Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29329
Docket No. CL-29691
92-3-91-3-53

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10535) that:

1. Carrier violated the effective Agreement when it failed to properly compensate Mr. D. P. Hibbert for December 24, 1987, a holiday and an unassigned day, when the work of the position on which he was the regular employe was required to be performed.

2. Carrier shall now compensate Mr. Hibbert an additional eight (8) hours' pay at the time and one-half rate of his position, Job #119, Short Line Yard, Des Moines, Iowa for December 24, 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.

On February 14, 1988, a Claim was filed on grounds that the Claimant, as Extra Board Clerk, was not called to work Job #119 at the Carrier's Short Line Yard in Des Moines, Iowa, on December 24, 1987. In declining the Claim the Carrier states that the Claimant was protecting Job #119 on day-to-day basis and had worked on December 23, 1987, but that on December 24, 1987, his "job was blanked and he was given the day off consistent with the holiday agreement." In response, the Organization argues that the Claimant was, in fact, "protecting a vacancy caused by the incumbent being on vacation that period of time" and that Agreement support for the claim is found in Rule 40(f). This Rule states the following, in pertinent part:

"Employees called from the extra board for vacancies shall remain on the vacancy for which called until the need for an extra employee on that specific vacancy ceases to exist, and while so assigned shall assume the rest days and all other conditions of the assignment as of the time the employee begins work thereon...."

At higher handling of the Claim on property the Carrier argues that "had it found it necessary to fill (job 119) on this date" it would have called the Claimant, but the position was "not filled on December 24 and 25, 1987."

The facts outlined in this case are parallel to those found in Third Division Award 29328, already ruled on by the Board. After study of the record the Board concludes that all reasoning pertinent to that earlier case is applicable here and is incorporated herein by reference. Although Job #119 had been blanked by the Carrier on December 24, 1987, work associated with that position was performed and the Carrier was in violation of the Agreement when it did not call the Claimant to work. The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.

CARRIER MEMBERS' DISSENT
TO
AWARDS 29328, 29329, DOCKETS CL-29690, CL-29691
(Referee Suntrup)

Dissent to these decisions is required because the Majority and the author of these decisions has ignored the basic tenant of arbitration that the party making the claim has the burden to prove the violation.

In Award 29328, Claimant was on vacation on December 24, 1987. In Award 29329, Claimant was off the extra board filling Claimant Shelton's vacation vacancy. Claimants did not work on December 24, 1987 because Position #119 was blanked.

The Majority in Award 29328 correctly states that the resolution of these claims rests on whether Position #119 worked on this date.

In support of its position, the Organization submitted, on the property, two pieces of evidence and attempted to submit a third to this Board.

Initially, the Organization submitted work reports that indicated that Clerk DePauw worked on Position #119 on December 24, 1987. No special codes were listed; eight alleged entries were made between 8:15 - 11:20 AM; each entry was signed by another employee and the Carrier, in response, stated that said reports were nothing more than IDP work which is done by Position #119 and other positions in the office. The Carrier's response was never challenged nor refuted in the subsequent handling on the property or before this Board. One would have to conclude that such evidence was not dispositive.

Secondly, the Organization attempted to submit a note, allegedly by Clerk DePauw, that was never made a matter of record on the property. The Board correctly found that such was not a part of the record and properly excluded it from consideration.

Thirdly, the Organization submitted a letter dated August 25, 1988 from Clerk Hibbert to the General Chairman. While the Majority correctly notes that this letter was part of the on-property handling, it does not point out that Mr. Hibbert was NOT on the property at the time and his conclusion is based on hearsay. The letter was written eight months after claims were filed and by an individual who had a personal interest in the outcome. Note that Mr. Hibbert is the Claimant in Award 29329 and the letter was NOT provided .to the Carrier at that time but TWO YEARS LATER on October 20, 1990 during the final conference. No explanation was ever given by the Organization for the delay in submitting this evidence. Nor has this Board been given any rationale for the delay in providing evidence in support of their claims. While the Majority acknowledges that, "The case centers on the credibility of this letter..." it concluded without addressing any of the factors noted above that said letter, "...alone satisfies evidentiary requirements...that Job #119 worked on the date in question..." The credibility of that letter is comparable to President Bush's "read my lips" statement in the hindsight of 1992.

The Majority further heaps insult upon injury by sustaining the claim when the on-property record substantiates that Clerk DePauw only worked a total of five hours and twenty minutes on December 24, 1987. Such was reflected in the payroll record as

well as posted bulletin notices that were made a part of the on-property record. Even if the Organization had substantiated that work on Position #119 was done on December 24, 1987, and their evidence does not support that conclusion, these decisions provide gross enrichment which is neither sanctioned by the contract nor by the evidence of record.

We Vigorously Dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost