Award No. 2277
Docket No. CL-2262

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of System Committee of the Brotherhood of Railway Clerks that the railroad violated the provisions of the Clerks' Agreement when it required and permitted R. J. Rowan, an employe on leave of absence, to perform certain routine clerical work during the months of September and October 1939; that the manner of compensating Rowan for this service was in violation of the rules of the Clerks' Agreement; and that S. J. Gardner be compensated to the extent that he has suffered monetary loss by reason of these violations.

EMPLOYES' STATEMENT OF FACTS: On June 8, 1939 this Brotherhood and the Railroad concurred in granting a leave of absence to R. J. Rowan for the purpose of engaging in special work for the Railroad Retirement Board. This leave was still in effect during the months of September and October 1939.

During these two months Rowan was assigned by the Railroad to the preparation of a tie report. This work was performed away from Railroad property. He was paid for actual hours work at a rate of $5.35 per day. The preparation of the tie report was a duty of the former position of Roadway Clerk, which position would be rated at $6.57 per day. Subsequent to the abolishment of the position of Roadway Clerk this work was assigned to and performed by the Head Maintenance Clerk whose rate, during September and October 1939 was $8.64 per day.

POSITION OF EMPLOYES: There is in evidence an agreement between the parties bearing an effective date of October 1, 1930 from which the following rules are cited:

> "Rule 1. These rules shall govern the hours of service and working conditions of the following employes, subject to the exceptions noted in Rules 2 and 3:
>
> (1) Clerks—
>
> (a) Clerical workers;
> (b) Machine Operators.
>
> (2) Other office, store and station employes—such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employes, train and engine crew callers, operators of certain

would have handled the work if it had been in effect. The rate of $6.57 per day, requested by the employes, is the rate requested by the Clerks' Organization in Docket No. C. L.-1685.

Schedule Rule 31 reads in part:

> "Vacancies or new positions of thirty days' or less duration need not be bulletined."

It was known that the temporary position would be in existence less than thirty days and it was the responsibility of the Management to use its best judgment in filling it. Rowan possessed seniority as a clerk in the seniority district involved and had a perfect right to the work and there could have been no basis for dispute if he had been required to work a tour of duty in the Superintendent's office instead of doing the work intermittently at another location. Carrier realized that the method used was irregular but because of the emergency, it was necessary to take any steps available to accomplish the purpose.

Rowan worked 58 hours in September and 92 hours in October, 1939, or 18¾ days, and because of the irregularity, Carrier expressed a disposition to settle the dispute by paying any one or more employes to be agreed upon a total equivalent of the amount paid Rowan, or 19 days at $5.35 per day—$101.65. This proposal was rejected and Carrier was finally informed that the employes would insist on payment on an overtime basis at time and one-half being made to S. J. Gardner, Head Maintenance Clerk (seniority date April 7, 1910) whose basic rate of pay was $8.64 per day, or 150 hours at $1.62 per hour, totaling $243.00.

If the work had been done in the Superintendent's office by either a regular or an extra clerk, Gardner would not have been the one to do it and Carrier fails to see any basis for compensating this individual. If the position covered by your Docket No. CL-1685 had been in existence, this tie report would have been made on that desk and not by Gardner.

Neither the Clerks' agreement, taken in its entirety, nor any rule thereof contemplates or provides that the compilation of the tie report involved must be done by any regularly assigned clerk on an overtime basis. The Agreement does contemplate that an extra clerk or a furloughed clerk, if available, should be used for this temporary work. An extra clerk was not available, but a furloughed clerk (Rowan) was used. In the absence of an extra clerk and in preference to using Rowan in the manner described herein, Carrier would have temporarily employed a clerk, if a qualified one could have been found, for such employment and Carrier's right to handle in this manner can not be challenged.

Carrier contends that the work involved in this dispute was performed by an employe holding seniority in the class in the district to which the work properly belonged and that proper compensation was allowed for the performance thereof and that, in reality, there was no actual justification for it to indicate a willingness to pay any penalty whatsoever, but because the case was unique and there was every probability to expect that no similar case would ever occur in the future, it was willing to close out the dispute by paying a reasonable penalty. Inasmuch as the employes have not seemed inclined to dispose of the case on a fair basis, Carrier earnestly requests your honorable Board to decline the request in its entirety.

OPINION OF BOARD: R. J. Rowan, a clerical employe of the Carrier, was on June 8, 1939, with the approval of the Carrier's General Manager and the Brotherhood's General Chairman, granted a leave of absence under the first paragraph of Rule 52 of the current Agreement which reads:

> "Leave of absence will not be granted for more than ninety days except in case of injury or sickness. An employe who has seniority rights of five years or more may be granted one year's leave of absence when approved by the General Manager and General Chairman."

No question is raised as to the propriety of the granting of the leave. The occasion therefor was the request of the Railroad Retirement Board that Rowan be loaned to it for some character of special work. The leave was indefinite as to time, but it seems to have been contemplated that the Retirement Board work, to which Rowan was assigned, would continue for several months. Just how long it continued is not shown, but it does appear that it covered the period from June 8, 1939, to and beyond the months of September and October, 1939, the two months during which Rowan did the work for the Carrier which gives rise to this claim. It seems to be conceded that the Carrier could, at any time, have cancelled the leave and recalled Rowan to his regular work, but he was not recalled until after he completed his Retirement Board work, and subsequent to October, 1939.

The second paragraph of Rule 52 of the Agreement provides:

> "An employe returning after leave of absence shall resume his former position or if off duty ninety days or less, he may exercise his seniority rights to any position assigned during his leave of absence. Employes displaced thus will exercise their seniority in the same manner."

It is the contention of the Petitioner that while Rowan's seniority rights were not impaired by his leave, such leave, during the continuation thereof, operated temporarily to take him out of the scope of the Agreement; and that the Carrier, in assigning him work during the leave period, violated the Agreement. In particular, the Petitioner cites Award No. 1784 of this Division in support of his contention. We think that Award, as well as a fair interpretation of the Agreement as a whole, sustains this contention, and it is so held.

At the time Rowan was granted his leave of absence he occupied a position the basic rate of pay of which was $5.35 per day and, the Carrier says, was experienced in the work of making up tie reports, a work which, it says, not every clerical employe could do. At this time the Petitioner, S. J. Gardner, held the position of Head Maintenance Clerk, at a rate of pay of $8.64 per day, and, according to the contention of the Brotherhood, was the person who ordinarily and regularly made up tie reports, and the person who would, ordinarily, have been called on to make such reports. We do not understand the claim to be that Gardner had the exclusive right to this work; but that, customarily, he would have been called on for this work. It is conceded that the Carrier could have created a new position for this work, or called an extra clerk, working under the Agreement, to perform it; but, it is claimed this was not done, and not being done, the work fell to Gardner, and, his regular time being otherwise taken in his regular work, that of preparing the tie report would necessarily have had to be done by him on an overtime basis.

The material facts in the case are not in dispute. What was probably an unexpected and urgent call for a tie report was made. The clerical force available for this character of work was otherwise constantly employed during regular hours, and in this situation Rowan was assigned the work, which he did, beginning on September 20th and ending October 20, 1939, performing from three to eight hours work during 28 days of said period, a total of 150 hours, or 18¾ days, for which he was paid at the rate of $5.35 per day. When the Carrier says that regular employes were not available for the work, it must mean that they were not available during regular hours of work. We are warranted in assuming that Rowan did the work during hours when the Retirement Board did not require his services, which would be a type of overtime work. Gardner, or any other employe working under the Agreement, and competent to perform the work, could have been called for overtime work. Gardner's pay was at the basic rate of $1.08 per hour, or $8.64 per day, and his overtime rate would have been $1.62 per hour, and the Carrier may have thought itself justified in seeking to get the work done at a lower cost than the assignment of Gardner thereto would have entailed.

Had it been able to do this without violating the Agreement, no one could have justly disputed its right to do so. However, when it sought to do so by a violation of the Agreement, can it escape the penalty which the Agreement warrants?

We think it clear that Rowan, being on leave of absence, was not entitled to the work; and when the Carrier assigned the same to him it violated the current Agreement. The only question arises whether Gardner, who did not, in fact, do the work, is nevertheless entitled to be paid therefor, and on an overtime basis of pay, by reason of the claim that, while not exclusively entitled to the work, he would have, under ordinary circumstances, been called on therefor. If we are to allow the claim it must be done on the basis that the Carrier should be penalized for its violation of the Agreement, regardless of the fact that the result thereof would operate to compensate Gardner for work he did not perform, and on an overtime basis of pay. To impose this penalty may, in the circumstances, seem harsh; but Agreements are made to be kept and the imposition of penalties to attain that end, and to discourage violations, are justified. As we view the matter, less harm will result to the principles of collective bargaining by imposing the penalty than from ignoring the violation and refusing to impose the penalty. Furthermore, the Petitioner is not subject to criticism for making his claim where, through the failure of the Carrier to assign the work to a new employe or to an extra clerk, as it could have done, the work would, ordinarily, be assigned to him. When, in these circumstances, he was deprived of an opportunity to do the work, even on an overtime basis, his rights under the Agreement were violated. It is true that provisions for extra pay for overtime work were incorporated in wage agreements to discourage the working of employes beyond the usual eight hours, but the right to perform overtime work attached to a position is recognized as an employe's right which, in proper cases, he is entitled to have enforced.

Considering the case from all standpoints, we conclude that the situation in which the Carrier finds itself is the result of its own failure to protect itself against an excessive cost for the work in question, by a resort to the several methods open to it, within the rules of the Agreement. When it failed to follow that course, and sought to reach the same result by a violation of the rules, it must suffer the consequences. The claim will be sustained.

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, finds and holds:

That the Carrier and 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 in assigning to R. J. Rowan, an employe on leave of absence, the work of preparing the tie report in question, the Carrier violated the current Agreement, and that S. J. Gardner is entitled to compensation, on an overtime basis, for monetary loss sustained by him by reason of such violation.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of August, 1943.