

Award No. 16192

Docket No. MW-16913

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) Bulletins Nos. 14, 16, 17, 18, 19, 20, 49, 50, 51 and 52 (Lake Erie Division - 1965) were in violation of Rule 14(b) because said bulletins did not show the hours of service of the positions advertised therein. (Carrier's File 30-20-144)

(2) The above mentioned bulletins should have been and should be corrected as requested by employe representatives.

(3) All future bulletins should precisely show the information required under the provisions of Rule 14(b).

EMPLOYES' STATEMENT OF FACTS: During the month of September, 1965, the Carrier issued bulletins reading:

**"NORFOLK AND WESTERN RAILWAY COMPANY
Lake Erie Division**

**Conneaut, Ohio
September 7, 1965**

File 832.1.01-A

BULLETIN NO. 14

All Concerned:

The following position is hereby advertised for bids. Applications should be sent to Mr. L. J. Goodman, Division Engineer, % Norfolk

clear that unless the Carrier agreed to your interpretation you would handle the complaint with the National Railroad Adjustment Board for adjudication, and, failing to receive a favorable decision, you would then file a Section 6 Notice under the Railway Labor Act.

Yours very truly,

/s/ E. B. Hunter"

Attached hereto and marked as Carrier's Exhibit A are copies of bulletins involved in the instant dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue here is whether Company Bulletins No. 16, 17, 18, 20, 49, 50, 51 and 52, advertising positions for bid and which failed to specify fixed lunch periods; and further whether Company Bulletins No. 14 and 19, advertising Extra Gang Cook positions for bid and which failed to specify fixed hours of service, as well as fixed lunch periods, violated Rule 14(b) of the Agreement.

The pertinent provisions of Rule 14(b) provides as follows: "Bulletins showing the location, headquarters, description title, hours of service, and rate of pay of new positions or vacancies will be posted . . ."

It is the Organization's position that the words "hours of service" mean the hours during which the position is assigned to perform service and that Rule 14(b) by implication requires that a lunch hour be specified; that inasmuch as Carrier argues that under the rules, the lunch hour can be floating, thereby making the words "hours of service" ambiguous, therefore, the past practice of the parties, in which the Carrier has always specified fixed lunch hour period in said bulletins, governs the intent of the language used in said Rule 14(b).

The Carrier's contention is that Rule 14(b), read together with Rule 38 of the Agreement, permits Carrier to flexibly set the lunch period between the ending of the fourth hour and the beginning of the seventh hour after starting work; that concerning cook position bulletins, by virtue of Rule 29 and Rule 27, as well as Rule 38, permits Carrier to not specify fixed hours of service as well as fixed lunch hour periods.

"RULE 38. MEAL PERIOD

When a meal period is allowed, it will be between the ending of the fourth hour and the beginning of the seventh hour after starting work. Employees will not be required to work more than ten hours without being permitted to have a second meal period."

In support of its position, Carrier cites Award No. 131. In that Award the facts and the Rules involved are almost identical as in this dispute. The Referee in said Award No. 131 concluded:

"The bulletins in controversy did show hours of service as required by Rule 10 of the Agreement between the parties in the sense that they specifically designated the beginning and ending of the service period. It may, of course, be contended, as was

contended by the Employees, that this rule, standing alone, requires that bulletins of positions shall show nothing but service hours. Rule 10, however, does not stand alone; it must be read in connection with Rule 48, which provides that 'when a meal period is allowed, it will be between the ending of the fourth and the beginning of the seventh hour after starting work, unless otherwise agreed upon by the Employees and Employer.' This rule permits the Carrier to indicate a meal period between the ending of the fourth and beginning of the seventh hours of a service period, but does not require him specifically to designate the period."

The Organization, in support of its position, cited Award 11367 (Dorsey) and the referee in said Award stated:

"... This raises the question: What is the meaning of 'hours of assignment?'"

Carrier argues that it satisfies the Rule if it sets the beginning time and the termination time of the basic day (Rule 2) and reserves to itself the right to direct an Employee as to when he will take his lunch hour, on a day to day basis, so long as it is between 11:30 and 1:30 o'clock (Rule 6(a)).

We do not agree. To us, 'hours of assignment' cannot be construed to connote any open-endedness. Therefore, it follows that Carrier is obligated by Agreement to assign to the position here involved a fixed lunch hour within the period of time agreed to in Rule 6(a). This is not to be construed as meaning that the lunch period has to be assigned for the same fixed hour on every working day. It can be fixed for an assigned different hour on different days, provided the Employees have proper notice."

We are constrained to agree with the conclusion reached in said Award 11367, rather than in said Award 131, for the reasons stated in said Award 11367, and, therefore, find said Award 11367 to be controlling in this instant dispute.

Further, the Organization argues that inasmuch as the words 'hours of service' are somewhat ambiguous, the past practice of the Carrier in specifying fixed lunch period hours in previous bulletins, governs the intent of the language used in said Rule 14(b). In support thereof, the Organization introduced a number of previous bulletins issued by the Carrier showing fixed lunch hour periods. The Carrier did admit that many of the bulletins specified a fixed lunch period; however, in oral argument before this Board, Carrier answered that similar previous bulletins did not always specify a fixed lunch period. No evidence was adduced by Carrier that it did not always specify a fixed lunch period in prior company bulletins. Mere allegations or assertions are not proof.

To us, the words "hours of service" are ambiguous, and, therefore, evidence of past practice may be introduced to indicate the proper interpretation of ambiguous contract language. The many bulletins in evidence supports the Organization's argument that Carrier has in the past specified fixed lunch periods in said bulletins, and, therefore, indicate that it was the intent of the parties to specify fixed lunch periods in these bulletins.

Therefore, Carrier violated the Agreement when it failed to specify fixed lunch periods in Bulletins No. 16, 17, 18, 20, 49, 50, 51 and 52.

Concerning Bulletins No. 14 and 19, involving cook employees, and which show on said bulletin in regard to hours of assignment: "as required", the Carrier argues that this is justified on the grounds that cooks do not work consecutive hours, nor do their hours coincide with those of the gang for which they cook. The Carrier argues further that the Organization did not introduce into the record any past bulletins covering cooks which showed fixed lunch periods. Also, the Carrier contends that Rule 29 relieves them of the burden of specifying fixed hours of assignment and fixed lunch periods for cooks. Rule 29 reads: "No assigned hours will be designated for employees performing intermittent service requiring them to work, wait or travel, as regulated by train service and the character of their work, and where the hours cannot be definitely regulated."

The Carrier failed to produce any evidence that the hours of "cook" employees in regard to their assignment as well as lunch periods cannot be definitely regulated. Therefore, Carrier's contention in regard to bulletins covering cook employees' positions must be denied.

It is, therefore, the conclusion of this Board that Carrier is required to specify in bulletins, advertising bids for positions, a fixed lunch period within the time set forth in Rule 38. Further, Carrier is also required to specify fixed hours of service in said bulletins advertising bids for cook positions. However, Carrier is not required to assign the same fixed lunch hours for every work day, but may assign different fixed hours on different work days, provided it gives effected employees proper notice. Also, Carrier is not required to assign the same fixed hours of service on different work days provided it gives effected cook employees proper notice.

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 Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated by the Carrier.

AWARD

Claim sustained in accordance with this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April 1968.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.