Award No. 572
Docket No. CL-556

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of T. J. Norman, General Clerk, Freight Station, Charlotte, North Carolina, for pay for work performed by Assistant Agent, Mr. Ralls in preparing and delivering employes' pay checks, both before and after his regular assigned hours since May 15, 1936."

EMPLOYES STATEMENT OF FACTS: "Since March 15, 1936, the work of preparing and delivering employes' pay checks has been regularly required of Mr. Norman. His regular assigned hours are from 8:00 A. M. to 5:00 P. M. On each pay day (semi-monthly) from March 15, 1936, through May 15, 1936, he was given a call under Rule 11 of the Clerks' Agreement for reporting at 7:00 A. M. to prepare and have the pay checks ready for delivery, beginning at 8:00 A. M. to make deliveries. Effective May 30, 1936, Assistant Agent, Mr. Ralls reported for work earlier than his regular hours and prepared the pay checks for delivery. The pay checks were turned over to Mr. Norman at 8:00 A. M., his regular assigned starting time for delivery, also around 8:00 P. M. Each pay day since May 15, 1936, Assistant Agent, Mr. Ralls carried certain pay checks from the Freight Station to the Passenger Station to deliver to certain Dining Car employes reaching Charlotte on passenger trains arriving at 8:05 and 8:20 P. M."

There is in evidence an agreement between the parties bearing effective date of September 1, 1926, and the following rules thereof read:

"CALLS—RULE 11.

"Employes called to perform work in advance of or not continuous with the regular work period on days of their regular assignment shall be allowed a minimum of three (3) hours at pro rata rate for two (2) hours or less, additional time calculated on minute basis pro rata. Except as otherwise provided in these rules, time worked after the ninth hour on any day, exclusive of meal periods or relief, will be paid for at rate of time and one-half time.

"* * * *"

"ASSIGNMENT OF OVERTIME—RULE 14.

"In making overtime before or after assigned hours, employes regularly assigned to class of work for which overtime is necessary shall be given preference.

"In making extra time on Sundays or holidays, the above principle shall apply."

POSITION OF EMPLOYES: "It is the contention of the employes that the work of preparing and delivering pay checks is regularly required and a part of Mr. Norman's assignment and that the work in question that is being performed by Assistant Agent, Mr. Ralls, rightfully belongs to Mr. Norman as provided in Rule 14 of the Clerks' Agreement.

'There is a vacancy in this office of General Clerk, rate of pay, $5.55 per day.

'Applicants must be qualified to check yard, inspect carload and less carload freight, issue exceptions and inspection reports, handle overcharge and undercharge corrections, junction reports, general correspondence pertaining to claims, corrections, etc., proficient in use of typewriter and competent to handle general office work.

'Bids for this position to be filed with the undersigned up to midnight, July 7th.'

"It will be noted from this bulletin that no specific assignment of duties attached to the position of general clerk, but, to the contrary, it was contemplated that the incumbent would be used as and when necessary in the judgment of the officers in charge to perform or assist in performing any of the clerical work incident to the operation of the station. In other words, Mr. Norman was not **regularly assigned** to the work of delivering pay checks or to any other specified duties, and the fact that on five occasions he was instructed to go to the express office in advance of the hours of his regular assignment, obtain the pay checks and prepare them for delivery, would not and could not establish that work as being regularly assigned to him. As a matter of fact, the very nature of his position of general clerk precludes the practicability of a regular assignment of duties. It is, therefore, obvious that the provisions of Rule 14 of clerks' agreement, upon which the employes rely, have no application whatever in this case.

"The attention of the Board is also called to the fact that the responsibility for the proper delivery of pay checks at the Charlotte Freight Station rests with the Agent and Assistant Agent at that station, that it has in the past always been a part of their regular duties to assist in the delivery of these pay checks, and the carrier was under no obligation to call Mr. Norman to perform the service. The only requirement contained in Rule 14 is that an employe regularly assigned to class of work for which overtime is necessary shall be given preference. Mr. Norman was not so assigned to the work in question and, therefore, has no grounds whatever for a claim under that or any other rule of the schedule. The duties of the Assistant Agent having included the handling and delivery of pay checks over a period of many years, there is no reason why he should not have performed the service in connection with which this claim was filed.

"In their handling of this case the employes cited Decision Nos. 60 and 68 of the Third Division. The carrier respectfully submits that there is no analogy between the instant case and the cases upon which Decisions Nos. 60 and 68 were issued. By reference to the Board's files it will be found that the claimants in the cases upon which those decisions were issued were **regularly assigned** to the class of work which was performed before or after their assigned hours, or on Sundays or holidays, whereas in the instant case Mr. Norman was **not** regularly assigned to the delivery of pay checks. and, for this reason, as hereinbefore stated, the cases are in no way analogous."

OPINION OF BOARD: This case resolves itself into a very close question of fact, i. e., was Mr. Norman "regularly assigned" to the work involved within the contemplation of Rule 14?

For the carrier it is argued in substance (1) that as he was a general utility man, so to speak, nothing in particular could be regarded as a regular assignment to him and (2) further, only work recurring daily could be considered the subject of a regular assignment; and (3) that in any event, on the facts, he had not been so "assigned" but was simply directed, on each of the 5 occasions involved, to do the work.

(The claim for the evening time was withdrawn or abandoned it appearing that neither Mr. Norman nor the late paymaster had ever done this work, it always having been performed as now by the assistant agent.)

With the carrier's first two propositions the Board is unable to agree; the evidence shows he had certain very definite assignments of regular work such as claim investigation calls, etc. As to the second point, work may be recurrent periodically other than daily, such as Sunday, and still be the subject of regular assignment. Indeed it is apprehended that most cases involving the application of Rule 14 will be ones where the recurrence was other than daily. Such was the case in Award 420.

It therefore comes down to the question of fact as to whether he was "regularly assigned." The carrier says that he was instructed to do the work each of the five times but adds about May 29, 1936, he was advised by the agent "that it would not be necessary for him to call" for the checks but to continue the other work connected with paying, after his regular time for reporting. Doubtless he could be directed in his capacity of general clerk to do numerous tasks from time to time and even repeatedly without their necessarily becoming a part of his regular assignment. But the evidence shows that he in particular was chosen for the work because of the facts that he had an automobile for which the company furnished gas, used in connection with his other work and which apparently was needed to take the pay checks out to the shops and other outlying places and also that he was personally acquainted with most of the payees and thus able to insure correct deliveries; it also is shown that the practice was discontinued immediately following Mr. Norman's claim for pay for 3 hours as for a call under Rule 11 between 7 and 8 A. M., instead of the 1 hour overtime he had been allowed.

While the absolute determination of the ultimate fact as to whether he was "regularly assigned" rests in the mental intention of the agent, the preponderance of the available evidence indicates that he was.

In such circumstances he should have been, under Rule 14, accorded the opportunity to perform the 7 to 8 A. M. work even though it results in the application of the call rule. The foregoing is not to say that the carrier is not free to reassign the work away from him at any time, but not merely a part of it, as here, in order to nullify Rule 14. See Awards 60 and 68.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 T. J. Norman is entitled to pay for the period 7 to 8 A. M., May 30, 1936, and each successive semi-monthly pay period thereafter when Mr. Ralls performed the service of bringing the pay checks from the Express office to the freight station while Mr. Norman performed the balance of the paymaster work.

AWARD

Claim for time 7 to 8 A. M. sustained to extent indicated by findings.

Claim for time covering service performed in the evening by Asst. Agent Ralls in delivering pay checks to dining car employes denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of January, 1938.