Award No. 2278
Docket No. CL-2263

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 incumbent of position of janitor at Elko, Nevada be paid in accordance with the provisions of the Clerks' Agreement for all time in excess of eight hours, exclusive of the meal period, subsequent to August 10, 1941.

EMPLOYES' STATEMENT OF FACTS: Attached hereto and marked "Employes' Exhibit A" is copy of grievance filed with Superintendent Curtis under date of August 6, 1941. Superintendent Curtis declined this claim under date of August 8, 1941 and on August 29, 1941 the same was appealed to Vice President and General Manager E. W. Mason.

Effective September 4, 1941 the hours of service of janitor at Elko were arranged in accordance with request of employes.

Carrier, however, has declined to pay incumbent of position involved in accordance with the provisions of Rule 20 of the Clerks' Agreement for all time in excess of eight hours, exclusive of the meal period, subsequent to August 10, 1941.

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 13. Where service is intermittent, eight hours' actual time on duty within a spread of twelve hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight hours from the time required to report for duty to the time of release within twelve consecutive hours, and also for all time in excess of twelve consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one hour.
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> "Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the Management and duly accredited representatives of the employes. For such excepted positions the foregoing paragraph shall not apply.
>
> "This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

The position was assigned on the basis outlined in the circular, no protest being made that it was not properly an intermittent position. In July, 1941, the position again became vacant and on July 23, 1941, it was advertised in exactly the same manner as set forth in Circular No. 284 of November 24, 1939.

The instant dispute is predicated on the advertisement of July 23, 1941, as contained in the general chairman's letter to the division superintendent dated August 6, 1941.

There was not and is not at this time any janitor work to be performed between 12:00 noon and 4:00 P. M., and under normal circumstances, there is no other work of a character for which a janitor could be expected to be qualified. At the time of the protest in 1941, it was determined that there was not quite enough labor available to handle all of the trucking of freight at the freight house; consequently, a position of trucker and janitor, with hours from 7:00 A. M. to 4:00 P. M., and one hour meal period, was established for the purpose, performing the duties of the position here involved and trucking freight in the afternoon. The former intermittent position was abolished and new position of janitor established with hours 4:00 P. M. to 1:00 A. M. and one hour meal period.

The schedule was not executed for the purpose of uneconomically burdening the Carrier, and the intermittent rule recognizes that there are circumstances in which the entire time of an employe can not be fully utilized on a continuous-period basis. In the instant case, there is not and has not been anything for a janitor to do at the division headquarters building and normally nothing for him to do at any other point in Elko, and it was only after looking away from the place of his assignment at the headquarters building that it was possible to find anything to fill the period between noon and 4:00 P. M. This is possible only during periods of heavy business at the freight house, which is separate and distinct from the headquarters and passenger station building.

The work of trucking at the freight house is not comparable to the work of janitor at the headquarters building, except that neither position requires any particular degree of skill.

Carrier contends that it readjusted the force with reasonable promptness after receipt of protest from the employes and should not be penalized for the period of less than a month intervening between August 10 and September 6, 1941.

OPINION OF BOARD: This dispute concerns the right of a janitor at Elko, Nevada, to be paid the established rate for overtime work for labor performed between August 10, 1941, and September 6, of the same year. The basic question at issue is the application to the facts here presented of Rule 13 of the current agreement, which reads:

> "Where service is intermittent, eight hours' actual time on duty within a spread of twelve hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight hours from the time required to report for duty to the time of release within twelve consecutive hours, and also for all time in excess of twelve consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one hour.
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> "Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the Management and duly accredited representatives of the employes. For such excepted positions the foregoing paragraph shall not apply.

"This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

"Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one hour's duration and service of the employes cannot be utilized otherwise.

"Employes covered by this rule shall be paid not less than eight hours within a spread of twelve consecutive hours."

Rule 20 of the agreement provides:

"Except as provided otherwise in these rules, time in excess of eight hours, exclusive of the meal period, on any day shall be considered overtime and paid on the actual minute basis at the rate of time and one-half.

"* * * * * * *"

The position in question had been filled on an intermittent basis for more than twenty years prior to the development of this dispute. The current agreement became effective on October 1, 1930, and Rule 13 was put into the agreement after the practice now complained of had been followed for at least ten years. The position became vacant late in 1939, and on November 24, 1939, was bulletined as an intermittent position, covering the period of 6:00 A. M. to 6:00 P. M., with assignment of eight hours' work within the twelve-hour period. In practice,—and this practice continued to September 6, 1941,—the janitor worked from 6:00 A. M. to 12:00 noon, and was then released until 4:00 P. M., when he returned to his job and worked four hours. This carried him two hours beyond his twelve hour regular period, and for these two hours he was paid at the overtime rate of pay. A copy of the bulletin of November 24, 1939, was furnished the General Chairman, and he made no objection thereto. The employe who bid in the work so bulletined made no complaint, and performed the work under the schedule outlined above.

In July, 1941, the position again became vacant, and on July 23, 1941, was bulletined in the same manner as that followed in November, 1939, and the work was bid in by the employe on whose behalf this claim is prosecuted. Following this bulletin, the question of the regularity of designating the work to be performed as "intermittent work" was first raised.

On August 6, 1941, the General Chairman wrote to the Carrier's Superintendent requesting "That eight hours, exclusive of the meal period, be assigned as constituting a day's work for the position of janitor at Elko immediately and that the incumbent of this position be paid in accordance with the provisions of Rule 20 of the Clerks' Agreement for all time in excess of eight hours, exclusive of the meal period, subsequent to August 10, 1941." The effect of this request was to call for overtime pay for five hours, allowing for a meal period of one hour, instead of the two hours paid under the schedule followed up to that date.

The Superintendent declined the request. The matter was appealed to the General Manager on August 29, 1941, who upheld the Superintendent. Very soon thereafter the janitor work at Elko was re-arranged. The so-called intermittent service job was abolished, and to take its place a new position of trucker and janitor combined was created and assigned to work between 7:00 A. M. and 4:00 P. M., with one hour for meal period. A new janitor position was created with work assigned from 4:00 P. M. to 1:00 A. M., with one hour meal period, the effect of which was to remove the cause of the instant complaint, leaving open the question of additional compensation for the short period during which the bulletined assignment continued after complaint was made, but still requiring a decision on whether the old practice was a violation of Rule 13.

The decision of this question must depend largely on our interpretation of the definition of "Intermittent Service" contained in the rule. It is there defined to mean, "service of a character where during the hours of assignment there is no work to be performed for periods of more than one hour's duration and service of the employes cannot be utilized otherwise." So far as janitor work is concerned, it seems clear that it was impractical to do such work during the period from 12:00 noon to 4:00 P. M., and in that sense there was no such work to do.

The next and important question is: Could the employe have been otherwise utilized during this period? Effective September 6, 1942, he was utilized during this period, probably as a trucker, and petitioner seems to contend that this fact is conclusive in its favor on its contention that the employe could and should have been utilized during the period covered by the claim. While somewhat persuasive that the Carrier could have utilized the employe, it does not necessarily mean that, in the circumstances of this case, it was required to do so.

The Carrier must be left some latitude and discretion as to the manner, and by whom, it secures the performance of particular work, and to guard against excessive expense therefor. Here the Carrier could have used the janitor employe for other work only at the cost of paying for four hours' work for each day at the overtime rate of pay. Four hours' janitor work being normally required from 4:00 P. M. to 8:00 P. M., the cost of the day's work, allowing for the meal hour, would have been $4.04 for the regular eight hours, and $3.88 for five hours' overtime, a total of $7.92, or practically the wage value of two janitors working the regular hours, and requiring the employe to work thirteen hours. Surely the rule never contemplated such a result, and the long period of time during which it was not allowed to occur is some evidence that it was never so intended.

In view of these considerations, and taking into account the character of the work, we cannot say that the long continued custom of assignment, and the acquiescence therein of all parties concerned in or affected thereby, was, as to this position, a violation of Rule 13. We are aware that this Division is committed to the proposition that, "past violations of an agreement do not revise an agreement." Award No. 1246. But the award in which this holding is made also states that, "on the other hand, if an agreement is susceptible of two different meanings, then what the parties have done under it would be the proper interpretation of the rule." Here there is ample ground for differences of opinion as to how the rule should have been applied; and, therefore, what the parties have done thereunder, particularly over a long period of time, should have great, if not compelling, weight in determining what the rule was intended to mean. Of course, these observations are based on the long acquiescence in, and acceptance by the employes and the Brotherhood, of the application of the rule by the Carrier.

But a time came when the Brotherhood Committee did not choose to further accept the Carrier's use of the rule, as applied to the janitor position in question. It protested the Carrier's action, and filed its claim, limited it is true, and asserted in a conservative way. As we view the case, this protest called for a reconsideration of the matter, and we think that, in the peculiar circumstances, the Carrier was entitled to a reasonable time to work out a correction of its assignment schedules, if it thought it advisable to do so, rather than to contest the claim. It did re-arrange janitor and trucker work within less than thirty days, and we do not think this was an unreasonable delay. In the meantime, and for the period covered by the claim, the janitor received the benefit of the assignment which permitted him to charge for two hours' work at the overtime rate of pay.

When the Organization permitted the situation complained of to continue for more than twenty years without protest, this, while not barring it from seeking to correct it, calls for some reasonable leniency for investigation and

determination as to the action to be taken on any protest filed. This would not be true in a case where there was a refusal to entertain the protest, and it was later sustained. In such a case the final judgment in the matter would, ordinarily, become effective as of the date of the protest. In no aspect of the case can we see that the claim should be sustained, and it is, therefore, denied.

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 employe involved in this dispute are respectively carrier and employe 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 employment by the Carrier of a janitor at Elko, Nevada, for intermittent services, prior to September 6, 1941, was not a violation of the current agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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