Award No. 3271
Docket No. CL-3029

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILWAY COMPANY

L. R. Powell and Henry W. Anderson, Receivers

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Clerk, D. H. Davenport, rate $6.49 per day, be paid time and one-half for February 26 and 27, 1944.

EMPLOYES' STATEMENT OF FACTS: Clerk Davenport with Class #1 Clerical Seniority as of October 13, 1943, with assigned hours of service from 4 P.M. to 12 midnight, was off on account of his wife being ill February 25, 1944. At 12:10 A.M. February 26 he called Caller Pressler (which is the custom and practice that has been in effect for three years) advising he would protect his assignment that day and marked up for any extra Class 1 or Clerical work that might be available for him. Clerk Williams, with assigned hours of service from 8 A.M. to 4 P.M., reported off sick February 26, 1944, and instead of calling Clerk Davenport, who held seniority rights to perform clerical work in the Roundhouse at Hamlet, N.C., the Acting Foreman instructed Caller Pressler to call Boy Pate, who held Class 2 seniority rights to perform Class 2 work only in that terminal and on that Division.

Clerk Davenport protested to the Foreman February 26, 1944, and advised the Foreman that he stood for this work ahead of Class 2 employes holding Class 2 seniority. Roundhouse Foreman again had Call Boy Pate, a Class 2 employe, called to fill Clerk Williams' vacancy in Class 1, the employe's protest being ignored by the Foreman. Call Boy Pate does not hold Class 1 seniority.

Local Chairman Huguelet then protested against the agreement violation to the Master Mechanic Chief Clerk, Mr. Barlow, who corrected the violation promptly. The Master Mechanic, the Superintendent, and the General Manager declined to reimburse Clerk Davenport for the time worked by Caller Pate on February 26 and 27, 1944, two days at time and one-half the rate of $6.49 per day, the Roundhouse Clerk's rate of pay.

POSITION OF EMPLOYES: Agreement effective October 16, 1922 and interpretation thereto contain the following rules and interpretations:

RULE 1. EMPLOYES AFFECTED. These rules shall govern the hours of service and working conditions of the following white employes, subject to exceptions noted below:

1 day, March 7, 1945.
5 days, April 9, 10, 11, 12 and 30, 1945.

On March 11th and 12th and April 19th and 20th, 1945, Class 2 Caller Pate, who was used to relieve Clerk Davenport on February 26-27, 1944, as covered by the instant claim, was again used under identical circumstances to relieve Class 1 Roundhouse Clerk Williams and no protest was made, neither was claim filed in behalf of Davenport or any other Class 1 employe.

For reasons as outlined above, Carrier respectfully requests that the claim be declined.

OPINION OF BOARD: At Carrier's Roundhouse at Hamlet, North Carolina, three Clerks are assigned in continuous around-the-clock service. Claimant was one of the regularly assigned Clerks working from 4:00 p.m. to 12:00 Midnight. Three call boys were also assigned in around-the-clock service at this point, one Pate occupying one of these positions. The Clerks were designated as Class 1 employes and carried upon one roster while the call boys are designated as Class 2 employes and carried upon a different roster consisting of white employes in Classes 2 and 3. On February 26 and 27, 1944, Clerk Williams, assigned 8:00 a.m. to 4:00 p.m., was off duty on account of illness. Call Boy Pate was assigned to the temporary vacancy. Claimant contends that he should have been called to perform the work at the overtime rate. The record shows that Claimant had given sufficient notice of his desire to perform any extra Class 1 or Clerical work that might be available.

The record shows that there were no extra, unassigned or furloughed Clerks in Class 1 available to perform this work. We are called upon to determine whether the Agreement requires the Carrier to double over a regular assigned Class 1 Clerk under such circumstances, to the exclusion of all Class 2 and 3 employes.

The Agreement provides that Class 2 and 3 employes "shall have preference over non-employes in the filling of clerical positions." See Rule 1 (a), current Agreement. The organization contends that any rights that Class 2 and 3 employes might have to Class 1 work are superior to non-employes only and that they are necessarily inferior to those of any available Class 1 Clerk. With this we agree. Necessarily, the crux of the dispute is whether Claimant was available to fill a temporary vacancy within the meaning of the Agreement. See Awards 1646, 2052 and 2282. We find no previous award where this precise question has been determined.

This Board has held that where extra board and furloughed employes are not available, regular assigned employes are entitled to work available on their rest days and to be called in the order of their seniority. Award 2341. And when there was no extra or relief man available to work the rest day of the occupant of a position necessary to the continuous operation of the Carrier, we held that the Carrier was required to work the regular occupant of the position at the penalty rate. Award 2467. And we have also held that regularly assigned employes of a class are entitled to overtime work in order of their seniority. Award 2426. And, clearly, the rule is the same with reference to extra work on Sundays and holidays. Awards 1630 and 2388. But in the present case, we are confronted with none of these situations but with the filling of a temporary vacancy. It will be conceded at the outset that the Carrier may call the occupant of a regularly assigned position to double over although it thereby subjects itself to penalty for work performed in excess of eight hours on any day. The question here is whether the Carrier is required to call the occupant of the regularly assigned position to the exclusion of all others where there are no extra or furloughed Class 1 employes available.

The Agreement before us reserves all Class 1 work for Class 1 employes. Call Boy Pate, being a Class 2 employe had no seniority as a Class 1 employe, although in the filling of a Class 1 vacancy he had a right superior to a non-employe. Under these circumstances, the work must be given to Class 1 employes if it is possible to do so.

There is no question that Claimant could have been required by the Carrier to double over and perform the work at the time and one-half rate. In Award 2467, in discussing the matter of requiring an employe to double over, we said that:

> ". . . it seems reasonable to conclude, predicated upon the essential nature of these contracts, that wherever they manifest an intention to impose a duty to perform certain work of the Carrier, there is thereby made manifest an intention to create a correlative right to perform that work."

The fulfillment of the six day guaranty does not limit the duty to work or the correlative right to the work. Award 2467. The Carrier could not, therefore, properly use employes or others not entitled by the Agreement to the work to the detriment of employes entitled to it under the Agreement. Award 3193.

The filling of a temporary vacancy in a regularly assigned position is work that belongs to the employes to whom it is given by the Agreement to the exclusion of employes and others having no rights to it when there is an employe available in the class or group entitled to perform it. The fact that an employe has already worked a regular assignment does not make him unavailable of itself. We are obliged to say, therefore, that Claimant was entitled to the work in preference to Call Boy Pate, a Class 2 employe having no right to it.

We do not think that Claimant is entitled to the time and one-half rate in the present case for the time he lost. The rule is that the penalty rate for work lost because it was improperly given to one not entitled to it under the Agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work. Award 3193. The regular occupant of the position in the present case would have received the pro rata rate. The present claim will be sustained at that rate.

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 the Agreement was violated as alleged.

AWARD

Claim sustained at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) H. A. Johnson,
Secretary

Dated at Chicago, Illionis, this 2nd day of August, 1946.