

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10282) that:

Claim No. 1:

(a) Carrier violated the provisions of the current Clerks' Agreement at Chicago, Illinois, on March 5, 1985, when it called Clerk Darlene Pudzimis to protect a short vacancy and refused to compensate her eight (8) hours' pay for the day, and

(b) Darlene Pudzimis shall now be compensated for eight (8) hours' pay at the daily rate \$99.30 for Position No. 6002, Steno to the Assistant to the Superintendent.

Claim No. 2:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on November 24, 1984, when G. P. Meriwether was not properly compensated for work performed, and

(b) G. P. Meriwether shall now be compensated for three (3) hours at the straight time rate in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6125.

Claim No. 3:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on February 14, 1985, when N. J. Harrison was not properly compensated for work performed, and

(b) N. J. Harrison shall now be compensated for one and one-half (1-1/2) hours at the straight time rate in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6025.

Claim No. 4:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on August 24, 1985, when K. J. Vestal was not properly compensated for work performed, and

(b) K. J. Vestal shall now be compensated for four (4) hours at the straight time rate in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6011.

Claim No. 5:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on January 28, 1986, when S. J. Taylor was not properly compensated for work performed, and

(b) S. J. Taylor shall now be compensated for one (1) hour and fifteen (15) minutes at the straight time rate in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6127.

Claim No. 6:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on February 17, 1986, when W. F. Sears was not properly compensated for work performed, and

(b) W. F. Sears shall now be compensated for one (1) hour and thirty (30) minutes at time and one-half (account holiday) in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6081.

Claim No. 7:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on February 7, 1986, when B. A. Mansell was not properly compensated for work performed, and

(b) B. A. Mansell shall now be compensated for one (1) hour at the straight time rate in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6112.

Claim No. 8:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on February 21, 1986, when W. F. Sears was not properly compensated for work performed, and

(b) W. F. Sears shall now be compensated for four (4) hours at the straight time rate in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6029.

Claim No. 9:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, on August 1, 1986, when J. E. Mitchell was not properly compensated for work performed, and

(b) J. E. Mitchell shall now be compensated for four (4) hours at the straight time rate in addition to any compensation Claimant may have received for this day, at the rate of Position No. 6067.

Claim No. 10:

(a) Carrier violated the rules of the current Clerks' Agreement at Topeka, Kansas on January 9, 1984, when it failed and/or refused to properly compensate Claimant G. H. Blush, Jr. for working Position No. 6136 on January 9, 1984, and

(b) G. H. Blush, Jr. shall now be compensated for eight (8) hours' pay at the rate of Position No. 6136 Train Order Clerk, Topeka, Kansas, for January 9, 1984, less the four (4) hours and thirty (30) minutes he was compensated for this day.

Claim No. 11:

(a) Carrier violated the provisions of the current Clerks' Agreement at El Paso, Texas, on December 13, 1986, when it failed and/or refused to properly compensate D. Gallardo for service performed on Car Clerk Position No. 6152, and

(b) D. Gallardo shall now be compensated three (3) hours and forty-five (45) minutes pay at the rate of Position No. 6152 for December 13, 1986, in addition to any other compensation he may have received for this date.

Claim No. 12:

(a) Carrier violated the provisions of the current Clerks' Agreement at Amarillo, Texas, on March 19, 1986, when it failed and/or refused to compensate L. B. Dodd a full eight (8) hours' pay while she was protecting the short vacancy of Car Clerk Position No. 6068, assigned hours 7:00 a.m. until 3:00 p.m., and

(b) L. B. Dodd shall now be compensated for one (1) hour at the straight time rate of Car Clerk Position No. 6068 which is \$99.30 per day, for March 19, 1986, in addition to any other compensation Claimant may have received for this day.

Claim No. 13:

(a) Carrier violated the provisions of the current Clerks' Agreement at Amarillo, Texas, on April 3, 1986, when it failed and/or refused to compensate L. B. Dodd a full eight (8) hours' pay while she was protecting the short vacancy of Car Clerk Position No. 6190, assigned hours 3:00 p.m. until 11:00 p.m., and

(b) L. B. Dodd shall now be compensated for two (2) hours and forty-five (45) minutes at the straight time rate of Car Clerk Position No. 6190 which is \$99.30 per day, for April 3, 1986, in addition to any other compensation Claimant may have received for this day.

Claim No. 14:

(a) Carrier violated the provisions of the current Clerks' Agreement at Amarillo, Texas, on May 15, 1986, when it failed and/or refused to compensate S. E. Gammill a full eight (8) hours' pay while she was protecting the short vacancy of Crew Clerk Position No. 6052, assigned hours 7:00 a.m. until 3:00 p.m., and

(b) S. E. Gammill shall now be compensated for three (3) hours at the straight time rate of Crew Clerk Position No. 6052 which is \$103.44 per day, for May 15, 1986, in addition to any other compensation Claimant may have received for this day.

Claim No. 15:

(a) Carrier violated the provisions of the current Clerks' Agreement at Calwa, California, on January 7, 1984, when it failed and/or refused to properly compensate G. S. Icanberry for service performed on January 7, 1984, and

(b) G. S. Icanberry shall now be compensated for three (3) hours and fifteen (15) minutes at the pro rata rate of Car Clerk Position No. 6082 for January 7, 1984, in addition to the four (4) hours and forty-five (45) minutes allowed.

Claim No. 16:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on February 7, 1983, when Ms. L. M. Moya was not properly compensated for work performed on Position No. 6054, and

(b) Ms. L. M. Moya shall now be compensated for three (3) hours and fifty (50) minutes at the straight time rate in addition to any other compensation Claimant may have received for work performed on Position No. 6054 on February 7, 1983.

Claim No. 17:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on April 10, 1983, when A. D. Chavez was not properly compensated for work performed, and

(b) A. D. Chavez shall now be compensated for four (4) hours at the straight time rate in addition to any other compensation Claimant may have received for this day at the rate of Position No. 6014.

Claim No. 18:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on March 30, 1983, when R. J. Estudillo was not properly compensated for work performed, and

(b) R. J. Estudillo shall now be compensated for four (4) hours at the straight time rate in addition to any other compensation Claimant may have received for this day at the rate of Position No. 6045.

Claim No. 19:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on June 25, 1983, when J. D. Bolduc was not properly compensated for work performed, and

(b) J. D. Bolduc shall now be compensated for three (3) hours at the straight time rate in addition to any other compensation Claimant may have received for this day at the rate of Position No. 6051.

Claim No. 20:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on June 29, 1983, when R. J. Estudillo was not properly compensated for work performed, and

(b) R. J. Estudillo shall now be compensated for three (3) hours and thirty (30) minutes at the straight time rate in addition to any other compensation Claimant may have received for this day at the rate of Position No. 6063.

Claim No. 21:

(a) Carrier violated the provisions of the current Clerks' Agreement at Los Angeles, California, on July 16, 1983, when Mrs. Dix was not properly compensated for work performed on Redondo Operator Position No. 6326, and

(b) Mrs. Dix shall now be compensated for three (3) pro rata hours' pay on July 16, 1983, at the rate of Redondo Operator Position No. 6326 in addition to any other compensation Claimant may have received, including interest payable at the prevailing prime rate, as long as Claimant is deprived of this compensation.

Claim No. 22:

(a) Carrier violated the provisions of the current Clerks' Agreement at Los Angeles, California, on August 29, 1983, when Mrs. Dix was not properly compensated for work performed on Redondo Operator Position No. 6325, and

(b) Mrs. Dix shall now be compensated for four (4) hours and thirty (30) minutes' pay on August 29, 1983, including twenty (20) minutes for meal period, at the rate of Redondo Operator Position No. 6325 in addition to any other compensation Claimant may have received, including interest payable at the prevailing prime rate, as long as Claimant is deprived of this compensation.

Claim No. 23:

(a) Carrier violated the provisions of the current Clerks' Agreement at Los Angeles on March 16, 1986, when D. C. Bush was not properly compensated for work performed, and

(b) D. C. Bush shall now be compensated for four (4) hours at the straight time rate in addition to any other compensation Claimant may have received for this day at the rate of Position No. 6329.

Claim No. 24:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on February 20, 1984, when G. D. Scheetz was not properly compensated for work performed, and

(b) G. D. Scheetz shall now be compensated for four (4) hours at the straight time rate of Station Wagon Driver Position No. 6405 in addition to any other compensation Claimant may have received for this day.

Claim No. 25:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on April 18, 1984, when G. M. Hoover was not properly compensated for work performed, and

(b) G. M. Hoover shall now be compensated for one (1) hour at the straight time rate of Station Wagon Driver Position No. 6045 in addition to any other compensation Claimant may have received for this day.

Claim No. 26:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on May 15, 1987, when it failed and/or refused to properly compensate W. A. Chavez for a day's pay at the rate of Crew Clerk Position No. 6061, and

(b) W. A. Chavez shall now be compensated at the pro rata rate of Crew Clerk Position No. 6061 for fifty-five (55) minutes in addition to any other compensation Claimant may have received.

Claim No. 27:

(a) Carrier violated the provisions of the current Clerks' Agreement at Barstow, California, on June 7, 1987, when it failed and/or refused to properly compensate G. M. Hoover for a day's pay at the rate of Crew Clerk Position No. 6061 by advising Claimant Hoover, on July 27, 1987, that claim on her timesheet for eight (8) hours' pay was declined and readjusted to five (5) hours and forty-five (45) minutes for time actually worked, and

(b) G. M. Hoover shall now be compensated at the pro rata rate of Crew Clerk Position No. 6061 for two (2) hours and fifteen (15) minutes, in addition to any other compensation Claimant may have received for this day.

Claim No. 28:

(a) Carrier violated the provisions of the current Clerks' Agreement at Silsbee, Texas, on February 21, 1985, when it failed and/or refused to properly compensate Claimant S. H. Duell for work performed on Position No. 6056, and

(b) S. H. Duell shall now be compensated three (3) hours' pay at the straight time rate in addition to any other compensation Claimant may have already received for work performed on Position No. 6056 on February 21, 1985.

Claim No. 29:

(a) Carrier violated the provisions of the current Clerks' Agreement at Topeka, Kansas, on March 10, 12 and 13, 1986, when it failed to properly call off-in-force-reduction employee to short vacancies, and

(b) Jerry R. Harvey shall now be compensated for forty (40) minutes' pay on March 10, 1986, forty (40) minutes' pay on March 12, 1986, and thirty (30) minutes' pay for March 13, 1986, in addition to any other compensation Claimant may have received for these days on Position No. 6120.

Claim No. 30:

(a) Carrier violated the provisions of the current Clerks' Agreement at Topeka, Kansas, when it failed to properly compensate D. P. McLaughlin for service performed on February 17, 1984, and

(b) Carrier shall now compensate D. P. McLaughlin for one (1) hour and twenty-five (25) minutes' pay at the rate of \$94.51 per day on Storehelper Position No. 6133 for February 17, 1984, in addition to any payment already allowed for that day.

Claim No. 31:

(a) Carrier violated the provisions of the current Clerks' Agreement at Topeka, Kansas, when it failed to properly compensate C. M. Leathers for service performed on March 30, 1984, in addition to any payment already allowed for that day.

(b) Carrier shall now compensate C. M. Leathers for three (3) hours and twenty (20) minutes' pay at the rate of \$94.51 per day on Storehelper Position No. 6128 for March 30, 1984, in addition to any payment already allowed for that day.

Claim No. 32:

(a) Carrier violated the provisions of the current Clerks' Agreement at Centralized Tie Treating Plant, Somerville, Texas, when it failed and/or refused to allow Kenneth C. Canatella to protect a short vacancy on Position No. 7054 in its entirety on February 4, 1987.

(b) Claimant Canatella shall now be compensated for five (5) hours at the proper pro rata rate of Position No. 7054 in addition to any other compensation already received on February 4, 1987."

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.

The facts common to all 32 Claims are that Claimants were unassigned, off-in-force-reduction employees; the Carrier called Claimants on various dates to protect short vacancies of less than eight hours; and the Carrier did not compensate the Claimants eight hours pay for those dates.

The relevant Rule (either Rule 26-A for the Railroad Claimants (Claim Nos. 1-31) or Rule 19-A for the Timber Treating Plant Claimant (Claim No. 32)) states:

"Except as otherwise provided in these rules, eight consecutive hours work, exclusive of a meal period, shall constitute a day's work."

This is not a case of first impression. In Third Division Award 26539 (Carrier Members dissenting) this Board sustained a similar Claim stating:

"This Board has concluded that the most compelling Rule cited by either side in this-dispute is Rule 26-A, Day's Work. That Rule can clearly be interpreted to mean that extra and unassigned employes when called should be afforded eight hours' work. This is especially true when one reviews the long tradition supporting the eight-hour concept and

the specific Rules the parties agreed upon concerning when an employe could be called and when he or she worked less than eight hours. We find no Rule cited in this record that would authorize Carrier to call off-in-force reduction employees and pay them less than eight hours' pay. In order for Carrier to support its position, where its actions fly in the face of practice throughout the industry, it must cite a Rule that the parties have agreed covers such a position. It has not done so.

* * *

Carrier argues that the burden of proof rests with the Petitioner in claim case[s]. This Board agrees with that position. We do not, however, agree that Carrier can raise an affirmative argument of past practice and have it be considered without proof. This record does not contain any evidence to support the fact that there was a practice on this property of paying off-in-force reduction employees less than eight hours when called in.

In the final analysis, this Board is of the opinion that, given the record of this case, considerable mischief would result if Carrier were allowed to call extra and unassigned employees into work for part-time vacancies without an agreement with the Organization to do so."

See also, Third Division Award 26540 adopting the rationale in Award 26539.

This record also demonstrates that by agreement of the parties, the Claims in this matter were held in abeyance pending the decision in Award 26539.

The Carrier argues that Award 26539 is palpably erroneous; in any event, in these matters it has demonstrated a past practice of only paying employees called in to cover short vacancies for actual hours worked; and finally, there are individual defects in five of the 32 Claims.

Initially, we are unable to find that Award 26539 is palpably erroneous. While, the arguments reflected in the Carrier's Submission and in the Carrier Members' Dissent in Award 26539 are by no means insubstantial, in this situation this Board's function is not to decide the matter de novo unless it can be shown that the prior Award on the issue is, according to the definition of "palpable," plainly or in obvious error. We can make no such finding. The logic underpinning the conclusion reached in Award 26539 is that Rule 26-A

"can clearly be interpreted to mean that extra and unassigned employees when called should be afforded eight hours' work" [emphasis added]. That Rule ("eight consecutive hours work ... shall constitute a day's work") "can" be read in precisely that manner as found in Award 26539. Given that reading, and again notwithstanding the Carrier's well-pleaded arguments to the contrary (particularly those addressing the ordinary rules of contract construction wherein elsewhere the parties were more specific for establishing guarantees - see e.g., Rules 25, 31-A, 34-A and 34-B), we are unable to conclude that the conclusion reached in Award 26539 is in plain, obvious or "palpable" error. Giving the Carrier the benefit of the doubt, at this point its assertions make the outcome in Award 26539 debatable at best. However, the debatable outcome of an Award does not equate with a demonstration that the Award is palpably erroneous. We must therefore conclude in accord with Award 26539 that the Carrier violated the Agreement by failing to compensate off-in-force reduction employees for eight hours when those employees were called to fill short vacancies of less than eight hours. To hold otherwise would be an invitation to chaos and would undercut the paramount goal of stability offered through the concept of final and binding Awards.

Second, the Carrier argues that notwithstanding the rationale of Award 26539 with which it continues to disagree, in these matters it has provided evidence of past practice of not compensating similarly situated employees for eight hours which evidence was found lacking in Award 26539 ("This record does not contain any evidence to support the fact that there was a practice on this property of paying off-in-force reduction employees less than eight hours when called in"). In this case we find that evidence unpersuasive. Some of the evidence now relied upon by the Carrier after its primary position was rejected in Award 26539 existed at the time the Claim leading to Award 26539 was argued and at the time these Claims were held in abeyance by agreement of the parties pending the outcome of that Award. Indeed, some of the dates of incidents forming the asserted practice were prior to the February 10, 1983, incident which formed the basis of the Claim in that matter. See Carrier's Exhibit B - a memo dated February 17, 1978, from Supervisor L. Manderino instructing timekeepers not to pay a full eight hours to off-in-force reduction employees covering short vacancies of less than eight hours and Carrier's Exhibit C - a list of 39 instances where employees were compensated for actual time worked where six of those instances listed occurred prior to the incident forming the basis of the Claim in Award 26539. Therefore, we must conclude that the Carrier was well aware of that evidence when the Claim in Award 26539 was argued, but it specifically chose not to produce that evidence in that matter. Given the procedural context in which the Claims in this matter arise with the parties' agreement to hold these Claims in abeyance pending the outcome of Award 26539, we conclude that the failure of the Carrier to present that evidence of an asserted past practice to this Board until its position in Award 26539 was rejected must be weighted against the Carrier's present position that a bona fide past practice existed. In short, if such evidence was as conclusive as the Carrier now argues, it stands to reason that the Carrier would have produced that evidence when it was required. The Carrier's having failed to do so causes us to now question the strength of that evidence.

Moreover, and more fundamentally (and again giving the Carrier the benefit of the doubt), even if we consider the past practice evidence offered by the Carrier, we cannot conclude that the Carrier has established that a bona fide past practice existed of nonpayment of eight hours for off-in-force reduction employees covering short vacancies of less than a full day's duration. Of the 39 instances relied on by the Carrier in Carrier's Exhibit C allegedly demonstrating such a past practice, 33 of those instances occurred after the dispute arose which formed the basis of the Claim in Award 26539. Indeed, 31 of the instances cited to us in Carrier's Exhibit C occurred in 1986 which post-dated 18 of the Claim dates in these matters which occurred prior to 1986. In order to constitute a bona fide past practice, it is well-established that the asserted conduct of the parties must be unequivocal; clearly enunciated and acted upon; and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. In this matter, the Carrier cannot rely to the degree that it has upon such post-dispute evidence to, for all purposes, boot strap a demonstration of the existence of a past practice. Indeed, the fact that the Organization has filed these Claims covering periods relied upon by the Carrier for demonstrating its practice leads us to conclude that the Organization has not accepted the asserted conduct as a practice. In making this past practice argument the Carrier has accepted the finding in Award 26539 that the Carrier must demonstrate a past practice as called for in that Award ("a practice on this property of paying off-in-force reduction employees less than eight hours when called in"). In sum, we find that the Carrier has not made such a demonstration.

Third, the Carrier has raised questions concerning specific problems with Claim Nos. 11, 15, 21, 22 and 24.

In Claim No. 11 (D. Gallardo for December 13, 1986) the record establishes that on Saturday, December 13, 1986, Claimant Gallardo was called to work at 6:00 P.M. There was no second or third trick relief on Saturday and therefore, there was no assigned position which would require the filling of a short vacancy. Gallardo worked until 10:40 P.M. and was compensated for the actual time worked. The Organization has not demonstrated that in this case Claimant Gallardo was called to fill a short vacancy. On that basis and consistent with the Carrier's argument, we shall deny this Claim.

In Claim No. 15 (G. S. Icanberry for January 7, 1984) the Carrier asserts that although called at 1:00 A.M. to complete a shift which became vacant due to illness of the incumbent R. K. Valentine, Icanberry did not report until approximately 3:30 A.M. and therefore, because Icanberry took "an excessive amount of time to report to work," the Claim is invalid. That kind of argument cannot defeat the Claim in this case. Under the theory found applicable for compensation for the filling of short vacancies of less than eight hours duration, it is irrelevant when Icanberry reported. By filling the short vacancy, Claimant Icanberry was entitled to eight hours pay. The Carrier's options concerning an employee who fails to report when called were other than to argue that Claim was invalid under the theory involved in this case.

In Claim No. 21 (H. M. Dix for July 16, 1983) the Claim letter was dated October 30, 1983 - 106 days after the incident arose. The Carrier's position that this Claim is untimely under Rule 47 is not rebutted. This Claim is therefore denied.

In Claim No. 22 (H. M. Dix for August 29, 1983) the record demonstrates that the Carrier reviewed its records and that search showed "that Claimant Dix performed no service at Redondo Tower Position No. 6325 on August 29, 1983 ... [and that t]he regular incumbent performed all service of this position on this date" (Carrier Exhibit F-22). That assertion is not rebutted. We must therefore deny this Claim.

In Claim No. 24 (G. D. Sheetz for February 20, 1984) the Carrier's position that the Claim is untimely because it was not received until June 14, 1984 - 115 days after the incident arose - is not rebutted. As in Claim No. 21, this Claim is denied.

In sum, we shall deny Claim Nos. 11, 21, 22 and 24. The remaining Claims are sustained. As a remedy, in the Claims we have sustained, Claimants shall be compensated the difference between what they would have earned for eight hours and what they actually were paid on the Claim dates. In light of the above findings concerning the applicability of Award 26539, we find it unnecessary to address the Organization's argument that the Carrier was obligated to apply the outcome of Award 26539 to these Claims solely because the parties agreed to hold these matters in abeyance pending the outcome of that Award.

Claim Nos. 11, 21, 22 and 24 are denied. The remaining Claims are sustained.

A W A R D

Claims sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1991.