Award Number 17708
Docket Number CL-18084

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Ellis, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6521) that:

1. Carrier violated the Clerks' Rules Agreement at Sioux Falls, South Dakota on July 16, 1967, when it improperly abolished Yard and Ticket Clerk Position 6314.

2. Carrier shall now be required to compensate employe E. C. Johnston for eight (8) hours at the straight time rate of Position 6314 for July 17, 1967.

EMPLOYES' STATEMENT OF FACTS: Employe E. C. Johnston is the regularly assigned occupant of Yard & Ticket Clerk Position 6314 at Sioux Falls, S. D. with assigned hours 5 AM to 2 PM, Monday through Friday, with Saturday and Sunday rest days. Employe Johnston has a seniority date of December 3, 1945 in District No. 42, which covers Sioux Falls, S. D.

On Sunday, July 16, 1967, which was employe Johnston's rest day, he received a telephone call from Agent L. A. Fiorello at 3 PM notifying him that his position (6314) was abolished effective 5 AM July 17, 1967. Consequently, he received less than the required 16 hours advance notice, actually only 14 hours. See copy of employe Johnston's statement attached as Employes' Exhibit "A".

Timeslip dated July 17, 1967 was filed by employe Johnston with Superintendent W. K. Peterson accompanied by a letter dated July 19, 1967, reading:

> "Please refer to attached time slip dated July 17, 1967 claiming 8 hours pay, straight time rate for regular assigned hours 5:00 AM to 2:00 PM.
>
> Time is claimed due to work stoppage on this particular day and I did not receive sufficient notice before abolishment of position 6314. Notification received by telephone, not in writing, at 3:00 PM July 16, 1967.
>
> I think you will readily agree this time is due and claim is just and will appreciate your approval of attached time slip."

OPINION OF BOARD: Claimant is the regularly assigned incumbent of the Yard and Ticket Clerk Position at Sioux Falls, S.D.. On July 16, 1967 Claimant was notified by telephone at 3:00 P.M. that his position was abolished effective as of 5:00 A.M. July 17, 1967 because of a threatened strike by Shop Craft employes which strike subsequently occurred. The facts are not disputed.

Organization claims an amount equal to 8 hours pay for employee E. C. Johnston and alleges a violation of Rule 12 by the Carrier. Rule 12(a) provides, in part, as follows:

"RULE 12— REDUCING FORCES

"(a) In reducing forces, employes in Groups 1 and 2, Rule 1, and regularly assigned employes in Group 3, Rule 1, whose positions are to be abolished, will be given not less than five (5) working days advance notice except that not more than sixteen (16) hours advance notice of abolishment of positions or reductions in force will be required under emergency conditions, such as flood, snowstorm, hurricane, earthquake, fire or strike, provided the Carrier's operations are suspended in whole or in part and provided further that because of such emergency, the work which would be performed by the incumbents of the positions to be abolished for the work which would be performed by the employes involved in the force reductions no longer exists or cannot be performed. Except under emergency conditions, the time of abolishment is the ending time of the assignment on the date of abolishment. (Emphasis mine).

* * * * *

Carrier admits that the purpose of the notification provisions of Rule 12 is to give an employee whose position is to be abolished time to investigate other positions and to exercise his seniority in acquiring another job. The shorter 16 hour notification period in emergency conditions has the same purpose as the 5 day notification period in non-emergency condition except it is calculated to relieve Carrier from a burden which is not of its own making. The same reasoning pertains to the last sentence of that part of Rule 12(a) set out above.

Undoubtedly, by that sentence, the parties to the agreement intended to allow Carrier to effectively abolish a position 16 clock hours from the time of the notice in emergency cases without regard to whether the last minute of the 16th hour fell during a regular assignment.

Organization contends that such an interpretation does violence to Rule 26 which provides:

"RULE 26—DAY'S WORK

"Except as provided in Rules 29 and 30, eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work. This rule shall not apply when employes lay off of their own accord before the completion of a day's work."

Organization, in effect, urges us to read into Rule 26 an "eight hour or nothing" meaning which would override the express wording of Rule 30 allowing a partial day and the express exception of the last sentence of the first paragraph of Rule 12(a) to a full 8 hour day. Such an interpretation would be strained and unwarranted.

Rule 30 seems to be highly pertinent to this case. It provides for "report in" pay when an employee is prevented from working "by condition beyond the control of the Railroad Company". This phrase is the very essence of the term "emergency", and easily relates back to Carrier's right to abolish an assignment, in emergency conditions, effective 16 clock hours from the time of notice pursuant to Rule 12(a).

Carrier confesses liability for 2 hours wages which we find is due to the Claimant.

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 Carrier violated Rule 12 of the Agreement.

AWARD

Claim sustained to the extent set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of February 1970.

LABOR MEMBER'S DISSENT TO AWARD NO. 17708
(DOCKET CL-18084)

The Referee erred in his decision for the following reasons:

The Opinion of Board reads in part:

"Carrier admits that the purpose of the notification provisions of Rule 12 is to give an employee whose position is to be abolished time to investigate other positions and to exercise his seniority in acquiring another job. The shorter 16 hour notification period in emergency conditions has the same purpose as the 5 day notification period in non-emergency condition except it is calculated to relieve Carrier from a burden which is not of its own making. The same reasoning pertains to the last sentence of that part of Rule 12(a) set out above.

Undoubtedly, by the sentence, the parties to the agreement intended to allow Carrier to effectively abolish a position 16 clock hours from the time of the notice in emergency cases without regard to whether the last minute of the 16th hour fell during a regular assignment.

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Organization, in effect, urges us to read into Rule 26 an 'eight hour or nothing' meaning which would override the express wording of Rule 30 allowing a partial day and the express exception of the last sentence of the first paragraph of Rule 12(a) to a full 8 hour day. Such an interpretation would be strained and unwarranted.

Rule 30 seems to be highly pertinent to this case. It provides for 'report in' pay when an employee is prevented from working 'by condition beyond the control of the Railroad Company'. This phrase is the very essence of the term 'emergency', and easily relates back to Carrier's right to abolish an assignment, in emergency conditions, effective 16 clock hours from the time of notice pursuant to Rule 12(a).

Carrier confesses liability for 2 hours wages which we find is due to the Claimant."

The Award reads:

"Claim sustained to the extent setforth in the opinion."

For ready reference, Rule 30 referred to by the Referee reads:

"(a) Employes required to report for work at regular starting time and prevented from performing service by conditions beyond the control of the Railroad Company will be paid for actual time held with a minimum of two (2) hours.

(b) If worked any portion of the day, under such conditions, up to a total of four (4) hours, a minimum of four (4) hours shall be allowed. If worked in excess of four (4) hours, a minimum of eight (8) hours shall be allowed.

(c) All time under this rule shall be at pro rata rate.

(d) This rule does not apply to employes who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces."

The Record reveals that only one rule (Rule 12) was relied on by Carrier in handling this dispute on the property. For the first time in its' Rebuttal, Carrier mentions Rule 30, which they say "the employes conveniently 'forgot' to cite". The Referee decided to overlook such "oversight" and permitted Carrier's use of Rule 30 in determining the decision, thus accepting new argument which the Board has long held is far beyond its power and jurisdiction.

There's an old saying that "close doesn't count except in horse shoes", but the "horse shoes" method is what the Referee used here. Using "new math", he took the 16-hour notice provisions required in emergency conditions and subtracted the 14 hours' notice the claimant received and the difference was 2 hours. He added Carrier's admission that it made a mathematical error of two hours, and his admission of new argument pertaining

to Rule 30 which mentions two hours' pay to Claimant account Carrier's violation of Rule 30—Reporting and Not Used, which is the most foreign rule in the Agreement to the Claim which was being considered. Rule 30 becomes applicable only when employes have reported for service and prevented from performing service for the full day.

However, applying the "close-doesn't-count-except" theory, the exception in this Award was Rule 30 because it happens to mention two hours, and the Referee had to come up with that answer because that's all Carrier concedes it might possibly owe to Claimant.

The dissenter believes that such mathematical logic and ingenuity deserve comment.

Worthy mention must also be made to one additional fact: The dissenting Labor Member did not move the adoption of this award because it is in direct conflict with the rules. Support for that reasoning is found in the fact that the Carrier Member of the Board moved its adoption.

/s/ C. E. KIEF
C. E. Kief, Member
3-5-70

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S DISSENT TO AWARD 17708

The Dissenter first states that Carrier relied on but one rule (Rule 12) in handling this dispute on the property. The record shows the Organization alleged violation of Rule 12 and that the Carrier denied the allegation that such Rule had been violated.

The Dissenter's statement that the Carrier injected Rule 30 into the dispute for the first time in its Rebuttal Submission is also erroneous. A review of the record readily indicated that in its Ex Parte Submission presenting the dispute to this Board the Organization made the following statement as the opening paragraph of it Position:

> "That Carrier violated the rules of the Agreement between the parties bearing effective date of July 1, 1967, except as amended and supplemented, copies of which have heretofore been furnished the Board and by reference thereto is made a part of this dispute."

Thus all rules of the Agreement were placed in issue by the Petitioning Organization. Furthermore, the Organization also specifically referred to Rule 26 in support of its position and which reads as follows:

> "Except as provided in Rules 29 and 30, eight (8) consecutive hours exclusive of the meal period, shall constitute a day's work. This rule shall not apply when employes lay off of their own accord before the completion of a day's work."

Rule 26 provides for an exception as to Rules 29 and 30. It is absurd to think that the Board would consider Rule 26 without giving consideration to the exceptions contained in Rules 29 and 30.

Apparently the Dissenter is of the opinion that the Carrier and this Board should look only at the rules specifically quoted by the Organization and should not look at any exceptions referred to therein, nor should they look at other rules that are involved in the disposition of a claim. While we are of the opinion that the same result could have been reached in this

dispute without regard to Rule 30 the consideration of that rule was entirely proper and no error was created thereby.

The gravamen of the dissent seems to lie in the final paragraph in which the Dissenter states the award must be in error because he did not move its adoption. To the contrary, the award is entirely correct and in accord with the rules as well as the principles applied in other situations of like character. The dissent does not detract in any manner from the soundness of the award.

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

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

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

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

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

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