Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33443
Docket No. CL-34452
99-3-98-3-97

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

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Delaware and Hudson Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11944) that:

(a) W. Morrissey is entitled to eight hours pay, $14.77 per hour for Sunday, June 23, 1996, for not being called into work and working another clerk at time and one-half.

(b) Mr. Morrissey was home and available for the call at straight time pay.

(c) The Carrier has violated TCU Clerical Agreement Rules 1, 13-G, and others.

(d) This claim is in accordance with TCU Clerical Agreement Rule 28-2."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On June 23, 1996, Carrier filled a clerical vacancy at the Buffalo Yard with a regularly assigned clerical employee, at the time and one-half rate. On June 24, 1996, the Organization submitted a claim on behalf of furloughed Clerk W. Morrissey for eight hours' pay, at $14.77 per hour, alleging Carrier violated TCU Rules 1, 13-G and others when it opted to fill the clerical vacancy with a regularly assigned clerical employee rather than calling Claimant who was "home and available for the call at the straight time rate of pay." The Organization cited various Company Memoranda and instructions, which allegedly "clearly indicate that spare employees must be called before an employee is called for overtime."

Carrier denied the appeal, maintaining that there are no provisions in the Agreement between the Parties that restricts Carrier on how it must fill a vacancy. Carrier contends that it "must have and is entitled to" make this decision premised upon the amount of extra or relief work in any given month for the clerical staff.

With regard to the inter company memos and instructions that the Organization submitted in support of its position, Carrier does not dispute the fact that furloughed employees have been used in the past, in accordance with Rule 13-G, but contends it was done "not exclusively and not always first." Specifically, Carrier stated that:

> "At times it has been furloughed clerks at straight time first and at times it has been regularly assigned employees at time and one-half first, and in either case, in full compliance with the Collective Agreement."

Finally, with respect to the Organization's charge that Carrier is also in violation of "other rules," Carrier asserts that the Organization failed to identify specific Rules and clauses along with a description of their applicability to the alleged violation or to establish that any violation occurred.

For its part, the Organization asserts that Carrier violated both Rule 1 and Rule 13(g) of Agreement, while Carrier maintains that there is no language in either of the Rules that requires it to call a furloughed Clerk to fill a vacancy rather than use the regularly assigned clerical employee. In all of the circumstances presented, we find Carrier's position persuasive.

Paragraph (b) of Rule 1 of the Agreement states:

"The contract shall govern the hours of service, rates of pay and working conditions for employees of the Carrier engaged in work in positions to which this Agreement applies as provided in Rule 32, i.e. Clerks Grade I, II and III.

Positions and/or clerical duties shall not be removed from the application of Rules of this Agreement except by agreement between the parties signatory hereto or as provided herein."

Clearly, Carrier's actions on June 23, 1996 did not constitute a violation of the Scope Rule. In fact, there is no dispute that the work at issue was performed by the regularly assigned Clerk at Buffalo Yard, and therefore, we find no violation of Rule 1 in these circumstances.

Rule 13(g), infra, provides the avenue for a furloughed employee to make himself available for extra work. It reads, in relevant part, as follows:

"Rule 13 - REDUCTION AND INCREASE IN FORCES

(g) An employee furloughed in accordance with this Rule and desiring to protect his seniority will keep his correct address on file with the appropriate officer designated by the Carrier. The Carrier shall maintain an up-to-date list of all furloughed employees on the Seniority District, copies of which shall be sent to the District, Division and General Chairman."

In that connection, Carrier acknowledges that it has, on some previous occasions, used a furloughed employee at straight-time rates in similar circumstances, but also has exercised discretion to use a regular employee at premium rates. Had Carrier chosen to call a furloughed employee on June 23, 1996, there is no question that Claimant met the appropriate criteria. However, that begs the question at the heart of this case, i.e. whether Carrier was obligated to call a furloughed employee by binding Agreement language or binding "past practice," as evidenced by a consistent, uniform, long-standing course of conduct sufficient to demonstrate mutual intent.

The contract language does not expressly support the Organization's contention that it was incumbent upon Carrier to call Claimant on the date at issue and the evidence of unilateral Carrier memoranda is insufficient to establish the mutuality and consistency required to prove a binding "past practice." Based on all the foregoing, we conclude that the Organization did not prove the claimed violation. Accordingly, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of August 1999.