Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27569
THIRD DIVISION Docket No. CL-27282
88-3-86-3-380

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(The Atchison, Topeka & Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10106) that:

1. Carrier violated the intent and provisions of the current Clerks' Agreement at Pueblo, Colorado by improperly using Weicker Transfer Company to adjust and reband six carloads of poles, and

2. Carrier shall now pay Mr. G. Fernandez four hours thirty minutes pay, time and one-half Claim Clerk rate for March 30, 1985, and

3. Upon expiration of 60 days from the original date of submission, Carrier shall also pay 15% per annum interest on the amounts claimed."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On Saturday, March 30, 1985, a Burlington Northern train crew bad ordered six flat cars loaded with poles at the Pueblo, Colorado, Yard which is manned only by Carrier employees. Carrier arranged for the adjusting and rebanding to be done by a Weicker Transfer Company employee who apparently used Carrier owned equipment.

On May 20, 1985, the Organization presented its Claim, stating:

"Mr. G. Fernandez, with a seniority date of July 29, 1947, is the regularly assigned occupant of Claim Clerk position No. 6076 which is regularly assigned

7:00 A.M. to 3:00 P.M. daily with assigned rest days of Saturday and Sunday. Claimant Fernandez regularly and normally adjusts and re-bands carloads such as those involved in the instant case during his regular working hours. Weicker Transfer Company was called to adjust and reband the six carloads at approximately 8:00 P.M. Saturday, March 30, 1985 instead of Mr. Fernandez.

POSITION OF EMPLOYES:

It is the position of the employes that Carrier violated the intent and provisions of the current Clerks' Agreement by failing and/or refusing to properly call Mr. G. Fernandez to perform overtime work of adjusting and re-banding six carloads of poles. Weicker Transfer Company was called to perform this service at approximately 8:00 P.M., Saturday, March 30, 1985. Weicker employes worked four hours and thirty minutes adjusting and rebanding TTX 476340 - TTX 157321 - TTX 476951 - TTX 100970 - JTTX 907700 - JTTX 501799.

Claimant Fernandez was at home and available, but Carrier chose to call Weicker Transfer Company to perform the work that Claimant Fernandez should have been called to perform at 8:00 P.M., March 30, 1985.

While we rely upon the entire agreement as support for this claim, your attention is specifically directed to Rules, 1, 2, 4, 5, 6, 11, 32 and 59."

Pertinent portions of the Rules cited as relied upon by the Organization include the following:

"RULE 1--SCOPE

1-A. These rules shall govern the hours, compensation, and working conditions of all employes engaged in the work of the craft or class of Clerical, Office, Station, Storehouse, Tower and Telegraph Service Employes as such craft is, or may be, defined by the National Mediation Board. Officers or employes not covered by this Agreement shall not be permitted to perform any work or function belonging to the craft or class here represented which is not directly and immediately linked to and in integral part of their regular duties, except by agreement between the parties signatory hereto.

1-B. Positions outlined below are generally representative of those within the craft or class:

Clerical workers and/or machine operators, station agents, manager-wire chiefs, wire chiefs, assistant wire chiefs, student wire chiefs, communication traffic controllers, towermen, levermen, block operators, car distributors, train order clerks, drawbridgetenders and boat dispatchers.

Other office and station employes such as assorters, office boys, messengers, station helpers, baggage and parcel room employes, train and engine crew callers, switchboard operators and oerators (sic) of certain office or station appliances.

Elevator operators, janitors, station, platform, warehouse, transfer, storeroom, stock room material handler or truckers, and other similarly employes."

* * *

2-E. Positions or work within Rule 1-SCOPE of this Agreement belong to the employes covered thereby and nothing in this Agreement shall be construed to permit the removal of such positions or work from the application of the rules of the agreement.

2-F. When a position covered by this Agreement is abolished, the work assigned to same which remains to be performed will be reassigned to other positions covered by this Agreement, unless such reassignment of work would infringe upon the rights of other employes."

* * *

"Work on Days Not Part of Any Assignment

32-E. Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by the senior qualified and available off-in-force-reduction employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe.

"32-F. Service rendered by employes on their assigned rest days shall be paid for under Rule 32-I, unless relieving an employe assigned to work on such day, in which case they will be paid the same as such assigned employe would be paid, subject to the provisions of Rule 43, unless the employes working such day shall have rendered service on five previous days in his work week, in which event he shall be paid at the rate of time and one-half."

"Calls

32-I. For continous service after regular working hours, employes will be paid time and one-half on the actual minute basis. Employes notified or called to perform work not continuous with the regular work period will be allowed a minimum of three hours for two hours work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis."

On June 25, 1985, the Superintendent declined the Claim. On June 29, 1985, the Organization notified the Superintendent of their rejection of his decision because:

"The fact still remains that Weicker Transfer Company was used to perform work normally performed by Mr. Fernandez within his regular assignment."

By letter of August 12, 1985, the Organization asserted:

"Claimant G. Fernandez, with a seniority date of July 29, 1947, on the Colorado Division Station Department Seniority District, is the regular assigned occupant of Claim Clerk Position No. 6067, at Pueblo, Colorado which is assigned to work 7:00 a.m. to 3:00 p.m. Monday through Friday with rest days of Saturday and Sunday.

On Saturday, March 30, 1985, at 8:00 p.m., Carrier determined there was a need to adjust and re-band TTX 476340, 157321, 476951, 100970, JTTX 907700 and 501799, six carloads of poles; however, instead of properly calling Claimant Fernandez who normally performs the work involved, Carrier improperly required and/or permitted Weicker Transfer Company to perform the schedule work here involved.

Claimant Fernandez was available and qualified to perform the service here involved but was denied the right or opportunity to do so.

* * *

While we reply upon the entire Agreement as support for our claim, your attention is specifically directed to Rules 1, 2, 4, 5, 6, 8, 11, 32, 47, and 59."

On September 30, 1985, the Carrier responded that no outside contractor performed any work reserved exclusively to clerks and as the Scope Rule is general and separate from Rule 2, exclusivity must be proved. The Carrier further contended the rebanding was for the benefit of the shipper and done at its expense and that no proof was offered that the Claimant was available.

Carrier has submitted lists alleging numerous occasions on which Weicker employees were used to perform similar work. It is unclear whether this was presented to the Organization during handling on the property but the Organization admits previous use of Weicker and asserts that in such instances Claimant worked along with the Weicker people.

This was the posture of the case as it reached this Board.

Prior Third Division Awards dealing with Rule 1 and 2 and on this property have held Rule 2-E and 2-F do not eliminate the need for a showing of exclusivity when work assignments are challenged. See Third Division Awards 25695 and 25571.

We do not disagree with those Awards. Nevertheless numerous Third Division Awards have held the exclusivity doctrine does not apply in Work on Unassigned Day rules situations. As was held in Third Division Award 19267:

> "The Carrier contends the Organization did not prove that Car Distributors have the exclusive right, by custom and practice, to the disputed work. We would respond to that by saying that Rule 25(j), the Work on Unassigned Day Rule, is specific and prevails over any general rule, including the Scope Rule (See Award 18245)."

In Third Division Award 19439 the Board stated:

> "The issue of work on unassigned days has been before this Division on numerous occasions before. See for example, Awards 12957, 18245, 18856 and 19039 upholding the regular incumbents right to the work on unassigned days without proving exclusivity of the involved work."

This Board has consistently refused to consider matters and arguments not raised on the property. The question is whether the doctrine enunicated in the Awards last cited are applicable given the facts and arguments raised on the property in this case.

We believe it is clear from the record that the Claim arose out of an alleged failure to call Claimant for work on his unassigned day. The original Claim stressed Claimant was on his rest day and was "home and available." Rule 32 was cited as one upon which the Organization relied. In its letter of August 12, 1985, the Organization reiterated that Claimant was on a rest day and "available and qualified to perform the service . . . but was denied the right or opportunity to do so." Rule 32 was again cited.

Thus this is not a situation in which new facts are attempted to be raised or new arguments made. The Claim's contention from its inception has been failure to call the employee on his unassigned day. It is true that cases holding that exclusivity is not a factor in Work on Unassigned Day situations were not cited on the property, but we do not believe that precludes us from a proper application of Board doctrine where, as here, the Rules and the facts have been extensively argued on the property. We are faced here with a proper application of Board principles. It is our responsibility to apply the legal principles which flow from the facts and arguments developed on the property. Dismissal of this Claim would require us to adopt Carrier's position that it is necessary to prove exclusivity in these situations. This we are unable to do if we are to follow precedent.

Carrier at no time denied that Claimant regularly does the type of work involved, but rather argued the question of exclusivity. As we believe the record establishes that the Claimant regularly does this work and as we do not agree the work was not for the benefit of Carrier we shall sustain the Claim. Claimant is to be paid at the rate described in Rule 32-F, but find no Agreement basis for the requirement of interest.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD 27569, DOCKET CL-27282
(Referee Cloney)

The Award is predicated upon a finding that the Organization based its claim upon two separate Agreement provisions: Rule 2 and Rule 32. The fact is, however, that a review of the on-property handling of the dispute shows that Rule 32 was not argued at all. To be sure it is mentioned in the Organization's initial Claim letter, along with Rules 1, 2, 4, 5, 6, 11, and 59 and mentioned again in the appeal letter, along with Rules 1, 2, 4, 5, 6, 8, 11, 47, and 59, but that is the extent to which it is even mentioned. The only Rule that was argued was Rule 2.

Indeed, the term "unassigned day rule" cannot even be found in the handling on the property. Rule 32 is entitled "Overtime and Calls," and consists of 14 different sections, most of which have nothing to do with each other. It is not until the Submission stage that we are informed which portions of Rule 32 are alleged to be involved.

The Carrier obviously never understood the Organization to be arguing Rule 32 as an independent basis for the Claim as it never even mentions the Rule in the handling of the Claim on the property or even in its Submission. The fact is that we have no idea what the Carrier's position would have been if a Rule 32 argument had been raised.

If Rule 32 was intended to be a basis for the Claim, the obvious place to have made such fact known was the Organization's appeal letter of August 12, 1985. It did not do so. Thus, in

its appeal letter, the Organization's General Chairman wrote, under the heading "Position of Employes":

> "While we rely upon the entire Agreement as support for our claim, your attention is specifically directed to Rules 1, 2, 4, 5, 6, 8, 11, 32, 47, and 59.
>
> "Rule 2-E of the Agreement reads:
>
> '* * *'
>
> "When Carrier agreed to this rule, to be effective January 1, 1980, it was enjoined, by agreement, from removing from clerical positions and allowing an employe not covered by the Agreement to perform that work."

It is noteworthy that the Majority while quoting from the letter at length, does so from the portion of the letter entitled "Statement of Facts," not from the portion headed "Position of Employes." The issue in this case was not <u>when</u> the alleged violation occurred, there was no dispute that the work was performed on the Claimant's unassigned day. The only contested issue was whether the use of the outside contractor violated the Agreement, and, with respect to this issue, the only <u>argument</u> made by the Organization was that the Carrier's action violated Rule 2.

In summary, the Majority decision is not based upon a consideration of the various arguments of the parties concerning the efficacy of Rule 32 as <u>neither</u> side set forth its position on the subject in its on the property handling of the dispute. Its precedent value, accordingly, is worthless.

M. W. FINGERHUT

M. C. LESNIK

J. E. YOST

R. E. HICKS

P. V. VARGA

LABOR MEMBER'S RESPONSE

TO

CARRIER'S DISSENT OF AWARD 27569 (DOCKET CL-27282)

The Minority Dissent continues to express it's desire to avoid the facts as set forth on the property and the governing rule of the Agreement. The applicable portion of Rule 32-E States:

> **"Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by the senior qualified and available off-in-force-reduction employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."**

The Majority Opinion correctly pointed out that no less than four (4) times while the Claim was on the property, the Organization advised the Carrier that the Claimant was entitled to do the work in dispute because he normally performed the work and he was on his rest days.

The Carrier now cries foul on the basis that they only partially defended their position. The Claim was very clear the Organization stated that the Carrier violated Rule 32-E. For the Minority to suggest that the Carrier did not understand the issues is to engage in self-delusion. We would refer them to the Carriers Letter of September 30, 1985, (Employes Exhibit "E" pg. 5) wherein the Asst. to Vice President of Labor Relations wrote the General Chairman. In that letter he made nine (9) different arguments why he felt the Claim should be denied. Arguments Eight (8) and Nine (9) pertain to the Claimant's availability and the fact that he was on his rest ays. The Carrier was clearly defending against Rule 32-E. Because

they then chose not to pursue that argument in their Submission before this Tribunal does not mean they did not understand the issues, but instead infers that they knew all to well that their arguments concerning Rule 32-E were incorrect. Rule 32-E was set forth on the property as one of the rules which was violated by the Carrier, to argue otherwise is contrary to the facts.

The Minority Opinion in it's effort to argue that Award 27569 is not precedential has simply decided to ignor the facts and that long line Awards which have stated that in disputes involving work on unassigned days it is not necessary to prove exclusivity. The Organization need only show that the regular incumbent normally does the work. (See Third Division Awards 12957, 18245, 18856, 19039, 19267, 19439, 20187, 20556, 26318 to name just a few).

Contrary to the Minority Dissent Award 27569 is precedential and should resolve this issue on the property henceforth. With a slight touch of "sour grapes" the Minority simply continues to ignore the factual record which sustained the Organization's position. We disagree with the Carrier Member's Dissent.

William R. Miller
Labor Member

October 17, 1988
Date

Award 27569 (Docket CL-27282)

CARRIER MEMBERS' REPLY
TO
LABOR MEMBER'S RESPONSE
TO
AWARD 27569, DOCKET CL-27282
(Referee Cloney)

The Organization's Response states that "(t)he Claim was very clear the Organization stated the Carrier violated Rule 32-E." We appreciate that statement because it very clearly delineates the opposing views with respect to the validity of this Award. Should another dispute arise in which the Organization claims a violation of "Rule 32E," the Organization will have every opportunity to demonstrate that the words "Rule 32-E" appeared, anywhere, in the handling of this dispute on the property. Being unable to do so, and there is no doubt that it will be unable to do so, the next referee will have no choice but to dismiss the precedential affect of this Award.

With respect to the "slight touch of 'sour grapes,'" we must confess that when we are confronted with an Award that decides a dispute on the basis of an issue that was never raised on the property, resulting in the Carrier never even having the opportunity to state its position with respect to such issue, it does tend to leave a sour taste in one's mouth.

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

P. V. VARGA

J. E. YOST