

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21698
Docket Number CL-21254

Walter C. Wallace, Referee

(Brotherhood of Railway, Airline & Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (.
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7884) that:

1. The Carrier violated the rules of the current Clerks' Agreement, which became effective March 3, 1970, when it called Tom Volk, Car Service Clerk, Car Distributors Office, Minneapolis, Minnesota, for three hours overtime to fill a vacancy on the first shift Car Service Clerk position on April 19 and 22, 1974.

2. The Carrier shall now be required to compensate Tom Volk, second shift Car Service Clerk, an additional five hours overtime for each day, April 19 and 22, 1974.

OPINION OF BOARD: This case arose because the regular incumbent of the Car Distributor's position in Minneapolis (with hours from 8:00 a.m. to 4:00 p.m.) was ill and therefore absent on April 19 and 22, 1974. The Car Service Clerk with the same hours, voluntarily moved up to that short vacancy on the Car Distribution position. As a result, there was a short vacancy on the first shift (8:00 a.m. to 4:00 p.m.) Car Service Clerk position which is classified as a five (5) day position with a work week of Monday through Friday and rest days on Saturday and Sunday.

The Claimant, Tom Volk, is an extra list employee who was filling the second shift (4:00 p.m. to 12:00 midnight) Car Service Clerk position. On each of the two dates Claimant was instructed to report to work three (3) hours ahead of the regular 4:00 p.m. starting time for his second shift Car Service Clerk position. The Carrier maintains the day shift position was not filled. Certain Car Service orders were received from the Association of American Railroads' Car Service Bureau and from the Interstate Commerce Commission regulating the destination of cars between carriers. Carrier contends it became necessary to call in the second shift Car Service Clerk early in order to handle these entries promptly. It is Carrier's view, therefore, that Claimant was called in to perform overtime in accordance with Rule 38 and he was properly paid for the hours worked at the overtime rate.

First, we must consider whether or not the Agreement contains a prohibition against blanking the day shift position for the Car Service Clerk. As a five-day position, it is covered by Rule 29B which does not contain the usual phrase that mandates filling the position. See Rules 29C and D. It

follows that in the absence of a specific contract prohibition, the Carrier has the right to blank a position. See Awards of this Division 14252 (Rohman), 15975 (Englestein), 17434 (Devine). In Award 17765 (McCandless), this Board reached the same conclusion and stated:

"But our decisions have consistently held that in the absence of a specific rule prohibiting the blanking of a temporary vacancy, the right of the Carrier to do so is unrestricted." (emphasis added).

Claimant cites other rules in support of his view including Rules 1, 4, 14, 18, 28, 33, 36 and 37. We have reviewed them and we do not find they impose a prohibition on Carrier's right to blank this position under the circumstances. Rules 1 and 4 involve the scope rule and seniority, respectively, and their application here is unclear. Rule 14A concerns "short vacancies" and provides in pertinent part:

"Positions or vacancies of thirty (30) calendar days or less duration will be filled under the provision of Rule 18D..." (emphasis added).

The underscored phrase has been interpreted in the Awards of this Division to mandate a procedure to be followed when the vacancy occurs and does not mandate the filling of the vacancy. Awards 14252 (Rohman) and 15975 (Englestein).

Rule 18D provides the rules governing extra list rosters and, through a process of exclusion, the Claimant here meets the requirements of that rule and would, therefore, be the proper individual to fill the short vacancy under Rule 14A.

Rule 28 provides for an eight (8) consecutive hour basic day. The Claimant here worked his assigned job for eight consecutive hours on the days in question and it is unclear how this rule helps his cause. Similarly, Rule 33 provides for a five (5) day week and the guarantee here applies to the regularly assigned employee of the position and not someone else. See Award 8346 (Daugherty) and 13042 (West). Presumably, Carrier was alluding to this on the property when it questioned whether Volk, the Claimant here, was the proper claimant even if the Employee's argument on blanking was accepted. See Employee's Exhibit No. 12.

Rule 36 deals with overtime but it is Rule 37 on "Assignment of Overtime" that provides a foundation for Claimant's case, particularly Sub-paragraph C which provides:

"When it becomes necessary to fill short vacancies by working overtime, such overtime will be worked by available incumbent or incumbents of the classification where the vacancy exists by calling the senior available employee from that shift who is off duty that day. If unable to fill the vacancy from this source, calls will then be made in seniority order of available qualified employees from the other shifts in that classification who can be doubled or are off duty that day. If unable to fill by this method, available qualified senior employees from other classifications in the same immediate office will be called."

The difficulty arises here because the very matter in issue is whether the overtime worked by the Claimant on April 19 and 22 was related to his regularly assigned position as Car Service Clerk, second shift, or was it worked to fill the short vacancy of Car Service Clerk, first shift in accordance with Rule 37. The Employee's argument, made on the property, is that Claimant Volk is the proper Claimant under that rule because no qualified extra list employees were called for the position and no written application from regularly assigned employees in the immediate office had been made.

Going a step further with Claimant's argument, if the overtime worked was for the purpose of partially filling the first shift job with the further purpose of leaving it partially blanked, there is substantial authority in the Awards of this Division that the Carrier must fill the position for the full eight hours if it is filled at all. Awards 7034 (Carter); 19668 (O'Brien); 19474 (Ritter); 20108 (Eischen); 10602 (Dolnick); 19827 (Blackwell); 11744 (Engelstein); 8760 (Bailer); and 9967 (Weston). It is interesting that this line of cases make no attempt to reconcile the opposing view, quoted above, in Award 17765 to the effect that Carrier's right to blank a position, unless prohibited by the agreement, is unrestricted. It is not our purpose to resolve this question here. Instead, we are directed to a more fundamental question concerning the proof even if we accept Claimant's decisional authorities.

In our view of these cases, it is clear that proof is needed to verify Claimant's contention that he performed the work of the first shift Car Service Clerk on those dates. In Award 7034 (Carter) there was no issue on this because the Carrier asserted the Claimants could perform the "necessary work" of the incumbent's position even though it was claimed that such position was blanked. The Referee disagreed and sustained a violation of the agreement. Similarly, in Award 19668 (O'Brien), it was clear the Claimant finished her regular position and then performed the work of the other position on overtime. It was held the agreement was violated. In Awards 20108 (Eischen) and 19827 (Blackwell) the evidence was carefully reviewed to determine whether the work performed was in fact the work of the so-called blanked position. In

both cases the conclusion was reached that it was and the claim was sustained. In Award 19827, the elements of proof included Carrier's admission that the extra clerk performed some of the duties of the Claimant's position and concluded:

"Consequently, we find that a preponderance of the evidence shows that claimant's position was not in fact blanked on the claim date, but instead, was worked by the extra board employee."

It follows that we must direct our attention to this record to gain an understanding of the nature of the work performed by the Claimant during the overtime assignments on April 19 and 22.

There are certain facts that are apparent that can be said to answer in part the question "when" with respect to this work. The overtime work was performed at a time that coincided with the hours of the first shift position. Moreover, it occurred on the two dates the first shift position was purportedly blanked. This coincidence of dates may even be considered suspicious. On the other hand it cannot be considered conclusive as to the question whether it constituted performance of the first shift position on overtime without more. The rules contemplate overtime performed before a shift. See Rule 38.

We also have information on the question of "who" relative to this work. Presumably, the Car Service Clerk, first shift, and Car Service Clerk, second shift, were in the same classification. There is even information in the record relative to "how" and possibly "why" this work came about, i.e., Carrier referred to the AAR and ICC orders. On this latter question an apparent conflict exists. The Claimant's submission to this Board, asks us, in effect, not to be taken in by this and asserts that "AAR and ICC car service orders are received daily by the carrier and are entered daily into its computer system." However accurate this may be, it is an argument made at the wrong time and in the wrong place. The Carrier made its assertion on the property in its letter from Mr. DeButts, Carrier's Vice President, to General Chairman Curran, dated March 3, 1975. Though there was an opportunity to do so, no comment on this was made by the Employees while on the property. It is too late to contest that matter now when the record is closed.

The only evidence we have concerning the nature of this work is that included in Employee's Exhibit No. 14 which is a handwritten statement that is undated and purports to be signed by the Claimant; the question exists whether this document was part of the record developed on the property. It was included as a numbered exhibit in the Employee's submission to this Board under date of June 10, 1975. It is undated and no reference is made to it in the record developed on the property. Moreover, the misspelling of the Claimant's signature gives credence to the belief this was a hurried afterthought. Absent any explanation or reference to it on the property, we conclude that it was

introduced into this record for the first time in the submission to this Board. On this basis, it is inappropriate for our consideration in this case. The function of this Board is to review evidence and arguments developed on the property. We are neither authorized nor equipped here to receive evidence of the dispute for the first time. Therefore, we conclude Employee's Exhibit No. 14 is outside the bounds of our consideration and whether that document helps or hinders either side is not our concern.

The state of the record, however, is our concern and we conclude that the evidence to be considered on the merits here is that the second shift Car Service Clerk was ordered to perform three hours' overtime on the very dates the first shift position was allegedly blanked by the Carrier. Presumably, these positions were in the same classification and we have an explanation from Carrier as to how this overtime came about. (To arrive at a sustaining award here we would have to make assumptions instead of relying on proof. This Board cannot do that. Therefore, we conclude the Claimant has failed to satisfy his burden of proof that the work performed as overtime during the first shift hours on April 19 and 22 was the work of the position of the Car Service Clerk, first shift. See Award 10905.) It follows that Claimant was properly paid in accordance with Rule 38 of the agreement and this claim must be denied.

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 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

The contract was not violated.

A W A R D

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1977.