obliged to change the rest days of Position 3 when by abolishing Position 4 only two rest days were to be protected by the furloughed employe. Failure to do so, it is alleged, violated Rule 37. In support of its position the Organization cites the report of Emergency Board No. 66, dated December 17, 1948, the salient parts of which are :

> "Consistent with their operational requirements, the Carriers should allow the employees two consecutive days off in seven and so far as practicable these days should be Saturdays and Sundays.'
>
> "... the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturdays and Sundays."

The Organization also cites Third Division Award 6384 (Kelliher) which dealt with the language contained in Rule 37(c), which said, in pertinent part:

> "Clearly this is not a requirement that the two consecutive rest days must be on Saturday and Sunday. If the parties had intended a mandatory provision they would not have used the all inclusive term 'any' nor the permissive expression 'may'. The use of the word 'presumption' does, however, show #at the parties regarded Saturday and Sunday to be the proper rest days unless some other condition existed.
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> "Because of the 'presumption in favor of Saturday and Sunday' set forth in [the Rule] the Carrier has the burden of showing that it was not 'practicable' to have Saturday and Sunday as rest days for this position. This Board cannot find that the terms 'practicable' and 'possible' are synonymous. There are many situations where what is 'possible' is not 'practicable'.'

See also Third Division Award 22242 (Sickles) to the same effect.

The basic issue is whether some other condition existed which made it impracticable for Carrier to change the rest days of Position 3. The Organization's argument is that Carrier utilized a furloughed employe to protect Friday as a day of rest for Position 3 and the same furloughed employe was just as available to protect Sunday as he was to protect Friday.

Carrier asserts various defenses to establish impracticability.

Carrier claims that it did not abolish Position 3 therefore no change of rest days was necessary. Carrier also asserts that for 5 years past Position 3 had the same Friday and Saturday combination without objection from the Organization. Neither of these defenses address the issue of practicability. While a defense of past practice cannot be ignored, it is not determinative in this situation. Carrier, however, does raise a substantial defense dealing with practicability based upon the following facts:

Carrier had an afternoon General Yard and Transfer Crew at the South Chicago Stat-ion during the period in question. Simultaneously with the abolishment of Position 4 Carrier established Yard Clerk Position 9 at South Chicago, hours 3:00 P.M. to 11:30 P.M., days of rest, Saturday and Sunday. The creation of Position 9 was intended to prevent the furlough of the incumbent of Position 4 and to alleviate some of the clerical burden on Position 3 as well as to ensure that the afternoon clerical work would be kept up to date. The incumbent of Position 4 took over Position 9 and, as before, the furloughed employe protected all days of rest. When Position 4 was abolished and Position 9 created, it was anticipated that the customer at South Leering would resume operations in 3 weeks. As it happened it took about 2 months before shipments resumed to the extent that warranted the re-establishment of Position 4. When that did occur Position 9 was abolished and the incumbent once more took up his duties in Position 4.

Carrier contends that practicability is' to be measured by its operational requirements as of April 1981 when it abolished Position 4 and established Position 9. Prior to said date there were four vacancies caused by days of rest, one each on Friday, Saturday, Sunday and Monday, all protected by the same furloughed employe. If Carrier acquiesced in the Organization's demand, there would have been two vacancies to fill on Saturday and two on Sunday. Hours worked in excess of 8 on either of these two days would have meant overtime pay to the incumbent Yard Clerk or the furloughed employe. Such a schedule, argues the Carrier, would have resulted in wasteful payment of avoidable overtime. The Organization argues that this scenario is hypothetical only and therefore cannot be considered. The Organization further argues that Carrier was free to change rest days back if at the end of three weeks its operations so required.

A review of the record convinces us that Carrier's refusal to change the rest days was made in good faith. The test, however, concerns operational requirements as impacted by a proposed change. When measured by that standard this Board believes that a potential problem is one to be considered and acted upon as well as an actual problem. A prudent man invests in fire prevention devices even though he never experienced such a calamity and hopes it will never happen; moreover he purchases fire insurance to ease the blow should disaster strike. Similarly a Carrier is justified in fashioning a work schedule so as to minimize avoidable overtime at premium rates. This is not to say that every hypothetical problem that could be dreamed up is excuse for not granting rest days of Saturday and Sunday. This Award is intended to state only that under the special conditions herein, it was not practicable to grant such a request. In short, the Carrier successfully rebutted the presumption contained in Rule 37(a) and therefore the claim is denied.

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 Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That #is 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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of December 1983.