

Award No. 2053
Docket No. CL-1963

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

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

ST. JOSEPH UNION DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That carrier violated rules of current agreement and particularly Rules 63, 52 and 45 thereof when on April 1st, 1941 they allegedly abolished regularly assigned position of Mail Truckman held by A. C. Kellermeyer and verbally assigned Mail Truckman G. E. Smith to cover the same relief assignments formerly covered by Kellermeyer.

(2) That Mail Truckman Kellermeyer be returned to his former regularly assigned position of reliefman, as assigned immediately prior to its alleged abolishment on April 1st, 1941 and compensated for any pay lost by reason of improper application of Rule 63 as between earnings of Mail Truckman G. E. Smith and amount earned by Kellermeyer subsequent to April 1st, 1941.

(3) That Mail Truckman G. E. Smith be paid at overtime rate in accordance with Rule 45 for all time worked in excess of eight (8) hours, on any day, subsequent to June 29th, 1941.

EMPLOYES' STATEMENT OF FACTS: On July 31st, 1940 the following bulletins were posted at St. Joseph Union Depot;

"St. Joseph Mo., July 31, 1940

Bids will be received up to and including August 5th for position of swing truckman to work the following schedule.

Hours of service

Monday	12 M. to 8 A. M.	
Tuesday	1:30 P. M. to 9:30 P. M.	
Wednesday	6:30 P. M. to 3:00 A. M.	Lunch 12 to 12:30 A. M.
Thursday	3:00 P. M. to 11:00 P. M.	
Friday	Day of rest	
Saturday	5:00 A. M. to 1:00 P. M.	
Sunday	5:00 A. M. to 1:00 P. M.	

Basic rate of pay \$108.17 per month.

Bids must be in writing and addressed to this office with copy to Gen. Chairman.

/s/ R. H. Brill."

Rule 63 hereinabove cited by the claimant reads as follows:

"Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules." (Emphasis supplied.)

In the first place there was no new position created; rate of pay was not reduced and the swing position was abolished in order to insure compliance with the provisions of Rule 43 rather than to evade applying the provisions of the schedule as alleged. As a matter of fact, settlement of the dispute in this connection hinged upon a simple statement from the claimant, A. O. Kellermeyer, who is General Chairman of the petitioning organization, to the effect that the variable starting times of the swing assignment were not in violation of Rule 43. **If he had given the carrier the assurance asked for, the swing assignment would have been continued and if he will give us that assurance now, we will gladly re-establish it.** The carrier cannot and will not be a party to a continuing violation of the agreement with the full knowledge that at some later date claims for damages may be filed because of such violation.

The third phase of this claim is presented for adjudication as follows:

"That mail truckman G. E. Smith be paid at overtime rate in accordance with Rule 45 for all time worked in excess of eight (8) hours, on any day subsequent to June 29, 1941."

In this respect, the Board's attention is directed to the provisions of Rule 28, which read:

"An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above (Rule 27) if written request is made to his immediate superior within seven (7) days of the cause for complaint."

It is stated by the petitioner that cause for the foregoing complaint arose on June 29, 1941. Nevertheless, the first intimation the carrier had that a claim was to be filed in behalf of said G. E. Smith was General Chairman Kellermeyer's letter of August 27, 1941, a copy of which is shown as Carrier's Exhibit D. From this it will be seen that even though there was merit in this phase of the claim, which the carrier avers there is not, prosecution thereof is definitely estopped by the limitations contained in Rule 28.

Looking to the merit or absence of merit attendant with this feature, it is a well established principle which will be found in all collective bargaining agreements of which the carrier has knowledge, that extra or unassigned employes who are used to relieve assigned employes, assume all the conditions applicable to the employes whom they relieve, which permits using such extra employes on more than one shift without the payment of overtime. This principle, so far as we have been able to determine, has never before been questioned by the Brotherhood of Railway Clerks.

In summation, the Carrier again asserts that this dispute should have been settled on the property and it would have been settled had the petitioner shown any disposition to so handle. This is conclusively evidenced by President F. B. Whitman's letter of December 22, 1941, a copy of which is shown as Carrier's Exhibit E.

The evidence of record proves beyond a question of doubt that this claim is entirely devoid of merit and it should be denied.

OPINION OF BOARD: Briefly, the essential facts are as follows:

On July 31, 1940, a position of swing truckman at the St. Joseph Union Depot was bulletined, and on August 6, 1940, A. O. Kellermeyer was assigned to that position. The position thus established had a different starting hour

on each of five days of the six days on which it was worked. Friday was the day of rest. This position was established so as to give other truckmen one day of rest in seven as provided for by Rule 52 of the then prevailing agreement.

On March 31, 1941, effective the next day, this position was abolished by bulletin, and the work that was performed by Kellermeyer on the position of swing truckman was performed by an extra or unassigned employee. Kellermeyer, thereupon, displaced G. E. Smith, a junior employee, who occupied another regular assignment. Smith then did the work formerly performed by Kellermeyer until June 29, 1941. On that date, Smith was assigned to work relief days differing from those assigned in the bulletin on July 31, 1940, and requiring his working in excess of eight hours on some days. That is, after June 29, 1941, Smith was required to work more than eight hours in twenty-four, which is claimed to be in violation of Rule 45.

The records show, and it is practically admitted by both parties, that the position of swing truckman, as bulletined on July 31, 1940, was a regular assignment.

The Carrier contends that the position of swing truckman created by the bulletin of July 31, 1940, was in violation of Rule 43, for the reason that the position did not have a regular starting time, and, therefore, it properly abolished this position by its bulletin effective April 1, 1941.

Rule 43 reads:

"Regular assignment shall have a fixed starting time, and the regular starting time shall not be changed without at least twenty-four (24) hours notice to the employees."

This rule is plain and unambiguous; it needs no interpretation. It means that regular assignments shall have the same starting time each day of the assignment, and it applies to all regular assignments. Past practices would not change the rule, this because the rule is unambiguous. See Award No. 1492.

Since the swing truckman's position was a regular assignment, it follows under Rule 43, that it must have the same starting time each day covered by the assignment. This it did not have; therefore, the Carrier did not violate the applicable agreement when it abolished this job on April 1, 1941.

Petitioner claims that G. E. Smith should be paid at overtime rate in accordance with Rule 45 for all time worked in excess of eight (8) hours, on any day, subsequent to June 29, 1941.

Rule 45 reads:

"Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis, at the pro rata rates for the ninth hour and at time and one-half thereafter."

A very similar rule was interpreted by this Board in Award 687, and this Board held that the word "day" meant a period of 24 hours computed from the beginning of the previous assignment, and that this rule applied to an extra employee. The Board is of the opinion that is what is meant by the word "day" in Rule 45 of this agreement.

The record shows that Smith was required to work more than eight hours on various occasions in a space of twenty-four hours. On those dates, he should be paid in accordance with Rule 45, which provides for pro rata rates for the ninth hour and time and one-half rates thereafter.

Carrier relies upon Rule 28 as a defense to additional compensation for Smith because it contends that this claim was first presented August 27, 1941.

The identical rule was interpreted in Award No. 1060, and the Board held that this has no application for compensation such as the one here in

question. Award 1060 was approved by this Board in Awards No. 1403 and 1839. Therefore, the Board finds no merit in this defense.

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 employees involved in this dispute are respectively carrier and employees 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 the Carrier did not violate the agreement as to Claims 1 and 2, but did violate the agreement as to Claim 3.

AWARD

Claim (1 and 2) denied. Claim 3 sustained in conformity with this opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of December, 1942.

DISSENT TO AWARD NO. 2053, DOCKET CL-1963

Those here dissenting disagree with the application given the Agreement by the Opinion of Board in this case. This dispute developed despite that the authorized representative of the Petitioners, General Chairman Kellermeyer, the occupant of the disputed relief position, and the Carrier had mutually agreed to Kellermeyer's assignment on that relief position with fixed monthly rate of pay for eight hours each day for each of six days, as specified by bulletin. The assignment of this relief position was in accord with the meaning of Rule 43 as evidenced by the establishment of the position and as claimed by General Chairman Kellermeyer, despite that it had different starting time on various days of the week.

The Carrier, being fearful that the assignment might be considered in conflict with the literal wording of Rule 43, and as it possibly might be considered in conflict with Rule 45 as previous Awards (improperly in our opinion) had applied that rule in cases involving different starting times on different days to require payment of time and one-half for time in excess of 8 hours in a 24-hour period, asked General Chairman Kellermeyer for assurance of his claimed meaning of Rule 43 as evidenced by their mutual understanding of it in the establishment of this relief position and his assignment thereto.

The declination of General Chairman Kellermeyer to do so resulted in the advancement of this dispute to this Division and the rendition of this Award, which is unsusceptible of reasonable application. The compensation claims should have been denied by reason of the preceding facts.

/s/ C. C. Cook
/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. P. Dugan
/s/ R. F. Ray