Award Number 17482
Docket Number CL-17140
NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jerry L. Goodman, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD CO.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6306) that:

1) Carrier violated the Clerks' Rules Agreement when it failed and refused to allow necessary traveling and other expenses to an employe not regularly assigned to Road Service who was assigned temporarily to perform service away from his headquarters.

2) Carrier shall now be required to compensate employe T. M. Bankey for the following expenses incurred while assigned to perform service away from his headquarters:

DATE	LOCATION	MEALS	LODGING	BUSINESS PURPOSE	TOTAL
6/1/66	Deer Lodge	$ 4.00	$ 1.00	Working temporary vacancy	$ 5.00
6/2	"	4.00	1.00	"	5.00
6/3	"	3.90	1.00	"	4.90
6/4	"	3.95	1.00	"	4.95
6/5	"	3.65	1.00	"	4.65
6/6	"	3.50	1.00	"	4.50
6/7	"	4.10	1.00	"	5.10
6/8	"	3.90	1.00	"	4.90
6/9	"	4.00	1.00	"	5.00
6/10	"	3.75	1.00	"	4.75
6/11	"	3.25	1.00	"	4.25
6/12	"	4.25	1.00	"	5.25
6/13	"	4.15	1.00	"	5.15
6/14	"	2.35	1.00	"	3.35
	TOTALS	$52.75	$14.00		$66.75

EMPLOYES' STATEMENT OF FACTS: Before setting down the pertinent facts in the instant case, the Employes first wish to point out that it should not have been necessary to bring this case before your Honorable Board because the same question involving the same parties but a different employe and location, was resolved by your Board in Award #14779 with Referee John Dorsey assisting. The same question involving the same parties is also presently before your Board in Docket CL-16675. The Carrier, however, is not inclined to accept and apply the Board's findings in Award #14779 to other disputes. Neither would the

There was no applicants for Position 7646, therefore, the Carrier, in accordance with the provisions of Schedule Rule 12(d) which reads in pertinent part:

"When forces are increased or vacancies occur, furloughed employes, when available, shall be recalled and returned to service in the order of their seniority and employes shall be required to return when so called."

recalled from the furloughed list, unassigned furloughed Employee T. M. Bankey for Position 7646.

Claimant T. M. Bankey commenced working Position 7646 on January 1, 1966 and worked said position up to and including June 13, 1966 for which service Claimant T. M. Bankey was properly and fully paid for all service he performed on and/or in connection with the service he performed on Position 7646 at Deer Lodge, Montana.

Attached hereto as Carrier's Exhibits are copies of the following letters:

Letter written by Mr. S. W. Amour,
Vice President-Labor Relations to
General Chairman Mr. H. C. Hopper,
under date of September 29, 1966 ..... Carrier's Exhibit "A"

Letter written by Mr. S. W. Amour
to Mr. H. C. Hopper, under date of May 15, 1967 .... Carrier's Exhibit "B"

(Exhibits not reproduced)

OPINION OF BOARD: This docket, together with a companion docket numbered CL-17138, Award 17481, involves the same parties and the same dispute resolved by this Board in Award 16350 (McGovern).

In the instant case Carrier has introduced substantial evidence of custom and practice indicating that the parties did not intend the Rule to apply to unassigned, furloughed employes.

We are precluded from considering such evidence, however, because Award 16350 (McGovern) has conclusively held that the language of the subject rule is clear and unambiguous.

Consequently, the claim is sustained.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1969.

CARRIER MEMBERS' DISSENT TO AWARDS 17481, 17482,
DOCKETS CL-17138, CL-17140

(Referee Goodman)

For all practical purposes, the proceedings leading to Awards 17481 and 17482 are but the inevitable continuation of those leading to Award 16350 (McGovern). The claims in all three cases are the same, but in handling the two cases now before us Carrier has properly submitted the vital evidence which the Board found to be lacking in Award 16350.

The significant issue in each case is whether an unassigned, furloughed employe has a headquarters for purposes of applying that portion of Rule 37 (a) reading;

> "Employes not regularly assigned to road service, who are temporarily required to perform service away from their headquarters which necessitates their traveling, shall be allowed necessary expenses while away from their headquarters . . ."

Carrier says that the unassigned, furloughed employe has no headquarters; the Employes say that his home is his headquarters, but no rule of the Agreement so provides.

The only rules in the Agreement that provide for a headquarters for any employe are the assignment rules, and they apply to employes regularly assigned pursuant thereto. Since no rule of the Agreement states whether an unassigned, furloughed employe does or does not have a headquarters, as the term "headquarters" is used in Rule 37 (a), whether he does or does not should be determined on the basis of the intention of the parties as manifested by the practices they have adopted in applying Rule 37(a).

Carrier has gone directly to the crux of the case by dealing specifically with the past practice in applying Rule 37 (a). Carrier asserted past practice as a defense in handling the claim in Award 16350 and apparently the Employes did not deny Carrier's assertions regarding past practice during the handling of that claim on the property. In stating its position to the Board in that case, Carrier reviewed the long history of Rule 37 (a) and practices thereunder (as it has done in this case), but instead of submitting evidence there Carrier merely stated as a fact that:

> "Even though the Clerks' Organization cannot deny the practice of over 46 years of applying the provisions of Rule 37 (a) **only** to regularly assigned employes, they will no doubt contend that there was no mutual recognition thereof. . ."

The Employes did, however, deny the existence of the alleged practice in their rebuttal statement.

In view of the Employes' belated, unexpected and false assertions regarding the critical issue of past practice in Award 16350, Carrier had an indication of the need to submit concrete evidence of past practice in these cases and fully satisfied that need by adducing the best evidence obtainable.

Carrier's affidavits are not challenged by the Employes. These affidavits establish beyond any shadow of doubt that it was Carrier who told the truth in the proceedings leading to Award 16350.

In Award 16350, which sustained the claim on the theory that the alleged practice had not been proved, the Board recognized that the Agreement is silent on the subject of headquarters for unassigned employes, but proceeded (we believe erroneously) on the theory that "in the absence of substantial evidence to the contrary" it should be considered that Rule 37 (a) was intended to apply to all employes. The majority in Award 16350 thus shifted the burden of going forward with the evidence on the past practice issue by adopting an unwarranted inference that the authors of Rule 37 (a) intended every employe to have a headquarters. They did, however, recognize that this inference would not stand up in the face of "substantial evidence to the contrary". The award went further and told Carrier precisely the type of evidence that should be submitted in order to prevail.

Award 16350 (McGovern):

". . . By filing the instant claim, the Organization has presented **a prima facie** case that Carrier has violated the rule. Carrier thereupon defends on the basis of past practice, history, etc., mutual interpretation of the language over a protracted period of time etc., **but has failed to present any evidence** sustaining such a position . . . **To establish such a mutually agreed upon practice could, it seems to us, be shown conclusively by the submission of appropriate affidavits to that effect from Carrier's own personnel.** We find no such evidence in this record." (Emphasis added.)

On the basis of the portion of Award 16350 which we have emphasized, Carrier has conclusively proved in the record before us that the alleged practice exists and Rule 37 (a) has no application whatever to an unassigned, furloughed employe because he has no headquarters. Thus, if the Referee had followed the principles laid down in Award 16350, he would have denied these claims.

The fact that the parties have been in agreement for forty odd years on the point that unassigned, furloughed employes do not have a headquarters and therefore are not entitled to any payment under Rule 37 (a) is conclusively established in this record with thirty-three unchallenged affidavits of employes having first-hand knowledge of the facts. In these circumstances, we believe the Referee's decision to pay this claim is absolutely arbitrary, and we dissent.

/s/ G. L. NAYLOR
G. L. Naylor

/s/ R. E. BLACK
R. E. Black

/s/ P. C. CARTER
P. C. Carter

/s/ W. B. Jones
W. B. Jones

/s/ G. C. WHITE
G. C. White

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