

Award No. 16851
Docket No. CL-16431

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6012) that:

(a) Carrier violated the Agreement at Cincinnati, Ohio, when it did not furnish a relief employee to relieve on the Rate Clerk Position, held by Mr. J. H. Dellbrugge, on Monday of each week beginning September 28, 1964, after position had been worked seven (7) days per week for many years.

(b) Mr. Dellbrugge shall be compensated at the time and one half rate for each Monday, beginning September 28, 1964, and continuing until proper relief is provided.

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the Class or Craft of employees in which the claimant in this case holds position and the Cincinnati, New Orleans and Texas Pacific Railway Company.

Mr. Dellbrugge has held the position of Chief Rate Clerk for a number of years, with a work week Tuesday through Saturday, with Sunday and Monday as rest days, he was relieved by regular Relief Clerk Mr. R. A. Boganschultz on Sunday and Monday. Effective September 27, 1964 the relief clerk position was abolished and a relief clerk position was established to relieve Mr. Dellbrugge on Sunday only, no relief was provided for Mondays. Rate Clerks Wessendorf, hours 8:00 A.M. to 5:00 P.M. and Henry, hours 4:00 P.M. to 12 Midnight were instructed to perform the rate clerk work on Mondays. They have also been assigned work from the abolished reconsignment clerk's position, Mr. Henry also bills freight. Two employees cannot perform all the work required of them on Mondays, the relief rate clerk is vitally needed.

Rate Clerk Mr. J. H. Dellbrugge, filed the initial claim in this case on October 24, 1964, Employees' Exhibit A, and stated:

hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carriers' operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of the Chicago Agreement of March 19, 1949.

(b) Five-day Positions — On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

(c) Six-day Positions — Where the nature of the work is such that employees will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

* * * * *

OPINION OF BOARD: The Claimant, in this dispute, in September of 1964, was the occupant of a regularly assigned rate clerk position at the Carrier's Cincinnati agency. His schedule of work was on Tuesday through Saturday with rest days of Sunday and Monday. His hours of work was from 7:00 A. M. to 4:00 P. M. It was a seven-day position.

In addition to the Claimant, two other rate clerk positions were assigned at the agency. One clerk, Mr. Wessendorf, worked Monday through Friday with rest days of Saturday and Sunday. His hours were 8:00 A. M. to 5:00 P. M. Another clerk, Mr. Henry, worked Monday through Friday with rest days of Saturday and Sunday. His hours were 4:00 P. M. to 12:00 midnight.

From 7:00 A. M. to 4:00 P. M. on Sunday and Monday, the rate clerk position was covered by a regular relief assignment.

The Carrier contends, that after an extensive study, it found that there was no longer any need for three rate clerks to work on Monday at its Cincinnati agency and so abolished the relief position on Monday, relative to the Claimant's position. By virtue of the action of the Carrier, beginning with September 28, 1964, the Claimant's position became a six-day position. All necessary rate work that had to and was performed on Monday, was performed by Rate Clerks Wessendorf and Henry. The Claimant continued, as before, working his assignment from 7:00 A. M. to 4:00 P. M. on Tuesday through Saturday. Rate Clerks Wessendorf and Henry continued to perform the same type of work after the relief clerk position was abolished on Monday.

The Claimant contends, as follows:

1. That the Carrier had no right to reduce a seven-day position to a six-day position as work remained to be performed on the seven-day position. An alleged violation of Rule 20.

2. That if a relief clerk is not available, or relief has not been assigned, the regular assigned clerk, who works the position on the five (5) days per week, is entitled to work on the rest days. An alleged violation of Rule 28.

3. That the Claimant's Monday position was being partly filled by Clerks who suspended their duties to perform the work on the rate position in question. An alleged violation of Rule 30.

The Carrier denies that it violated the terms or provisions of the Agreement between the parties and in support of its contention claims that, based on long established principle, unless limited by specific agreement and/or provisions of the Agreement between the parties, in the interests of economy and efficiency, it had the discretionary right to determine which positions need to be filled, what work needs to be performed and the right to alter the days of a position. That these rights are not limited by the various rules of the Agreement cited by the Claimant.

The parties to this dispute submit, for our consideration, in support of their respective contentions, the following rules of the Agreement:

"RULE 1. SCOPE

(Revised, effective October 1, 1938.)

These rules shall govern the hours of service and working conditions of employees described in the following respective groups in general and district offices, and similar employees in offices and operations under jurisdiction of other officers and subordinate officers in the various departments of each of the Carriers named in the caption of this agreement:

Group 1. Clerks —

- (a) Clerical Workers, and
- (b) Machine Operators, all as hereinafter defined in Rule 2."

"RULE 2.

DEFINITION OF EACH GROUP OF EMPLOYEES AS COVERED BY RESPECTIVE SECTIONS OF SCOPE RULES

(a) (Revised, effective October 1, 1938.) Clerical Workers — Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, rendition of bills, reports and statements, handling of correspondence and similar work, including Depot Ticket Agents and Depot Baggage Agents."

"RULE 3. EFFECTIVE DATE

(Revised, effective October 1, 1938.)

This agreement becomes effective October 1, 1938, and supersedes and cancels all former agreements but does not, unless rules are specifically changed, alter practices or working conditions established by or under former agreements."

"RULE 20. ABOLISHING POSITIONS

(Effective October 1, 1938.)

When forces are reduced the position to be abolished shall be the position or positions which are no longer needed; if there be two or more positions doing the same kind of work paying different rates in the office where such abolishment is to be effected, the position paying the lowest rate shall be abolished.

Understood and agreed that in reducing clerical forces, where there are two clerical employes in the same office assigned to the same class of work working the same hours and receiving the same rate of pay, if one of the positions is to be abolished it will be the position filled by the junior of the two employes."

"RULE 28.

ASSIGNMENT OF OVERTIME

(Revised, effective July 1, 1951.)

(c) Work on Assigned Days — Where work is required by Carrier to be performed on an assigned rest day which is part of a regular relief assignment and occupant of such regular relief assignment is absent on such day and it is necessary to use a regularly assigned employe on such assignment at rate of time and one-half, preference to such work will be given the occupant of such position who is observing that day as his assigned rest day."

"RULE 30. ABSORBING OVERTIME

(Effective June 1, 1921.)

Employes will not be required to suspend work during regular hours to absorb overtime, except as otherwise provided in Rule 26."

"RULE 16.

FILLING VACANCIES UNDER SENIORITY RULES

(a) (Revised, effective October 1, 1938.)

* * * * *

The officer in charge where vacancy occurs will, within two days, bulletin such position to all employes of the group or class on the seniority district in which vacancy exists. Bulletin to show location, title, rate of pay, and preponderating duties of position, number of hours assigned per day, and number of days assigned per week, sub-

ject to reduction in weeks in which holidays occur by the number of such holidays.

* * * * *

"RULE 23. POSTING BULLETINS

(Effective October 1, 1938.)

Bulletins will be issued and posted covering positions furloughed or abolished. This shall not apply to positions embraced in Group 4-(c) and Group 5."

"RULE 25. THE 40-HOUR WEEK

(Effective September 1, 1949.)

NOTE: The expression 'positions' and 'work' used in this Rule 25 and Rules 27(b), 28, 31, 32 and 33 refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

(a) General — The Carriers will establish effective September 1, 1949, for all employees, subject to the exceptions contained in Article II of the Chicago Agreement of March 19, 1949, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carriers' operational requirements; so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of the Chicago Agreement of March 19, 1949.

(b) Five-day Positions — On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

(c) Six-day Positions — Where the nature of the work is such that employees will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

* * * * *

The question as to who decides what position, or work, is needed or required, has been previously passed upon by this Board.

In Award 10622, we said:

"The determination of the number of employees needed to perform its work is the function of Management except as it has limited itself by Agreement. Relief assignments are only required to be made when there is work necessary to be done. When all work can be effectively

performed by staggering of regularly assigned employees the necessity for relief assignments on rest days does not exist. In other words, we hold Carrier may, in accordance with its operational requirements, stagger the work week assignments so that the rest days of some will coincide with the work days of others and combine the work done, as was done in this case, and thus make it possible for the regular employee to do all the work necessary to have performed on those days without the necessity of any relief, particularly, where as here, the employees were of the same class, performed the same type of work, receive the same pay and are carried on the same seniority roster."

See also Awards 15974, 15920, 12419, 13490, 13328, 13048, 11018, among others.

We conclude that all inherent rights of management that the Carrier has not contracted away still remain with it.

We have carefully examined the Agreement and we are unable to find any restrictions in the Agreement that prohibit Carrier from adding to or taking away any of the duties of a position. That is one of the prerogatives of management.

We note from the record, that, Claimant contends that "Two employees cannot perform all the work required of them on Mondays." " * * * This position has worked seven days per week from the time it was created years ago and is needed seven days per week to properly perform the duties of the position." "This position is badly needed on Sundays and Mondays or 7 days per week to keep the work up to date and to keep down complaints; as well as to correct the unbearable working conditions that now exist."

These contentions of the Claimant are denied by the Carrier.

It is fundamental that the Claimant must always present to this Board a preponderance of evidence to sustain his claim; the burden is on the Claimant to prove his case. We find no evidence in the record to sustain and/or support these contentions of the Claimant at the agency in question. Mere assertions are not evidence.

See Awards 15799; 13330; 13300.

In Award 15479, we held:

"We hold that the Carrier is not obligated under Rule 3(e) to sustain a burden of proving 'the needs of the service,' but that a presumption exists that the Carrier acts in good faith when it changes the rest days. We would require that an abuse of discretion be shown in order to overcome this burden."

We find no evidence, in the record, of an abuse of discretion on the part of the Carrier in this dispute.

Based on the record before us, we cannot find any violation on the part of the Carrier of Rule 28(c) as alleged by the Claimant.

This Board has set forth the elements required to be proven in order to sustain an alleged violation of the absorbing overtime rule. Rule 30 of the Agreement.

In Award 15406, we said:

"This Board has consistently held, as is argued in behalf of Carrier, that 'to find a violation of the (suspending work to absorb overtime) rule the record must contain credible evidence showing either (a) that the Carrier suspended an employee (Claimant) during his regularly assigned hours to equalize or absorb overtime which he had already earned, or (b) that an employee may not be taken from his regular assignment and used on the work of another position where it would result in depriving the employee of the other position of overtime which would otherwise have accrued. . . .'"

See also Awards 14243; 14242; 15046; 14952.

We find no evidence in this dispute to sustain the alleged violation of Rule 30 of the Agreement, as contended by the Claimant.

We have carefully searched the record and find that the Claimant has failed to meet his burden of proving that the actions of the Carrier violated the Agreement of the parties. We will deny the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1968.