

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41561
Docket No. SG-41916
13-3-NRAB-00003-120235**

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

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Massachusetts Bay Commuter Railroad

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Massachusetts Bay Commuter Railroad:

Claim on behalf of J. DiPietro, for compensation at the punitive rate for all hours worked on his recognized rest days and eight hours at the straight time rate for each Wednesday and Thursday he would have worked had his job been advertised correctly, account Carrier violated Agreement Rules 20 and 22 when it posted a Rover job with incorrect start times and rest days. This claim will be calculated from the effective date of Carrier’s illicit award date and continue until satisfied under the Railway Labor Act. Carrier’s File No. TC-02-11. General Chairman’s File No. 120-02-11. BRS File Case No. 14609-MBCR.”

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 were given due notice of hearing thereon.

On January 28, 2011, the Organization filed this claim asserting that the Carrier had violated Rules 20 and 22 of the Agreement when it established a third shift "Rover" Signal Maintainer position with rest days other than Saturday and Sunday. The Organization contends that the duties of the newly established position could be reasonably met in five days with Saturday and Sunday as rest days and that the Carrier ignored the criteria set forth in Rule 20 and assigned relief days other than Saturday and Sunday to this position.

Rule 20, argues the Organization, obligates the Carrier to substantiate that the assignment of relief days other than Saturday/Sunday are operationally necessary and that it must confer and negotiate with the General Chairman before implementation. It claims that the Carrier fulfilled neither of these requirements.

In addition, the Organization maintains that the Carrier violated Rule 22 when it implemented the "3rd Rover" Signal Maintainer position at Salem, Massachusetts with a start time of 11:30 P.M. Because there is no existing first shift or second shift "Rover" position in Salem, argues the Organization, Rule 22 prohibits the creation of a third shift position. Further, it claims, absent an existing first shift, the position at issue here must have an established starting time that falls between 6:00 A.M. and 8:00 A.M. in accordance with paragraph (b) of the Rule.

Lastly, the Organization strenuously asserts that the position as posted in the Carrier's "Bulletin Advertising Position" and assigned to the Claimant on January 6, 2011, clearly states it is a "New Position." The Carrier, claims the Organization, failed to establish with probative evidence that the position with the same hours and relief days was established more than 20 years ago and, therefore, it cannot contend that the claim is time barred or that the position already existed with the same hours and relief days.

The Carrier contends that the Organization failed to present any probative evidence or essential elements to meet its burden of proof. The Carrier argues that the Organization provided no evidence in support of its claim that the position in question is a newly created position. Further, even if the bulletin is for a newly created position, it is irrelevant asserts the Carrier because jobs with rest days other than Saturday and Sunday were first established by a predecessor Carrier with full knowledge by the Organization more than 20 years ago.

As a procedural matter, the Carrier asserts, the Organization has not shown where any changes were made to the position during the time period within which a claim must be filed. Rule 56 of the Agreement provides that all grievances or claims must be filed within 60 days of the occurrence on which the grievance or claim is based. Because the Carrier contends that the position has been in existence for more than 20 years, it urges the Board to find the claim defective and dismiss it without regard to the merits.

The Carrier further contends that Rule 20 (a) is clear in defining the meaning of "positions" and "work." These words, as used in the Rule, argues the Carrier, "refer to services, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees." Therefore, asserts the Carrier, the Organization is placing emphasis on the workweek of the individual employee in the case at hand and not on the needs of the service, which the "Rover" position at issue is meant to address.

Also, asserts the Carrier, with regard to the position in question, Rule 20 states that "so far as practicable" the days off for a five-day assignment will be Saturday and Sunday. It contends that due to the marked reduction in service on weekends, and thus the expanded hours that signal crews are able to access the right-of-way to perform required maintenance, it is not practicable to assign both Saturday and Sunday off to the position in question. Further, it argues the Agreement also states that "any two consecutive days may be the rest days."

The on-property record of the Carrier's denials of the claim and the subsequent appeals by the Organization indicates that the final decision by the Carrier was on May 31, 2011. The Organization appealed that decision on June 6, 2011.

The Board must first address the procedural objection raised by the Carrier that the claim is time barred because the occurrence on which the claim is based on took place more than 20 years ago and is, therefore, not within the 60-day requirement to file a claim as defined in Rule 56. We find no evidence in the record that the position assigned to the Claimant existed before December 14, 2010. The response to the initial claim by the Chief of Engineering Operations alone is not sufficient, without additional supporting evidence, to rebut the documents contained in the on-property record.

The record does indicate that the Claimant was assigned to the position, effective January 6, 2011, giving rise to the claim that was filed on January 28, 2011. The claim was filed within the time limits of Rule 56 and, therefore, the Carrier's objections are dismissed.

Our review of the merits of the claim reveals that the Organization satisfied its burden of proof in establishing that the Carrier violated Rules 20 and 22 of the Agreement. The Carrier failed to present any evidence to support its assertion that the "Rover" Signal Maintainer position in question existed prior to December 2011. Further, it failed to substantiate its contention that it is not practical or reasonable, based on an identifiable "operational problem," to have the position with relief days of Saturday and Sunday. Nothing in the on-property record provides the Board with reliable and credible evidence in support of its stance that the position must have relief days other than Saturday and Sunday. The relevant contract language reads as follows:

"RULE 20 – WORK WEEK

The established workweek for all employees covered by this Agreement, subject to the exceptions contained in this rule, is forty (40) hours, and consists of five (5) days of eight (8) hours each, with two (2) consecutive days off in each seven or, four (4) days of ten (10) hours each with three (3) consecutive days off in each seven. Four day assignments shall not be established for individual maintenance positions except by agreement of the parties. The work week may be staggered in accordance with the Company's operational requirements. So far as practicable the days off for five day assignments shall be Saturday and Sunday; for four day assignments, Friday, Saturday and Sunday or Saturday, Sunday and Monday. The observance of any of the recognized holidays as specified in this agreement will not be construed as a reduction in assigned working time for the week in which such holiday falls. The forgoing work week is subject to the provisions which follow:

- (a) The expressions 'positions' and 'work' as used in this rule refer to services, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

- (b) On positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday.
- (c) When the nature of the work is such that employees will be needed six (6) days each week, the rest days will be either Saturday and Sunday, or Sunday and Monday.
- (d) On positions which are filled seven (7) days per week, any two consecutive days may be the rest days, with the presumption in favor of Saturday and Sunday.
- (e) All possible regular relief assignments with five (5) days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six (6) or seven (7) day service, or combination thereof, or to perform relief work on certain days and such types of other work, under this Agreement, on other days as may be assigned.

Assignments for regular relief positions may, on different days, include different starting times, duties and work locations for employees of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employee or employees whom they are relieving.

- (f) If, in positions or work extending over a period of five (5) days per week an operational problem arises which the Company contends cannot be met under the provisions of paragraph (b) of this section and requires that some of such employees work Tuesday through Saturday instead of Monday through Friday and, if the Chief Engineer C&S and the General Chairman fail to agree thereon, then, if the Company nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under this agreement.

- (j) The term ‘work week’ for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work and, for unassigned employees, shall mean a period of seven consecutive days starting with Monday.” (Emphasis added)

RULE 22 – STARTING TIME HOURS

- (a) Where one (1) shift is worked, eight (8) consecutive hours exclusive of the meal period shall constitute a day’s work. Where two (2) or more shifts are worked, eight (8) consecutive hours including an allowance of twenty (20) minutes for lunch shall constitute a day’s work for each shift. The second shift will start immediately following the first shift and the third shift will start immediately following the second shift.
- (b) The starting time of the work period of employees, where one shift is worked, and the first shift where two or more shifts are worked, shall be established between 6AM and 8AM. The tour of duty of regular assignments shall not begin or end between 12:01 AM and 6:00 AM. (C&S Gangs may be required to start between 5AM and 8AM from May 1 through September 30).
- (c) The starting time of employees shall not be changed without first giving the employees affected five (5) calendar days notice with copy to Local Chairman. Changes in starting times made under the provisions of this Rule shall not require readvertisement; however, employees whose starting times are changed more than one (1) hour may elect to exercise their seniority to other positions in accordance with Rule 14.
- * * *
- (f) Except as provided in paragraph (d) of this Rule, starting times outside the hours specified in paragraph (b) of this Rule may be established only by agreement between the General Chairman and Chief Engineer-C&S.” (Emphasis added)

Introduced into the record by the Organization are the Bulletin Advertising Position, dated December 14, 2010, the Awards Summary, dated January 7, 2011, and a one-page assignment schedule. The Bulletin Advertising Position is for the Signal Maintainer – 3rd Rover headquartered in Salem, Massachusetts, with the starting time of 11:30 P.M. and relief days of Monday and Tuesday. The bulletin also indicates that it is a “Permanent – New Position.” The assignment schedule does not show a “Rover” position during the first or second shift in Salem. Here, the Organization presented evidence in support of its claim that Rule 20 and 22 was violated because the position did not assign Saturday and Sunday relief days and that it has a starting time other than “6AM -8AM” without first creating a first shift or second shift. The Carrier is obligated to rebut the evidence with more than mere assertions.

The Carrier contends that the position at issue has been in existence for more than 20 years, but offers no evidence in support of that contention. Further, it did not provide any reliable evidence or explanation of why it is not practicable or reasonable to assign relief days of Saturday and Sunday in accordance with Rule 20. Rule 20 is clear and unambiguous where it states “So far as practicable, the days off for five day assignments shall be Saturday and Sunday. . . .” (Emphasis added) The assignment here, as argued by the Carrier, is a five-day assignment. Paragraph (b) of the Rule states that where the duties “can reasonably be met in five (5) days, the days off will be Saturday and Sunday.” (Emphasis added)

The Board has previously held that the burden is on the Carrier to meet the requirements of a Rule similar to the one we find here in the introductory paragraph of Rule 20 and its paragraph (b). In Third Division Award 22242, citing Emergency Board No. 66 and Third Division Award 6384, it was held that “. . . it is the Carrier’s burden to show ‘. . . that it was not practicable to have Saturday and Sunday as rest days for this position.’”

Furthermore, the record is devoid of any reliable evidence that the duties of the position could not be “reasonably” met with relief days of Saturday and Sunday. The Carrier relies on paragraph (a) of Rule 20 to assert that it is not the workweek of the employee that the Rule addresses, but the “services, duties, or operations necessary” that must be addressed by a position. While this may be true, it cannot ignore the other provisions in the Rule, as they relate to the assignment of relief days to a position. The first paragraph of Rule 20, as well as paragraph (b) obligates the Carrier to provide probative evidence when it assigns relief days other than

Saturday and Sunday. The record only contains the Carrier's argument that the position existed as posted for more than 20 years. It contains no evidence in support of these assertions. In support of the Board's conclusion that the Carrier must provide more evidence than mere assertions, we look to Third Division Award 20107 where the Board held:

"Nowhere in the record has the Carrier provided evidence of any supportive or explanatory facts as a basis for this conclusion. We therefore believe the criteria set forth in our prior Award 15444 (Dorsey) is applicable:

'... when Petitioner made a prima facie case, as it did, the burden of going forward with the evidence shifted to Carrier. The unsupported assertions of Carrier did not satisfy its burden....'"

However, the Board does not find that paragraph (f) is applicable to the instant claim. Paragraph (f) expressly addresses the steps that must be taken when the Carrier intends to make a change that results in an employee being assigned "to work Tuesday through Saturday instead of Monday through Friday. . . ." There is nothing in the record that indicates that the position at issue here ever had Saturday and Sunday relief days. As stated previously, this position was bulletined as a "New Position." The facts here are unlike those in Third Division Award 31471 cited by the Organization. There the position was "rebulletined" with rest days of Monday and Tuesday. Because of the change to the relief days the Board in that case found that the Carrier violated the applicable Rule by not conferencing with the Organization as required. There is no evidence here of such pre-existing position with or without Saturday and Sunday relief days. Absent some other evidence of a past practice or other applicable contract language, paragraph (f) does not apply to the facts before the Board in the instant case.

The Carrier failed to address the allegation by the Organization that the "Rover" Signal Maintainer position assigned to the Claimant violates Rule 22. The record does not contain any evidence from the Carrier regarding the starting time and shift requirements of the position as it relates to the criteria set forth in the Rule. The Organization presented documentary evidence that the hours assigned to the position were in violation of the Rule. The Carrier's failure to rebut the assertions made by the Organization leads the Board to accept those claims as "established fact." In Third Division Award 29450, the Board held that "By long-

established precedent, the unrequited assertion of a material fact becomes an established fact for purposes of our deliberations.” We therefore find that Rule 22, for the reasons set forth herein, has also been violated.

The Board finds that the relief sought by the Organization must be addressed. The claim seeks “compensation at the punitive rate for all hours worked on his recognized rest days and eight hours at the straight time rate for each Wednesday and Thursday he would have worked had his job been advertised correctly.” The rest days contained in the Bulletin Advertising Position, dated December 14, 2010, are Monday and Tuesday. The calculation of the compensation, as it pertains to that part of the claim must be based on the bulletined relief days.

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 18th day of March 2013.