Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41562
Docket No. SG-41917
13-3-NRAB-00003-120236

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
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(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 Electronic Technician Positions, for compensation at the punitive rate for all hours worked on their recognized rest days and eight hours at the straight time rate for each Monday/Friday they would have worked had their jobs been bid correctly, account Carrier violated Agreement Rules 20 and 22 when it advertised Rover positions 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-01-11. General Chairman's File No. 120-01-11. BRS File Case No. 14610-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 three Electronic Technician positions with rest days other than Saturday and Sunday. The Organization contends that the duties of the newly established positions 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.

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 second and third shifts at Cobble Hill and a second shift at Abington without a first shift at either location with a starting time between 6:00 A.M. and 8:00 A.M. Absent an existing first shift, the second shift positions 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 asserts that the three positions as posted in the Carrier's "Bulletin Advertising Position" of January 5, 2011, clearly states they are new positions. The Carrier, asserts the Organization, has not established 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 positions already existed with the same hours and relief days.

The Carrier asserts that the Organization has not presented any probative evidence or essential elements to meet its burden of proof. The Organization maintains that the positions in question are newly created positions, argues the Carrier, but it provided no evidence in support of its claim. Further, even if they are newly created positions, it is irrelevant asserts the Carrier because positions with rest days of 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 argues that the Organization has not shown where any changes were made to the positions 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 maintains that the positions have 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 employees in the case at hand and not on the needs of the service.

Also, asserts the Carrier, with regard to the positions 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 positions in question. Further, it argues the Agreement contemplates 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 in that the occurrence the claim is based on took place more than 20 years ago and is not within the 60-day requirement to file a claim as defined in Rule 56. The Board finds no evidence in the record, as established on the property, that the Carrier raised the issue that the claim was not submitted in accordance with Rule 56. The statements by the Carrier that the predecessor Carrier created the positions more than 20 years ago were made to address the merits of the claim that the positions are new and must conform to the applicable sections of Rule 20. Therefore, the procedural objection must be 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 three Electronic Technician positions in question existed prior to January 2011. Further, it did not substantiate its assertion that it is not practicable or reasonable to have the position with relief days of Saturday and Sunday. Nothing in the 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
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> The established work week 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.
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> (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 and 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 1through 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 [the] 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 three job postings entitled Bulletin Advertising Position, dated January 5, 2011. The first Bulletin Advertising Position is for an Electronic Technician headquartered in Abington with the starting time of 3:30 P.M. and relief days of Sunday and Monday. The next Bulletin Advertising Position is for an Electronic Technician headquartered in Cobble Hill with the starting time of 3:30 P.M. and relief days of Friday and Saturday. The last Bulletin Advertising Position is for an Electronic Technician headquartered in Cobble Hill with the starting time of 11:30 P.M. and relief days of

Friday and Saturday. All three bulletins indicate that they are "Permanent – New Position[s]." Here, the Organization presented evidence in support of its claim that Rules 20 and 22 were violated because the position did not assign Saturday and Sunday relief days and that they have a starting time other than "6AM-8AM" without an existing first shift. The Carrier is obligated to rebut the evidence with more than mere assertions. Once the Organization produces documentary evidence that the three bulletins are for "New Positions" the burden shifts to the Carrier to rebut with probative evidence that they are not new if it wants to establish that the positions were created "more than twenty (20) years ago." Nothing in the record supports the Carrier's assertion.

Further, the Carrier 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 assignments here, as argued by the Carrier, are five-day assignments. 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) Nothing in the on-property record gives the Board a reason to conclude that it is not reasonable for the positions to have relief days of Saturday and Sunday.

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 meet its purpose. The first paragraph of Rule 20, as well as paragraph (b) obligates the Carrier, where it is "practicable" and where "the duties can reasonably be met" to assign relief days of Saturday and Sunday. The record

contains the Carrier's unsubstantiated argument that the position existed as posted for more than 20 years. It provided no evidence in support of these assertions; nor did it include essential facts that explain what "services, duties, or operations necessary" exist that require that these positions have relief days other than Saturday and Sunday. In support of our 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:
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> '. . . 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 hold here 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 positions at issue here ever had Saturday and Sunday relief days. As stated previously, each of these positions were 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 positions 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 adequately address the allegation by the Organization that the Electronic Technician positions violate Rule 22. The record does not contain any evidence from the Carrier regarding the starting time and shift requirements of the positions as it relates to the criteria set forth in the Rule. The Organization presented documentary evidence that the hours assigned to the positions were in violation of the Rule. The only reference by the Carrier to the

Organization's claim that Rule 22 was violated is found in the reply to the initial claim on the property by the Chief of Engineering Operations, dated March 7, 2011. The sole sentence in the reply regarding Rule 22 states, "Referencing your claim regarding Rule No. 22, the three positions advertised, provide for 'eight consecutive hours including an allowance for a twenty (20) minutes for lunch [sic]." The Carrier's failure to rebut the assertions made by the Organization with some essential facts leaves the Board no choice but to find that Rule 22 was violated.

The evidence contained in the record supports the claim by the Organization that the Carrier violated Rules 20 and 22 in accordance with the findings herein.

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.