

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31174
Docket No. CL-31639
95-3-93-3-646

The Third Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

(Transportation Communications International
Union

PARTIES TO DISPUTE:

(Delaware and Hudson Railway Company, Inc.

STATEMENT OF CLAIM: "Claim of System Committee of the Organization
(GL-10989) that:

The following claim is presented to the Company in behalf of the Claimants D. Gilchrist, G. Shields, B. Crowley and A. Novello.

(a) The Carrier violated the Clerks' Rules Agreement effective September 26, 1990, particularly Rules 4, 12, 13, Appendix I and other Rules, when they utilize employees of the spare or unassigned extra board on a regular basis, instead of establishing regular assignments at Clifton Park, New York.

(b) Claimants should each now be allowed an additional eight (8) hours pay, based on the pro rata hourly rate of \$13.64, commencing sixty (60) days retroactive from the date of this claim and continuing for each and every day thereafter on account of this violation.

(c) That in order to terminate this claim, the Carrier must advertise an appropriate number of regular assigned positions to perform the required clerical duties and discontinue the usage of spare/unassigned extra board employees in order to avoid the establishment of regular assigned positions.

(d) Claimants are qualified and would have been eligible to bid said positions had the Carrier properly advertised same.

(e) This claim has been presented in accordance with Rule 28-2 and should be allowed."

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 employee 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.

The claim is predicated on an alleged violation of Rule 4 (Work Week) Rule 12 (Bulletining New Positions and Vacancies) and Rule 13 (Reduction and Increase in Forces). The Organization contends that the Carrier abolished four regular assigned Customer Service Clerk positions in the CATS Department on August 26, 1992 and commenced to use extra Clerks that same day on a regular basis until this Submission was filed in November 1993. The Organization filed the initial claim on November 11, 1992 and when this dispute could not be settled on the property, it was referred to this Board.

The Organization asserts that the Agreement, and the cited provisions thereof, require that the Carrier establish regular assignments instead of using Extra Board Clerks on a regular basis. It adds, for example, that the Carrier used 24 extra Clerks during the month of September; 46 during October; 53 during November and 45 during December 1992.

The Organization states there is no merit to the Carrier's position that it had to use extra board Clerks because the nature of its work does not facilitate establishing regular positions. The Organization rebuts the Carrier's defense that it needs extra board Clerks because of its "ad hoc volume related business" as well as "intermittent vessel arrival," by stating the dictionary defines "ad hoc" as "exclusively for some understood special purpose," and this does not fit the situation of the daily use of extra board Clerks for several months. It further states that "intermittent" is defined as "occurring at intervals or stopping from time to time." This is not what occurred on the property.

The Organization states it wrote the Carrier asking it to define "ad hoc" and "intermittent work" and also what kind of regularity would warrant establishing a regular position. The Carrier never replied to this May 12, 1993 letter.

The Organization states the negotiated Rules in effect cover the current situation. It adds Rule 4 (a) provides for a workweek of 40 hours; paragraph (f) allows a starting day of Tuesday instead of Monday; and Paragraph (j) guarantees a five day workweek for regularly assigned employees. The Organization states Rule 12 (g) requires vacancies of two weeks or more to be bulletined. It states Rule 13 exists to protect the employee. It protects his seniority and this becomes a prime consideration, because when jobs are abolished, long service employees have a contractual right to the job over younger employees.

The Organization maintains that the Carrier regards itself as not bound by the Agreement when it abolished four regular positions in August 1992 and has since that time constantly used extra board Clerks. This means that the Carrier believes it can abolish positions at will and be free to use extra board Clerks as it sees fit.

The Organization asserts the Carrier is in error when it maintains that the Claimants suffered no monetary damages and so the requested relief is not warranted. It adds that when regularly assigned positions are abolished and the work is thereafter done by unassigned employees, it is not a bona fide abolishment and constitutes an Agreement violation. The Organization states the Carrier is liable for damages when it commits a contractual violation.

The Carrier denies that it is guilty of any Agreement breach because the work being performed by the extra board was volume related work of an intermittent nature, due both to vessel arrivals and the necessity for satisfying the requirements of the temporary billing system. It added the extra board Clerks were also used to fill sick and holiday vacancies.

The Carrier explained that with the introduction of the Electronic Data Interchange (EDI) system into its operation, there continued to exist on an ad hoc basis, the need to manually bill the container traffic arriving on the various vessels, which could not be electronically produced through the computer at that time. The Carrier adds that since the EDI has been enhanced to accommodate the bulk of this traffic it is now only exception reporting that is required to bill these containers.

The Carrier stated it does not dispute the number of extra board Clerks required during the period cited by the Organization, but instead maintains that these lists support its position, i.e., that the work being performed was volume related so that on certain days as many as four extra Clerks may have been called while on

other days only one or two Clerks may have been used, and on some days no extra board Clerks were required. It emphasizes that these Clerks were also used to fill sick or vacation leave absences. The Carrier adds that the Organization was in error when it stated four regular CATS Department positions abolished on August 26, 1992 had the same assigned duties that the extra board Clerks were now performing. It states that these four positions were transferred to Milwaukee as a result of centralized billing (EDI) and are not part of this dispute.

The Carrier also submits lists to show it has a long standing practice on this property to use extra and unassigned Clerks to perform ad hoc billing necessitated by the arrival of container vessels.

The Carrier asserts it is inappropriate for this Board to order it to establish an undetermined number of full time jobs to perform work that has been historically assigned to extra board Clerks.

The Carrier adds that the Organization is in error when it cites it as being in violation of certain provisions of the collective bargaining Agreement. For example, Rule 4 purports to establish a 40 hour, five days of eight hours workweek. However, the Carrier asserts its intermittent, unassigned ad hoc relief work did not provide 40 hours of work on a regular basis so as to necessitate establishing regular positions. The Carrier states that Rule 12 is not applicable because there were no new positions or existing vacancies that had to be bulletined due to the nature of the ad hoc relief work. The Carrier also states that there is nothing in Rule 13 dealing with reduction or increase in forces, that requires it to create permanent positions for ad hoc relief work. The Carrier concludes that since the cited Rules did not support the claim as presented, it must be denied.

The Carrier states, in any event, there is no basis to award the Claimants the compensation requested. The Agreement contains no provision for punitive damages. It adds the Organization has not identified the involved work, the number of hours required to perform the work and the days on which the work was allegedly performed. The Carrier asserts that the Claimants were properly compensated for all hours they were called to perform ad hoc relief work. The Organization has not cited any proof to show any loss the Claimants suffered. It states the Organization is seeking additional compensation that is not supported by any provisions of the collective bargaining Agreement.

The Carrier states, arguendo, that even if the Organization established a violation of the Agreement, the initial claim is invalid. It filed a blanket and a non specific claim. The Organization is required to state the days on which the violations

occurred, the work performed and the amount of time involved. The Carrier asserts that during this blanket time period, the Claimants were employed when required and suffered no loss of earnings.

The Board concludes, on the basis of the record before it, that the Organization's position is more persuasive than the Carrier in contending that the Carrier breached the negotiated Agreement by its utilization of the extra board in lieu of establishing regular positions pursuant to the Agreement.

The Board finds, conceding there was a considerable volume of work arriving intermittently on vessels, that there comes a point where a quantitative condition becomes a qualitative condition. The Board does not find this to be a situation where the Carrier resorted to the extra board for a short time to cope with the problems created by the abolishment of four regular clerical jobs or by a temporary increase of work. Extra boards are usually established to enable the Carrier to cope with certain temporary operational exigencies. This is not what occurred here.

The record reveals that four regular positions were abolished, regardless of whether the jobs were transferred to Milwaukee; the Carrier then resorted from August 26, 1992 to April 23, 1993, for approximately 210 days, to use extra board Clerks to perform routine regular Clerk duties. It appears that the Carrier has done violence to the intent and purpose of the Agreement by its constant and repeated use of the extra board for regular work.

The Carrier employs competent and skilled executives to plan and administer its work load. These administrators are expected to cope with a large volume of work, including containers delivered by vessels. The Board is reasonably certain that over the years, these vessels do not appear suddenly and unexpectedly. These vessels are not like the mysterious ship in Wagner's opera the "Flying Dutchman" which appears out of a fog and then disappears. The arrival of ships cannot be so sudden that experienced Carrier executives are not able to plan to have a regular staff available to enable them to cope with the demands, large or small, of the traffic which arrives at regular intervals, rather than have to resort virtually every day for extra board employees to perform the work rather than incumbents of regular positions.

The Board recognizes the Carrier is entitled to a certain amount of flexibility to accommodate itself to the sudden exigencies of its operations, but the Carrier's actions as described in this claim are a distortion and misuse of the Agreement provisions for the use of extra positions rather than establishing regular Clerk positions to cope with the routine, regular periodic work that comes to the Carrier in executing its mission.

The Board will not award any monetary damages to the Claimants

unless it can be shown that there were Claimants, who were ready, able and qualified to fill the given jobs but were not utilized by the Carrier. The Board further expects that the parties will meet, and negotiate in good faith, a contractual arrangement that will obviate the necessity of Carrier's constant recourse to the extra board for assignments that should, in the ordinary course of business, be filled by regular positions.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.