NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20376
THIRD DIVISION Docket Number CL-20364

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the Burlington Northern System Board of Adjustment (GL-7376) that:

1. The Carrier violated the rules of the current Clerks' Agreement which became effective March 3, 1970, when it, by directive, ordered the crew calling at Kelly Lake transferred to the Crew Office at Superior, effective Saturday, November 6, 1971; and,

2. The Carrier violated the rules of the current Clerks' Agreement which became effective March 3, 1970, when it, by directive, ordered the crew calling at Kelly Lake transferred to the Crew Office at Superior, effective Sunday, November 7, 1971; and,

3. The Carrier violated the rules of the current Clerks' Agreement which became effective March 3, 1970, when it, by directive, ordered Operators to manifest trains, trace cars and make mine reports on Saturdays and Sundays; and,

4. The Carrier shall now be required to compensate Joseph Milkovich, Chief Clerk, Kelly Lake, eight hours overtime for Saturday, November 6, 1971, and each succeeding Saturday thereafter, until such time as the crew calling and related work is returned to the Chief Clerk position at Kelly Lake; and,

The Carrier shall now be required to compensate Joseph Milkovich, Chief Clerk, Kelly Lake, four hours overtime for Sunday, November 7, 1971, and each succeeding Sunday thereafter, until such time as the crew calling and related work is returned to the Chief Clerk position at Kelly Lake.

OPINION OF BOARD: This dispute involves the question of whether the Claimant, the Chief Clerk at Kelly Lake, Minnesota, was entitled to perform clerical work which allegedly was part of his major assigned duties during his regular workweek, and which was performed on his rest days of Saturday and Sunday by employees at Superior, Wisconsin.

PROCEDURAL ISSUES

Before proceeding to the merits of the claim, we shall dispose of several procedural questions involving objections to evidence and issues not presented on the property and involving a time limit defense interposed by the Carrier. Our disposition of these procedural matters are noted in paragraphs numbered 1 through 6 hereinafter.

1. We shall not consider Exhibit #18, annexed to Petitioner's Ex Parte Submission. Carrier's statement that this exhibit was not presented to it on the property is not contradicted by the record.

2. We shall consider the entries from the Claimant's diary which show crew calls made at Superior during the periods November 6, 1971 through January 16, 1972, and January 22 through November 12, 1972. Such entries appear at page 4 of Petitioner's Submission and in a 36 page exhibit annexed thereto as Exhibit #19. The Carrier objects to the consideration of this material with the statement that "The last conference held on the property in this case was on February 6, 1973...but Employes' Exhibit No. 19 was not offered to the Carrier in support of the claim even at that late date though it is evident it must have been available." The Petitioner counters with the statement that "In conference with the Carrier on December 6, 1972, the Organization presented the Carrier with Claimant's personal diary showing dates and occurrences when calls were made by other than Claimant." In appraising these positions, and the whole record, we note that the parties had at least two conferences on the property and that the Petitioner refers to a specific conference by date as the one in which the logs of entries were presented to Carrier. As the Carrier states, the logs "must have been available" and it seems plausible that they were presented, discussed, or referred to in some fashion in one of these conferences. The logs do not raise a new issue, for they are consistent with the Petitioner's position as stated from the inception of the claim, and, consequently, we believe there is no basis on which to exclude the page 4 entries and Exhibit #19 from our considerations. See Award Nos. 8755, 10385, and 11598 for similar situations in which exhibits offered by the Carrier were accepted for consideration.

3. We shall not consider Rules 10-D, 29-B, 29-C, 29-D, 29-G (7), 43-A, and 43-B. Carrier's statement that these rules were not raised on the property is not contradicted by the record. However, notwithstanding Carrier's objection, Rules 1-A-3 and 36 are properly before the Board, as the record shows that these rules were cited on the property. (See March 24, 1972 letter of General Chairman)

4. We shall not consider the Merger Agreement of November 17, 1967. The Petitioner's statement that this agreement was not raised on the property is not contradicted by the record.

5. We shall not consider Exhibit R-1, Petitioner's Rebuttal Brief. Carrier's objection that this exhibit was not handled on the property is not contradicted by the record.

6. As regards the Carrier's time limit defense, its theory is that this claim is barred because it is based on the same occurrence protested in the General Chairman's letter of March 30, 1968. The record shows, however, that the protest made in the March 30 letter concerned the cancellation of bulletins at Kelly Lake, "except for the Chief Clerk position." The Chief Clerk position is involved in the instant dispute, and since it was explicitly excepted from the March 30 letter, there is no showing that the parties have previously joined issue on the controversy involved in this dispute. We must therefore reject the Carrier's time limit defense and proceed to the merits of the dispute.

APPLICABLE RULES

The pertinent rules are as follows:

"RULE 1. SCOPE

A. These rules shall govern the hours of service and working conditions of the following employees occupying positions in the craft or class of Clerical, Office, Station and Storehouse employes, subject to exceptions contained in Rule 3:

. . . . . .

(3) Other Office Station and Store Department employees such as:

Depot masters; station masters; gatemen; train announcers; train and engine crew callers;.."

"RULE 36. OVERTIME

F. WORK ON UNASSIGNED DAYS. Where work is required by the carrier to be performed on a day which is not 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."

"RULE 37. ASSIGNMENT OF OVERTIME

F. The above procedure does not apply to working five and six day positions on the day they are not assigned to work. If a five or six day position is worked on the day or days which it is not assigned to work, the employe who works the position on the five days of assignment must be called."

"RULE 38. NOTIFIED OR CALLED

A. Employes notified or called to perform work, not continuous with, before, or after the regular work period or on days of rest and specified holidays shall be allowed a minimum of three (3) hours for the two (2) hours' work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

FACTS

A brief review of the setting in which this dispute arose is in order. Kelly Lake, Minnesota, was once the principal railroad terminal for the movement of iron ore from the Mesabi Iron Range to Superior, Wisconsin, for shipment by water to the steel mills at the lower lake ports. Kelly Lake is situated in about the middle of ten or so other towns which extend along the Mesabi Range, from Virginia, Minnesota, in the north, to Grand Rapids, Minnesota, in the south. Because it was centrally located with respect to the ore mines, it evolved into a large classification yard for outbound loaded cars and a large incoming yard for trains hauling empty ore cars. Each year a large number of positions were established and abolished coincident with the beginning and end of the ore season-April or early May until the latter part of November or early December. Ore shipments peaked in 1953, began to decline in 1954, and then dropped off markedly in 1958. The mines accounting for the decline were concentrated east of Kelly Lake, so the Kelly Lake facilities were no longer centrally located. Starting in 1962, the Carrier initiated a policy to end Kelly Lake's function as a major terminal; operations were gradually discontinued until ultimately all of the yard trackage was removed, the roundhouse and repair track facilities were taken out of service, and train dispatching service was terminated. From 1968 onward, the work force at Kelly Lake consisted of the positions of the Chief Clerk, one Steno-Clerk, and telegraphers assigned around the clock, seven days per week. One hundred miles away at Superior, Wisconsin, the complement of the Division crew office consists of twelve (12) employees, assigned around the clock, seven days per week. (Nine (9) employees were contemplated for the staffing at Superior, in a June 9, 1971 Agreement between the Parties, but the staff was subsequently expanded to twelve (12) employees.)

In the Fall of 1971, the Claimant was the regularly assigned Chief Clerk at Kelly Lake, Minnesota, working straight time Monday through Friday, eight hours of overtime on Saturday, and four hours of overtime on Sunday. There is some dispute that the Chief Clerk position was bulletined to work 6½ days weekly, but there is no dispute that the Claimant did in fact work his position 6½ days weekly. On October 21, 1971, to be effective November 6, 1971, the Chief Clerk position at Kelly Lake was bulletined as a five day position; the notation of "change of duties" was contained in the bulletin, along with the following information:

> "Description of the Major Assigned Duties/Coordinate train and enginemen's boards, make various mine reports, Joint Track Statement and Division Records."

The Saturday and Sunday rest days of the prior Chief Clerk position were not included in any relief assignment. The Claimant, occupant of the prior Chief Clerk position, bid in the new five day position and also, under date of November 15, 1971, submitted the following claim:

> "I hereby submit a claim for 8 hours Saturday November 6, 1971 and 4 hours for Sunday November 7, 1971 and every Saturday and Sunday hereafter.
>
> Kelly Lake, crew are called on week ends from Superior crew office and other duties performed by Operators.
>
> We contend the company is violating rule 37 assignment of overtime and rule 37F plus other rules of the current schedule now in effect."

In subsequent correspondence on the property, the General Chairman cited Rules 1-A-3 and 36 as additional basis for the claim. In addition, in a January 18, 1972 letter, the General Chairman made the following statement:

> "Prior to November 6, 1971 all the crew calling and coordinating the train and enginemens' boards was performed by the Claimant. He was assigned eight hours per day Monday through Saturday and four hours on Sunday. Commencing Friday, November 5, he was instructed to phone the Crew Office at Superior giving the necessary information so that a Kelly Lake board could be maintained at Superior. The Claimant was advised that his Saturday and Sunday work was abolished effective November 6, 1971.

"Under the circumstances I think you will have to agree that the Chief Clerk position at Kelly Lake is a seven day position as work is necessary seven days each week. By transferring the Kelly Lake board to Superior, the Carrier did not eliminate the work of calling crews at Kelly Lake. The actual calling of crews is still being performed by Operators, Chief Dispatcher and Crew Clerks at Superior.

Effective November 6 and 7, 1971 employes of a different craft are calling crews, manifesting and furnishing information to mining companies on Saturdays and Sundays. Mr. Milkovich and his predecessors on the Chief Clerk position at Kelly Lake had exclusively performed these services for the Carrier for over 50 years.

In Award No. 28 of Special Board of Adjustment No. 336 (G.N.) Dudley Whiting, Neutral Member, supports Organization's contention that when work is performed on a rest day of a 5 or 6 day position, the Carrier must use the incumbent of the position on an overtime basis."

In rejecting the claim for being without merit, the Carrier's Vice President for Labor Relations laid out his argument in the following extracts from his letters dated March 15 and June 7, 1972:

March 15 letter

"The responsibility for deciding which road service employee to call for any service has never been an exclusive function of clerical employees at Kelly Lake or system-wide, nor is it the exclusive function of clerical employees at Kelly Lake or system-wide to actually make the call to the road service employee.

The crews are handled at the control center at Superior, a 24-hour operation, and decision as to how the crew members will be contacted is determined in that facility. Whether the crew callers use commercial long distance, telegraph, word of mouth, message or whether they require an employee, clerical or otherwise, at some distant point to contact a crew member to tell him he is called or whether the crew member calls in himself and in the process is called are the means the carrier may use in the conduct of its business, none of which is within the exclusive province of the clerical group."

June 7 letter

"Without waiving or in any manner receding from the foregoing position that the claim is procedurally defective, it is also the Carrier's position that the claim is completely lacking in merit. In reviewing the instant claim, as well as companion claims covered by your File Nos. 168 (1-72), 169 (1-72), 170 (1-72), 171 (1-72), and 172 (2-72), you contend that employees of a different craft are calling crews, manifesting and furnishing information to mining companies, but you are in error when you state that the claimant has somehow acquired any exclusive right to that service. The scope rule is a general position type rule which does not delineate any work as being reserved exclusively to the positions named therein. If you will refer to Award No. 6, Special Board of Adjustment No. 171, BRAC v. GN (Begley), you will find the following contention set forth in the Employes' position before that Board:

> 'If you refer to Page 2 of Exhibit 'A', you will see under Kelly Lake Roundhouse that two clerks are listed with the major assigned duties listed as clerical and calling engine crews and that a relief clerk with the same duties was assigned to relieve these two positions two days per week inasmuch as these are seven-day positions.
>
> It is the Employes' contention that this work definitely has belonged, for a period of over thirty years, during the entire ore season, seven days per week, to the clerical employes and has always been performed by them until August 12, 1954 when the Carrier abolished these positions and turned the work over to the roundhouse foremen.'

That claim was denied.

* * * * * * *

* * * *

You further seek comfort in the brief description of major assigned duties shown on the bulletin of the claimant's position. You must be aware, however,

"that bulletins are informational and not contractual - they do not confer any exclusive rights to work. In this connection, I refer you to the Board's Opinion in Third Division Award No. 15695, BRAC v. StL&SF (Dorsey) which reads in part:

> 'The Scope Rule in the Clerks' Agreement is general in nature. Therefore, to prevail, Petitioner has the burden of proof that the work claimed has been traditionally and customarily performed on a system-wide basis by employes covered by its Agreement. See Award Nos. 14044 and 15394 involving the same parties and Agreement.
>
> It is not disputed that one of the assigned bulletined duties of Claimants was 'transporting crews in company automobile from yard office to various areas in and around terminal' at Tulsa. Petitioner states that they had performed such work exclusively. Carrier states they had not.
>
> We have held that a bulletined duty, in and of itself, is not evidence of an exclusive reservation of work. Award 14944.'

* * * * * * *

As pointed out to you in my letter of April 12, 1968 (Your File 312-1) ore shipments have steadily declined over the years from peak seasons of 25 to 33 million tons down to the present 10 or 11 million. Kelly Lake, a major facility in the making up of ore trains, has been abandoned as a yard facility and the trackage torn up. The need for clerical service has disappeared and with the direct telephone service installed in 1968, there is no necessity for relaying calls through the claimant. Not doing so simply eliminates one intermediate step."

DISCUSSION AND CONCLUSION

In the proceeding on the property, the Petitioner's position included the contention that the disputed work was historically and exclusively performed by the position of Chief Clerk at Kelly Lake. However, in its Submission, the Petitioner has abandoned this contention,

and consequently, the dispute is now confined to the narrow question of whether the claim is valid under the text of Rule 36F, WORK ON UNASSIGNED DAYS. The Petitioner's position is simply that the disputed work was performed only by the Claimant during his Monday-Friday workweek, and thus, he had an agreement right to perform the weekend work which was performed at Superior. The Carrier's defenses as reflected in its Submission and in the quoted extracts from the Vice President's letters, are that: (1) crew calling is handled at Superior and decision as to how crew members are contacted is determined in that facility; (2) the claimant had no exclusive right to the disputed work; (3) the bulletin description of major duties of Claimant's position does not confer exclusive rights to the disputed work; (4) the installation of direct phone service in 1968 eliminated the necessity for relaying calls through the Claimant; and (5) the Petitioner has offered no proof that duties other than crew calling were performed on weekends at Superior.

We shall comment on Carrier's defenses seriatim. We can accept Carrier's point (1) as valid, but this does not negate the claim. The Petitioner's challenge is that certain work should have been performed at Kelly Lake by the Claimant; resolution of this question, in the instant record, in no way depends upon whether such work was controlled from Superior or elsewhere. Carrier's points (2) and (3) are likewise off point, as the exclusivity defense is not applicable to an unassigned work dispute. (Award Nos. 5810 and 17425.) Carrier's point (4) would have some substance if the claim was that calls generated by the Superior crew board had to be relayed through the Claimant; however, since the claim concerns calls generated by the Kelly Lake crew board and in no way suggests that the Claimant is an intermediary for the relay of Superior calls, we conclude that Carrier's point (4) is not germane to this dispute. (We note that the Carrier does not contend that the disputed work was transferred from Kelly Lake to Superior on November 7, 1971, and that Carrier had an agreement right, reserved, expressed, or implied, to do so. Nor does the Carrier contend that the disputed work has been eliminated.) The Carrier's defense in point (5) is borne out by the record and we shall find for Carrier in this regard as hereinafter more fully stated.

In appraising the Petitioner's position, we note that the Claimant held the only clerical position at Kelly Lake and, hence, was the only employee available to perform the disputed work at this location. This fact, plus the Carrier's October 21, 1971 bulletin on the Chief Clerk position, makes it clear that the disputed work was performed by the Claimant during his regular Monday-Friday assignment. In reaching this conclusion we have carefully studied prior Awards 12493 and 13195 which are cited by Carrier in support of its argument against the evidenciary value of the bulletin. It is true that these Awards

hold that bulletins are not contractual in the sense of conferring exclusive rights to the work described therein; however, these same Awards make it clear that a bulletin is informational in nature and it is the informational aspect of the bulletin which is pertinent here. The bulletin expressly lists the major assigned duties of the Chief Clerk position as follows: "Coordinate train and enginemen's boards, make various mine reports, Joint Track Statement and Division Records." The foregoing aptly describes the disputed work; it comes from the Carrier, itself, and, hence, there can be no doubt that the disputed work was part of the Claimant's regular assignment. Indeed, except for questioning the evidenciary value of the bulletin, the Carrier makes no contention that any employee other than the Claimant performed the disputed work at Kelly Lake or elsewhere during the Claimant's workweek.

We also conclude that crew calling work assigned to the Claimant during his workweek was performed by employees at Superior, Wisconsin, on the Claimant's rest days of Saturday and Sunday. All of the Petitioner's evidence tending to prove this element of the claim was objected to by the Carrier on grounds of inadmissibility; these objections were granted in part (paragraphs 1 and 5, Procedural Issues herein), but the Claimant's logs on crew calls from Superior were admitted (paragraph 2, Procedural Issues). These logs, and the Carrier's response thereto, as hereinafter set forth, show beyond any doubt that Kelly board crew calls were made from Superior on the Claimant's weekends. The part of the logs quoted in Petitioner's Submission reads as follows:

"November 6, 1971

Superior Crew Office calling Ex. Brakeman John Rogers to cover Brakeman Harry Cammilli laying off the 7:30 a.m. Kelly Lake mine run for one day.

November 7, 1971

Superior Crew Office calling Ex. Brakeman John Rogers and Brakeman Pas. Serrano off the Brakeman Extra Board at Kelly Lake to cover Brakeman W. J. Beasy and Brakeman Geo. P. Rukavina laying off the 8:00 a.m. Kelly Lake mine run for one day.

Superior Crew Office had Opr. Helen Pederson call Brakeman Geo. W. Hill off the Brakeman Extra Board at Kelly Lake to cover Brakeman C. W. Ross laying off the 6:30 a.m. Bovey mine run for one day.

"November 14, 1971

Superior Crew Office having Operator at Grand Rapids call Brakeman Harry Camilli that he is displaced by Brakeman Geo. P. Rukavina and also having Operator at Kelly Lake call Brakeman Geo. P. Rukavina he is being displaced by Brakeman C. W. Ross.

November 28, 1971

Superior Crew Office calling Ex. Brakeman Vern Loken to cover Brakeman C. W. Ross laying off the 8:00 a.m. Kelly Lake mine run for one day.

December 19, 1971

Superior Crew Office calling Ex. Brakeman L. Magestad to cover Brakeman Harry Camilli two week vacation on the 8:00 a.m. Kelly Lake mine run.

December 26, 1971

Superior Crew Office calling Ex. Brakeman John Rogers to cover Brakeman C. W. Ross laying off the 8:00 a.m. Kelly Lake mine run for one day.

January 15, 1972

Superior Crew Office called Ex. Brakeman W. J. Beasy to cover Brakeman Emil Blasina laying off 7:30 a.m. Kelly Lake mine run.

January 16, 1972

Superior Crew Office called Ex. Brakeman W. J. Beasy to cover Brakeman Les Taggart laying off 8:00 a.m. Kelly Lake mine run."

The foregoing was the subject of an extensive comment in the Carrier's Reply Brief:

"...Taking each one of the instances cited on page 4 of the Organization's submission, we find that:

-November 6, 1971, the crew clerk at Superior called Extra Brakeman Rogers who lives at Chisholm, Minnesota by telephone;

-November 7, 1971, the crew clerk at Superior called Extra Brakeman Rogers who lives at Chisholm,

"Minnesota, and Extra Brakeman Serrano who lives at Buhl, Minnesota by telephone;

-November 7, 1971, the crew clerk at Superior telephoned the on-duty operator (Helen Pederson) who, in turn, called Extra Brakeman Hill who lives at Pengilly, Minnesota, by telephone;

-November 14, 1971, the crew clerk at Superior telephoned the on-duty operator at Grand Rapids, Minnesota, who, in turn, telephoned Extra Brakeman Camilli who lives at Grand Rapids, Minnesota by telephone;

-November 28, 1971, the crew clerk at Superior called Extra Brakeman Loken who lives at Hinckley, Minnesota, by telephone;

-December 19, 1971, the crew clerk at Superior called Extra Brakeman Magestad who lives at Pengilly, Minnesota, by telephone;

-December 26, 1971, the crew clerk at Superior called Extra Brakeman Rogers who lives at Chisholm, Minnesota, by telephone;

-January 15, 1972, the crew clerk at Superior called Extra Brakeman Beasey who lives at Hibbing, Minnesota, by telephone;

-January 16, 1972, the crew clerk at Superior called Extra Brakeman Beasy who lives at Hibbing, Minnesota, by telephone.

The activities of the Division Crew Office at Superior are described starting on page 24 of the Carrier's submission. It is staffed by 12 clerks, around-the-clock, seven-days-per-week, who are on the same seniority district as the claimant. Illustrative is Carrier's Rebuttal Exhibit 'B', which is a bulletin going back some four years, and which lists both a crew clerk assignment and a relief crew clerk assignment representative of the around-the-clock, seven-day service on a pro rata basis at Superior. This bulletin lists as major assigned duties:

'Book mileage, call crews and miscellaneous reports connected therewith. Handle trainmen, enginemen, yardmen, yardmasters and Clerks' boards and other duties as assigned by chief crew clerk.' (Emphasis added)

Assuming for the sake of argument that the calling procedure were to be handled as desired by the claimant, what would be required (taking November 6, 1971 for example) is that the crew clerk at Superior, whose duties include 'call crews', would first have to telephone the claimant at his Kelly Lake home by commercial long distance telephone and the claimant would then have to relay the call to Extra Brakeman Robers at Chisholm by commercial long distance telephone. In the instance cited for November 14, 1971, the crew clerk at Superior would have to telephone the claimant at home by commercial long distance telephone and the claimant, in turn, would have to come to the Kelly Lake station so that he could telephone the on-duty operator at Grand Rapids over the Carrier's lines, who, in turn, would telephone the call to Extra Brakeman Camilli who lives in Grand Rapids, Minnesota. In the instance cited on November 28, the call was telephoned to Extra Brakeman Loken who lives at Hinckley, Minnesota. Hinckley is some 80 miles south of Superior while Kelly Lake is about the same distance north. To handle in the manner desired by the claimant, the crew clerk at Superior would first have had to place a commercial long distance call to the claimant's home some 80 miles north of Superior so that the claimant could in turn have placed a commercial long distance telephone call to the extra man who lives some 80 miles south of Superior."

The Carrier's statement is persuasive enough on the point that the Kelly Lake crew board could easily be handled from Superior on weekends. Indeed, the record clearly suggests that, while the staff expansion at Superior originally had no apparent connection with the situation at Kelly Lake, it became manifest during and after the expansion that the increased clerical force at Superior could feasibly absorb the weekend crew calling work at Kelly Lake. Thus, that the Carrier had a sound and conventional business objective in this dispute is not difficult to perceive. However, a proper business objective must be compatible with an employee's agreement right, and this the Carrier has not shown. The Carrier's quoted statement fails to say, for example, that Superior handled the Kelly Lake board during the Claimant's regular workweek, or that

Superior handled the Kelly board on weekends prior to this dispute; these, of course, are the kinds of facts which would show that an agreement right had not been impaired. More important, though, in setting out its information on the calls listed in the logs, the Carrier reveals the names of the towns where the employees live, which names are not reflected in the original logs. A comparison of the names of these towns with Carrier's Exhibit #1 (a map of the Mesabi Range, including Kelly Lake, and the Superior area) shows that four of the six towns (Chrisholm, Buhl, Grand Rapids, and Hibbing) involved in the calls are among the towns extending along the Mesabi Range, and lying 80 to 100 miles west of Superior and within the area served by the Kelly Lake board. The logs are also pertinent to Carrier's Submission argument that calling Range crews was not a significant part of the duties at Kelly Lake.

> "...Insofar as relaying calls to crews is concerned, Range crews are assigned by bulletin and report to work on schedule; they are not called. The only occasion for a call would be in the event of a layoff on short notice and this is not the type of circumstance which would occur with any degree of regularity...."

Contrarily, the logs show that, of the nine calls listed in the quoted part of the logs, seven were made to cover layoffs from the Kelly Lake mine run, in view of which we cannot concur in the Carrier's suggestion of the insignificance of the Kelly Lake board activity. (We observe here that we have no quarrel with Carrier cited Awards No. 6307, Second Division, and No. 23, Public Law Board No. 713, which hold that work can be too miniscule to support a claim; however, in this case, the Carrier has made no showing of precisely what work was performed at Superior on the dates in question and, hence, there is no basis on which the Awards could be said to apply.) We also reject the Carrier's suggestion that the claim is invalid, because the Kelly Lake board is a "convenience board". This label of "convenience board" does not gainsay that work was performed in coordinating the board, but rather, confirms that a board did exist and did entail work just as asserted by Petitioner. In view of the foregoing, and based on the whole record and the logical inferences to be drawn therefrom, we are satisfied that the work of calling crews was part of the Claimant's Monday through Friday assignment, that such work was performed by employees at Superior, Wisconsin, on the Claimant's rest days of Saturday and Sunday, and that no eligible extra or unassigned employee was called to perform the work.

We come now to the question of damages and to our earlier indication that the record supports the Carrier's assertion that the Petitioner has offered no proof in respect to the "other duties" (manifest trains, trace cars, and make mine reports) mentioned in the claim. First,

CARRIER MEMBERS DISSENT TO AWARD NO. 20376 DOCKET CL 20364

(REFEREE BLACKWELL)

The decision in this case is not only a travesty on the rules of procedure adopted by the Board but flies in the face of the requirements of the Railway Labor Act as the following comments will clearly point out.

Taking the various items in the award in page sequence, the following are our comments:

Page 2, in Item No. 2 the Referee erred in admitting Employes' Exhibit No. 19 for consideration by the Board. At no time in the handling on the property did the Employes offer any specifics as to who did what, on what dates, that would constitute a violation. On page 21 of its submission, the Carrier stated:

> "Neither then (the initial filing of the claim), nor at any time since, in the handling on the property has any effort been made by the claimant or the Organization to show that any crew was called on claim dates, or even that a train was run on those days . . . "

and, again, on pages 22, 23, and 24 the Carrier called attention to this shortcoming. On page 39, the Carrier repeated:

> "Without waiving or in any manner receding from the foregoing, the Carrier further submits that there is no showing on either the named dates in the statement of claim (November 6 and 7) nor on 'each succeeding Saturday thereafter' or on 'each succeeding Sunday thereafter' that any of the work cited as

"the basis of the claim was in fact performed. There is no showing that any crews were called on those dates, that any trains were 'manifested' or even run for that matter or that any 'mine reports' (whatever they may be) were made..."

and, finally, on page 41 in its summary, the Carrier said:

"(2) The petitioner has failed to meet the burden of proof requirement and does not submit a viable claim for adjudication. Between the date of filing of the claim on the property and its submission to this Board, there has been offered nothing but unsupported assertions and generalized allegations coupled with contentions that the scope and overtime rules have been violated. Notwithstanding the fact that agreed-to-extensions of time limits has given the Organization more than 19 months to perfect its claim, it has offered nothing in all that time to support its contentions."

It should not be necessary to cite the myriad of awards issued by the National Railroad Adjustment Board of the requirements in this respect; representative is Third Division Award No. 17346, Clerks v. LI (McCandless):

"...Where Employes have been specific as to the individuals and groups whom they allege should have been doing 'ushers' work and as to which days certain they should have been allowed to do it - they have been just as vague as to alleging specifically who did the work and at what times and involving which trains."

The Organization apparently recognized this shortcoming and on page 4 of its submission, which they attempt to support by Exhibit No. 19, for the first time listed specifics of alleged violations. As emphasized in Carrier's Rebuttal, never before in the handling on the property were these specifics furnished in support of the claim and never before was Exhibit No. 19 offered to the Carrier in any size, shape or form. At the very outset of the Carrier's Rebuttal, it was stressed that the Organization's statement that "... all data herein submitted in support of Claimant's position has been submitted to the Carrier and made a part of this claim" was not true. In great length and detail on pages 1, 2 and 3 of its Rebuttal, the Carrier dwelt on that fact in a most emphatic manner.

Yet, what does the majority say: "...it seems plausible that they were presented, discussed, or referred to in some fashion..." It relies on a statement made by the Organization in its Rebuttal that the Organization presented Exhibit No. 19 to the Carrier on December 6, 1972. Where is the proof? All exchanges between the parties are a matter of record and there is no record even of a conference being held on December 6, 1972, let alone any record of presentation of this most vital aspect of the Organization's case. It is much more plausible to assume that if such presentation had been made, the Organization would have confirmed that fact on the record.

The record is the controlling factor in resolving any conflicts, not the Referee's judgment of what is plausible, for Referees, being human beings subject to human frailities, it is not inconceivable that their judgments can be influenced, consciously or subconsciously, by some sense of sympathy, equity or bias. In seeking support for its "plausible" theory, the majority looks to Awards 8755, 10385 and 11598. In Award 8755, the Maintenance of Way Organization presented in great detail the specifics of the alleged violation - it was the construction by Signal Department employees of forms and foundations for the installation of flasher light signals at High Mills Crossing on the Saratoga Division. In admitting Exhibits "A" through "F" in that case, the majority found that there was no record before the Board of what handling occurred on the property and it also found that these identical exhibits had been considered in a prior case between the two same parties in Award 8091. In Award 10385 there was no dispute as to the specifics of the claim and in admitting the challenged evidence, the majority placed considerable reliance on the fact that the challenge was first raised in panel argument and not in the Organization's submission. In Award 11598, again the specifics were not disputed and the majority pointed out that the record did not contain copies of correspondence between the parties relating to the handling of the claim on the property and therefore assumed the parties had complied with the requirements of the Railway Labor Act. These three awards are poor crutches for the plausibility theory offered by the majority for in not one is there the serious question of the viability of the claim in the first instance and, contrary to the situation in those three awards, the record in the instant case contains all the correspondence exchanged between the parties and nowhere in that correspondence is there any support for such an irresponsible finding.

On page 5, the Award quotes the initial claim submitted November 15, 1971, included in the record as Carrier's Exhibit No. 9, but completely ignores throughout the award Carrier's Exhibit No. 10, which is the claimant's own statement dated November 22, 1971 that concedes that others than he (the claimant) call train and enginemen on the Range. This was pointed out, and the text fully quoted on page 10 of the Carrier's Submission. Notwithstanding, on page 9, the majority proceeds to construct an unassigned day rule case by finding that only the claimant called crews living on the Range during his Monday through Friday work week when the claimant himself in Carrier's Exhibit No. 10 conceded that "...fellow workers in the crew office and on the Range call them as a favor to the Enginemen and Trainmen the saving of a long distance phone call." The majority further erred when on page 9 it stated that "...the Claimant held the only clerical position at Kelly Lake and, hence, was the only employee available to perform the disputed work at this location." Yet on page 4, the majority points out that since 1968, the work force at Kelly Lake consisted of the positions of the Chief Clerk, one Steno-Clerk, and telegraphers assigned around the clock, seven days per week. Having found on page 8 that the Organization had abandoned its scope rule position, it is inconceivable that it could reach a conclusion that only the Chief Clerk was available to perform the crew calling.

Continuing on page 10, the majority refers to the major assigned duties as expressed in the bulletin and concludes that there can be no doubt that the disputed work (crew calling) was part of the claimant's regular assignment. This is not a conclusion based on fact but instead the majority quite obviously again engages in assumptions necessary to firm up the Petitioner's claim. Crew calling is not mentioned in the major assigned duties listed on the claimant's bulletin and notwithstanding the strained reasoning expressed by the majority, even if it were, this Carrier has not relinquished its managerial prerogative of adding to or taking from any position duties which may have been assigned by bulletin. That right has not been contracted away in the agreement and this Board has repeatedly held that such right does not flow to the employee contractually by virtue of a bulletin.

The majority then states on page 10:

> "...the Carrier makes no contention that any employe other than the Claimant performed the disputed work at Kelly Lake or elsewhere during the Claimant's workweek."

That statement flies in the face of the record! The Carrier maintained throughout that the claim was absent any specifics, consisting only of a broadside of unsupported and unspecified allegations, creating the necessity of offering "in the alternative" defenses. Yet even in such vacuum, the afore-quoted statement is amply refuted in the record: On page 10 of its submission the Carrier points out that when questioned on the initial claim by the Trainmaster at Kelly Lake as to the established practice of calling trainmen and enginemen who live on the Range from Superior Crew Office, the claimant acknowledged that this was the practice but sought to justify his claim by referring to that established practice as a "favor" to the trainmen and enginemen (Carrier's Exhibit No. 10).

On page 25 of its submission, the Carrier makes the following statement regarding the Superior Crew Office:

> "Their responsibilities require that they control crew assignments, relief and calling at all points on the Division, including Cass Lake, Grand Rapids, Coleraine, Calument, Nashwauk, Keewatin, Kelly Lake, Hibbing, Chisholm, Buhl, Mountain Iron and Virginia. It is, and has been, a common practice to call the nearest open station over Company Lines and have whatever personnel are on duty regardless of craft place a service call with the trainman, engineman, or yardman, as the case may be, so as to save that employe the cost of a long distance call. Absent such accommodation, the call is placed long distance at the called employe's expense."

Carrier's Exhibits Nos. 3, 22, 24, 25, 26, 27 and 28 are definite evidence of the long established practice system wide, but most disconcerting to the Carrier is that proof of fact that other employees "at Kelly Lake or elsewhere" performed the disputed work is the very exhibit which the majority admitted over the Carrier's objection - Employes' Exhibit No. 19. Once having admitted that exhibit, the majority was obligated to examine its full import rather than just the Saturday and Sunday dates specifically named in the Petitioner's submission. Such examination of the entire exhibit clearly establishes the fact that the complained of practice occurred not only on Saturdays and Sundays but on other days of the week - January 24 is a Monday, January 26 is a Wednesday, January 27 is a Thursday, January 31 is a Monday, February 16 is a Wednesday, February 17 is a Thursday, February 18 is a Friday, March 1 is a Wednesday, and so on. Over the period of 11 months covered in what purports to be

the claimant's diary, some 80 instances are cited as occurring on weekdays (Monday through Friday) involving either the crew clerks at Superior or the telegraphers at Kelly Lake.

Still on page 10, and continuing through page 12, the majority seeks to find support in the Carrier's Rebuttal for the specific instances cited for the first time in the Organization's submission. We are sure that the Referee is aware that alternative pleadings can not ordinarily be used as an admission against the pleader on his primary defense. The omission indicated in the quote from the Carrier's Rebuttal was the introductory sentence reading:

> "Even were such information properly before this Board (which it is not), it would not support the contentions of the Claimant..."

The majority then proceeds to analyze its quote out of context and speculates as to what it suggests, what it says and does not say. A review of the entire record refutes such speculation. The record shows that the claim was submitted alleging agreement violation but failed entirely to meet the burden of proof requirement that such a violation did exist. Contrary to the majority's speculation, the Carrier did show that the Crew Office in Superior is charged with the responsibility for handling the Trainmen's, Enginemen's and Yardmen's Boards for the entire division, including the Range points; it shows that the bulletin for the Crew Office positions requires their calling of crews while the bulletin for the claimant's position does not contain that requirement; it shows that others than the claimant and others than clerks call crews not just on weekends but on other days also. Furthermore that fact is confirmed by the claimant at the initial stages of handling and further confirmed by the Petitioner's challenged Exhibit No. 19. The majority inflates out of proportion the reference to a "convenience board" at Kelly Lake when it has been shown that this is not the controlling board, is not a complete board, and only reflects a portion of the Board maintained at Superior. The description given it by the Organization does not attempt to sanctify it as a crew board but instead refers to it as a "peg board" (Employes' Submission, page 13). It does not control the assignment of employees at Kelly Lake or anywhere else on the Operating Division - it is there only for the convenience of the trainmen so as to avoid the necessity of their having to call Superior for information as to their standing.

Finally, on page 14, the majority, in rejecting the Carrier's position with respect to the insignificance of the work in question, while conceding the propriety of awards denying claims under the De Minimus doctrine, states:

> "...in this case, the Carrier has made no showing of precisely what work was performed at Superior on the dates in question..."

While the Carrier has every reason to rely on the countless awards of this Board that have held the burden of proving all elements of a claim lie with the one seeking payment, it need only refer to that portion of its Rebuttal which the majority saw fit to quote out of context on pages 11 and 12 which pointed out in each instance that the work properly performed by the Superior Crew Office on each date but one was a single telephone call; on the date excepted, two telephone calls were made. In the paragraph immediately following that quoted by the majority on pages 11 through 13 of the Award, the Carrier in its Rebuttal stated:

> "In all cases, calls are placed by telephone. In no case is the calling done by personal contact (i.e., by foot, bicycle or auto). The actual telephone call by the crew clerk at Superior consumes not over five minutes. What the claimant is asking here is that he be interjected as an intermediate step in these telephone calls so that he might secure eight hours' pay at the overtime rate for a service not needed or, in the alternative, that he be allowed such payment for performing no service." (Carrier's Rebuttal, page 10.)

Similarly, the quote from the Carrier's Rebuttal set forth on page 13 of the Award is clearly illustrative of the fact that the claimant, had he been used as desired, would simply have performed as an unneeded intermediary.

In total, considering the strained and tortured trail traveled by the majority, as evidenced by its Award when compared to the record, the admonition of this Board in its Second Division Award No. 4361 comes to mind:

> "1. The law of labor relations is firmly settled that a labor agreement, as an instrument of industrial and social peace, should be interpreted and applied broadly and liberally, not narrowly and technically, so as to accomplish its evident aim and purpose. See: Awards 3954 and 4130 of the Second Division and references cited therein.

"Trivial deviations or those lacking in substance will generally be disregarded under the universally recognized de minimus rule in the interest of flexibility and workability. Any other approach would be bound to convert a labor agreement from an instrument intended to promote industrial harmony into a source of continuous irritation and excessive litigation, and thereby, deprive it of its effectiveness and vitality..."

Erroneous awards such as No. 20376, Docket No. CL-20364, contribute nothing to industrial peace but on the contrary encourage the promotion of frivolous claims in the hopes that this Board through assumptions, plausibility theories and patently erroneous conclusions will relieve the Petitioner of the necessity for discharging its obligations under the Railway Labor Act in the first instance.

W. B. Jones
W. B. Jones

G. M. Youhn
G. M. Youhn

H. F. Braidwood
H. F. Braidwood

G. L. Naylor
G. L. Naylor

P. C. Carter
P. C. Carter

LABOR MEMBER'S ANSWER TO
CARRIER MEMBERS' DISSENT TO AWARD 20376
(Docket CL-20364)

Carrier Members' Dissent to Award 20376 repeats the very arguments raised by Carrier Members before this Board. The Dissent adds nothing to, nor does it detract from, the sound decision reached in this dispute--that the Agreement was violated and that the claim be sustained. Carrier Members in their Dissent presume each of their contentions to be established and accepted facts. They set forth nothing in support of their contentions but self-serving conclusions which were set forth more intelligently and in greater detail when this Docket was under consideration by the Division.

After tedious page upon tedious page, Carrier Members finally conclude with a suggestion that Awards such as the instant Award "will relieve the petitioner of the necessity for discharging its obligations under the Railway Labor Act in the first instance." Are the Carrier Members advising a suggestion of "do as I say, not as I do"? The Section 2 First obligation of the Railway Labor Act applies to carriers as well as employes. The law exhorts employes and carriers by requiring:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Award 20376 is manifest proof that the Carrier not only failed to exert <u>every</u> effort to maintain the Agreement but failed to make <u>any</u> effort to maintain the Agreement at Kelly Lake, Minnesota. Award 20376 is correct.

One final comment to illustrate the frivolousness of the Dissent: For seven single-spaced, typewritten pages, the Dissent nitpicks and argues technicalities; then, at the bottom of Page 7, it sets forth the admonition of Second Division Award 4361 that labor agreements should be interpreted liberally and broadly. The Dissent is obviously as inconsistent as the Carrier's case was in the first instance.

J. C. Fletcher
10-16-74