NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert A. Franden, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY (South-Central District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6784) that:

1. The Carrier violated the agreement entered into by the Brotherhood of Railway, Airline and Steamship Clerks and the Carrier when on February 22, 1969, Agent O. G. Clark, City of Industry, performed waybilling on four (4) cars for the Carrier Corporation.

2. The Carrier violated the controlling agreement entered into by the Brotherhood of Railway, Airline and Steamship Clerks and the Carrier when on March 1, 1969, Agent O. G. Clark, City of Industry, performed waybilling on four (4) cars of freight for the Carrier Corporation.

3. Carrier shall now be required to compensate Claimant, W. E. Stovall, General Clerk at the City of Industry, California for wage loss suffered by him by reason of the above enumerated violation of the controlling agreements in the amount of five (5) hours and twenty (20) minutes on each date, February 22, 1969 and March 1, 1969.

EMPLOYES' STATEMENT OF FACTS: Claimant W. E. Stovall is in the employ of the Carrier at City of Industry, California on position of General Clerk, a position encompassed by the Scope Rule of the current controlling agreements between the Brotherhood of Railway, Airline and Steamship Clerks and the Carrier which he holds by virtue of his seniority date of April 16, 1937 on Station Clerks' Seniority District Roster 91.

On date of February 22, 1969 and again on March 1, 1969, need arose at City of Industry for the Carrier's employes to handle waybilling of freight for Carrier Corporation.

CARRIER'S EXHIBIT D — General Chairman Hallberg's letter of appeal to Mr. Lott, Assistant to Vice President, dated April 30, 1969.

CARRIER'S EXHIBIT E — Mr. Lott's denial of General Chairman Hallberg's appeal dated May 21, 1969.

CARRIER'S EXHIBIT F — General Chairman Hallberg's letter requesting conference of the claim dated June 3, 1969.

CARRIER'S EXHIBIT G — Mr. Lott's letter to General Chairman Hallberg accepting the conference date proposed dated June 11, 1969.

CARRIER'S EXHIBIT H — Assistant to Vice President Lott's reaffirmation of the denial of this claim to the General Chairman dated August 15, 1969.

CARRIER'S EXHIBIT I — General Chairman's request to reconference the claim dated October 23, 1969.

CARRIER'S EXHIBIT J — Mr. Lott's redenial of the claim dated November 14, 1969.

CARRIER'S EXHIBIT K — General Chairman Hallberg's letter requesting an extension of time limits, dated January 12, 1970.

CARRIER'S EXHIBIT L — Assistant to Vice President Lott's letter of January 16, 1970, granting the request for an extension of the time limits.

(Exhibits not reproduced.)

OPINION OF BOARD: On Saturday, February 22, 1969 and Saturday, March 1, 1969 the Agent at City of Industry, California performed waybilling on four cars for Carrier. Claimant is the General Clerk at City of Industry who performs this work on his regularly assigned days of Monday through Friday. Claimant alleges that he should have been called to do the work under the provisions of Rule 41(1) if there were no qualified extra or unassigned employes available. Rule 41(1) reads as follows:

"RULE 41.

(1). Work on Unassigned Days.

Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

In order to prevail in the case at bar it is necessary for Claimant to show that the disputed work was exclusively assigned to him during his regular work week. In the present case the Claimant has failed to make that showing. For this reason we are unable to find that the Carrier violated Rule 41(1).

Further, the Scope Rule in the Agreement between the parties is general in nature and does not in and of itself reserve to the clerks the duties performed in the instant case. There has been no showing that the work in dispute traditionally and historically in practice has been performed by the Clerks. For that reason there can be no finding of a violation on that basis.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 9th day of April 1971.

LABOR MEMBER'S DISSENT TO AWARD 18498
(Docket CL-18759) (Referee Franden)

The Referee erred when he stated that the Claimant had to show that the disputed work was exclusively assigned to him during his regular work week. If the Referee had applied ordinary common sense and previous decisions of the Board, he would have concluded that this was not an "exclusivity" matter because with the inclusion of the standard rule, "Work on Unassigned Days", the "exclusivity theory" is not involved.

The issue was very plain. All that had to be proven was that the Claimant performed this work during his regular work week. Proof that he performed this work "exclusively" during his regular work week was not an issue but was improperly made the issue in this dispute.

Performance of the work during his work week is all that was necessary to prove, and that was conclusively shown; Carrier did not deny and, in fact, admitted Claimant performed this work during his work week but then continued with the timeworn argument that he did not perform it "exclusively."

Rule 41 is quite clear; it provides that "where work is required * * * to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by **the regular employe.**", i.e., the employe who performs it during his regular work week.

There was no necessity for the Referee to wander into the realm of witch hunting.

The Referee apparently is one of those who "calls them as he sees them"; however, in this dispute it was easier for him to close both eyes and ignore the clear mandate of the provisions of the rule as well as the Board's consistent interpretation thereof, causing an injustice toward the one claimant involved.

I dissent.

C. E. Kief
Labor Member
4/20/71

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 18498 (Referee Franden)

The record shows without contradiction that at the agency here involved all work was done by an agent until 1962, at which time a general clerk position was created to provide assistance for the agent. After assignment of the clerk, the agent continued to perform clerical work in connection with agency.

The two positions were assigned so that the agent worked on Saturday, the rest day of the clerk. On each of the two Saturdays involved in the claim, the agent signed and picked up bills of lading and prepared switch lists for four cars.

A claim on behalf of Claimant (Clerk Stovall) for five hours and twenty minutes overtime each Saturday was initially presented on the theory that Rules 1 and 41 reserved the work to him because such work was allegedly "exclusively performed Monday through Friday" by Claimant. The claim was denied on the basis that the two rules did not support the claim and there was no evidence to support the "exclusive" claim.

Instead of coming forward with probative evidence to support this essential element of the claim, the Employes contented themselves with bald and unsupported assertions. In their initial submission they assert, still without proof, that the Claimant "performs the disputed work exclusively during his regular tour of duty".

Obviously, these unsupported assertions of Claimant's representatives are not evidence, and even if Petitioner had persisted in such allegations to the very end, we would have been compelled to rule in favor of Carrier on the essential question of exclusive assignment of the work because Petitioner had the burden of proof and adduced no evidence. See our many awards on the point that assertions cannot take the place of evidence and the claim

must be denied where essential elements thereof are not supported with proof, particularly Awards 16810 and 17036 (Franden).

As we read the record, Petitioner finally concedes in its rebuttal that the involved duties are assigned to the agent and that he does perform them from time to time, even during Claimant's regular hours. Petitioner says:

> ". . . The Agent, only performs clerical work in connection with Agency business when time permits. The fact that he performs clerical work only on a time permitted basis would seem to have no bearing on the exclusivity of Claimant's right to the work."

Certainly, the record is clear on the point that the agent "performs clerical work in connection with agency business when time permits"; and the issue in this case is simply whether the Scope Rule or Rule 41 can be construed as prohibiting Carrier from assigning the workweeks of the two positions and assigning the work as it did.

This issue is not a new one, but has already been resolved in Award 13197, involving these same parties and agreement, and in many awards involving other carriers. The Referee in this case properly followed those sound precedents.

G. L. Naylor
R. E. Black
W. B. Jones
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