NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26539
THIRD DIVISION Docket Number CL-26032

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9933) that:

(a) Carrier violated the rules of the current Clerks' Agreement at Barstow, California, on February 10, 1983, when Ms. L. L. Bert was not properly compensated for work performed on Position No. 6058, and

(b) Ms. L. L. Bert shall now be compensated five (5) hours' at straight time in addition to any compensation she has already received for work performed on Position No. 6058 on February 10, 1983."

OPINION OF BOARD: Claimant was at the time of the incident that gave rise to this Claim not regularly assigned. She was in off-in-force reduction status on the Los Angeles Division Station Department Roster. She had submitted a proper notice of availability pursuant to Rule 14-B to protect short vacancies, extra work, and vacation relief at Barstow, California.

On February 10, 1983, the regularly assigned occupant of Crew Clerk Position No. 6058 was summoned to perform jury duty. He left the job at 1:00 P.M. Claimant was called to complete the assignment. She worked the short vacancy from 1:00 P.M. to 3:00 P.M. Claimant submitted a time card for one day's pay (eight hours). She was subsequently notified by the Regional Freight Office that she would only be paid a two-hour call. A Claim was filed contending that Carrier had violated the controlling Agreement, specifically Rule 26, Hours of Service - Work Week.

"DAY'S WORK

26-A: Except as otherwise provided in these rules, eight consecutive hours work, exclusive of a meal period shall constitute a day's work."

The Organization also contends, among other things, that the tradition in the railroad industry is to pay any extra or unassigned employe a full day's pay when called to perform service.

Carrier counters the Organization's position by arguing that there is no basis for the Organization's Claim. It takes the following position:

(1) There is no "guarantee" rule in effect on this property providing a minimum of eight (8) hours pay for off-in-force reduction (unassigned) employes performing Grade 1 or 2 work when working a lesser number of hours under the circumstances outlined herein.

(2) The Carrier asserts there is absolutely no basis for allowing the claim on the assumption that it is comprehended by the basic day rule, i.e., Rule 26.

(3) Claimant Bert was properly compensated for a call and release (minimum three (3) hours) in accordance with past practice on this property.

(4) The Agreement has not been violated and Claimant is not entitled to the compensation claimed, nor has Petitioner presented any probative evidence to support its position.

This Board has reviewed the record of this case and has concluded, after considerable deliberation, that Carrier has violated the controlling Agreement when it denied Claimant eight hours' pay for being called in to cover the short vacancy on February 10, 1983.

This Board has concluded that the most compelling Rule cited by either side in this dispute is Rule 26-A, Day's Work. That Rule can clearly be interpreted to mean that extra and unassigned employes when called should be afforded eight hours' work. This is especially true when one reviews the long tradition supporting the eight-hour concept and the specific Rules the parties agreed upon concerning when an employe could be called and when he or she worked less than eight hours. We find no Rule cited in this record that would authorize Carrier to call off-in-force reduction employes and pay them less than eight hours' pay. In order for Carrier to support its position, where its actions fly in the face of practice throughout the industry, it must cite a Rule that the parties have agreed covers such a position. It has not done so.

Carrier argues in the instant case that payment of less than eight hours to unassigned or extra employes for less than eight hours work is a long-standing practice on this property. It used as support of this position a letter from a Division Chairman to all off-in-force employes wherein he stated that if employes are called for a tour of duty that starts at 7:30 A.M. and they arrive at 8:30 A.M., the employes will only be paid for seven hours. This Board considers Carrier's position on this point to be a tortured interpretation of the Division Chairman's letter. This Board interprets that letter to mean that if employes report late, they do not get paid for time not worked. We see no way it can be construed as an agreement that off-in-force reduction employes can be called in to cover part-time openings.

Carrier argues that the burden of proof rests with the Petitioner in claims case. This Board agrees with that position. We do not, however, agree that Carrier can raise an affirmative argument of past practice and have it be considered without proof. This record does not contain any evidence to support the fact that there was a practice on this property of paying off-in-force reduction employes less than eight hours when called in.

In the final analysis, this Board is of the opinion that, given the record of this case, considerable mischief would result if Carrier were allowed to call extra and unassigned employes into work for part-time vacancies without an agreement with the Organization to do so.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 26539, DOCKET CL-26032
(Referee Dennis)

If there is any principle that can be asserted as axiomatic in the arbitration of disputes in this industry, it is that in disputes alleging a violation of Rules of an Agreement, the burden is upon the Organization to prove the violation. The burden can be met by reference to a specific Rule covering the dispute or, in the absence of a specific Rule, the past practice of the parties.

The instant dispute involves an alleged Rules violation by the Carrier. The Majority decision makes no finding that a specific Rule was violated by the Carrier, nor that the Carrier violated any past practice. How then does the Majority find a Carrier violation? The answer is simple. It stands the axiomatic principle on its head by requiring the Carrier either to point to a specific Rule demonstrating that it did not violate the Agreement or to past practice proving that it did not violate the Agreement. The predicate for such "axiom reversal" appears to stem from the Majority's belief that the Carrier's position was inconsistent with practice in the railroad industry. Thus, throughout the Majority decision, we find such phrases as "the long tradition supporting the eight-hour concept," the Carrier's "actions fly in the face of practice throughout the industry," and "considerable mischief would result" if the Carrier's position were to be upheld.

While it is an exercise in futility to debate the point at length here, we would be remiss not to point out that there is nothing in the record of this dispute to support the Majority's belief. Insofar as the facts established on the property are concerned, it is possible that every railroad in the United States has the right under its Agreement to do

precisely what the Carrier did here. In any event, even if the facts were that no other railroad had such right, it would be irrelevant to the issue here. The function of this Board is to interpret the Agreement between the parties to the dispute; not to coordinate collective bargaining in the industry.

There are two additional points worth noting. First, the Majority finds "the most compelling Rule cited by either party to be Rule 26-A." We agree. We also point out that the only party to the dispute that relied upon Rule 26-A was the Carrier. Thus, while the Organization's initial letter of Claim alleged Carrier violation of virtually all the Rules of the Agreement, the one Rule conspicuously absent from the list is Rule 26. It was the Carrier that relied, in part, upon Rule 26-A because that Rule specifically provides that a "day's pay" shall result from "eight consecutive hours of work," and if there was any fact established beyond question, it was that the Organization's demand was for eight hours' pay for two hours' work.

The second point of note is that if there is any consolation to the Carrier, it is the Majority holding that it would have come to a contrary decision if the Carrier had introduced on the property "any evidence to support the fact that there was a practice on this property of paying off-in-force reduction employes less than eight hours when called in." While the Carrier did provide such evidence, it no doubt would have supplied far more evidence of past practice had it reason to believe that the established burden of proof rules were going to be suspended and, indeed, reversed in this case. In future disputes involving this issue, the Carrier will supply

evidence that, even under the Majority's approach, would be sufficient to defeat claims of a similar nature. We are confident that the Majority has rendered a decision that, at most, will have precedential value only in disputes where the facts are identical to those presented here.

We dissent.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost