

The Third Division of the regular members and in addition Referee John E. Cloney when award was rendered.

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

PARTIES TO DISPUTE: (

(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood  
(GL-10105) that:

1. Carrier violated the rules of the current Clerks' Agreement at Arkansas City, Kansas, on May 27, 1985 when it abolished Position 6138, Control Clerk, and established Position 6138, Control Clerk, as a five day position with rest days Friday and Saturday, and

2. Carrier shall now compensate Claimant D. A. Childs, and/or his successor for each and every Friday commencing May 31, 1985, continuing thereafter, for eight (8) pro rata hours at the rate of Position No. 6138, in addition to any other compensation he may have received for these days, until violation ceases. In addition Carrier shall now compensate Claimant for each and every Sunday commencing June 2, 1985, for eight (8) hours at time and one-half at the rate of Position No. 6138 until violation ceases."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Prior to May 29, 1985, Claimant held Position 6138, a seven day position, midnight to 8:00 A.M. with rest days of Tuesday and Wednesday. The rest days were protected by Position AC-1. On May 22, 1985, Carrier abolished Positions 6138 and AC-1 and immediately reestablished 6138 as a five day position with rest days of Friday and Saturday. On September 10, 1985, Position 6138 was abolished once more and reestablished as a seven day position, again with rest days of Tuesday and Wednesday.

Pertinent Agreement Rules provide:

"RULE 26--HOURS OF SERVICE--WORK WEEK

40-Hour Work Week

NOTE: The expressions 'positions' and 'work' used in this Agreement refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

26-B. Subject to the exceptions contained in Rules 26-B to 26-K, inclusive, all employees will have a work week of forty hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the day's off shall be Saturday and Sunday.

5-Day Service

26-C. On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

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Deviation from Monday-Friday Work Week

\* \* \*

26-G. If in positions or work extending over a period of five days per week an operational problem arises which Carrier contends cannot be met under the provisions of Rule 26-C, and requires that some of such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend to the contrary, and the parties fail to agree thereon, then if the Carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under this Agreement."

"RULE 33--HOLIDAYS

\* \* \*

Sunday Work

33-C Existing provisions that punitive rates will be paid for Sunday, as such, are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that was in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change."

On July 21, 1985, the Local Chairman filed claim alleging violation of numerous sections of the agreement. The Claim was denied.

On August 23, 1985, the General Chairman advanced the claim to the Assistant to the Vice President contending:

"There are no persuasive operational requirements for Carrier's action; the sole motivation was to eliminate a clerical position and Carrier cannot, by the terms of the Agreement, establish a position in five - day service with rest days of other than Saturday and Sunday."

On September 3, 1985, in correspondence apparently not directly related to this claim Carrier wrote the Organization regarding a 15.05% decline in net revenue tons and asserting "Carrier is permitted to reduce the number of protected employees by 10 per cent."

On October 14, 1985, Carrier responded to the Claim as follows:

". . . Due to a decline in business, decreased earnings and requirements of its service, Carrier had to reduce its costs and Relief Clerk Position No. AC-2 was abolished at the location . . . . This necessitated changing the rest days of positions affected by the abolishment of the relief assignment . . . .

It was necessary for Carrier to have the complained of Position No. 6138 on duty from 12:00 midnight Sunday to 8:00 A.M. Monday morning each week. This was due to the fact that Train Order Clerk Position No. 6149 could not absorb the duties of abolished positions and handle all the train orders and work orders for Work Trains, Extra Gangs, etc. that commenced working during the early Monday morning hours at the beginning of each work week. Therefore, due to the requirements of Carrier's service it was absolutely necessary to assign rest days of Friday and Saturday to Control Clerk Position No. 6138.

In view of that stated above and under the provisions of Rules 26-G and 26-H of the current Agreement, Carrier requested concurrence from the BRAC Organization to assign rest days of Friday and Saturday to Position No. 6128 to which they would not agree even though the Organization had agreed to many numerous identical and similar situations . . . ."

The Organization argues that Rule 26 as well as Decisions of the Forty Hour Week Committee and of this Board require Carrier to furnish "conclusive proof" that operational problems necessitate some employees work other than Monday thru Friday. It contends Carrier has refused to give specific information regarding any operational problems here.

Further the Organization denies Carrier made any effort to obtain an agreement despite their assertions.

Carrier argues it has a right to arrange schedules to meet operational needs. It also points out that Claimant could have been scheduled to start his shift at 12:01 A.M. on Monday rather than at 12:00 midnight on Sunday. Thus, for a matter of one minute, there would be no basis for a Claim.

In Third Division Award 16191 the Board stated:

"Numerous Awards of this Board have held that Carrier has the prerogative to determine when work will be performed. See Awards 7849, 11994, 15537. Further, Carrier has the right to rearrange work assignments to meet its operational necessities unless prohibited by the Agreement between the parties. See Awards 10009, 11793, 12565 and 15537."

We agree mere assertion of an organizational problem is not sufficient under Rule 26. The question is whether there was more than a mere assertion in this case. We believe there was. In its October 14, 1985, letter Carrier, which had previously pointed attention to a decline in revenue, described the work it contended could not be performed by Position 6149 on Monday mornings in addition to absorbing the duties of the abolished positions. While Carrier's description of the duties is somewhat general it does contain some specifics and we note it was never controverted or challenged on the property.

Carrier's assertion that it sought the Organization's agreement is devoid of any evidentiary support. While this contention was not specifically addressed by the Organization on the property we have held on numerous occasions that unsupported assertions are not a substitute for evidence. Rule 26 contemplates efforts to obtain agreement prior to effectuating the re-assignment. There is no evidence of such efforts here and we therefore hold the Agreement has been violated.

Not every action that violates an agreement requires a remedy. In some instances, admittedly rare, a finding that a violation had occurred is as far as logic suggests the matter should go. Here Claimant was required to work for one minute at most on each Sunday during the period May 29 to September 10, 1985. Carrier contends, and we agree, the requested compensation would be excessive. We do not believe it would be accurate to describe the violation of the Agreement as de minimis due to its having continued for a period of some weeks. Nevertheless, the circumstances here, especially the fact that after a relatively short period, the status quo ante was restored, and there was no evidence this was a recurring problem between the parties convinces us that no formal remedy need be supplied by this Board.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1988.