Award No. 3323
Docket No. CL-3325

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement when it permitted the Agent at Galion, Ohio, an employe holding no rights under the Clerks' Agreement, to perform duties on position of Mail Porter and Janitor on Sunday, October 15, 1944, and

That Carrier shall now compensate employe N. B. Buskirk for eight hours at time and one-half rate account not having been called in place of the regular incumbent who was off sick.

EMPLOYES' STATEMENT OF FACTS: On Sunday, October 15, 1944, V. G. Smart, regular incumbent, hours 11:00 P. M. to 8:00 A. M. of position of Mail Porter and Janitor reported off sick. This position is a regular assigned Roster "B" position. Instead of calling another Roster "B" employe who was available to be called to work the position, the Agent, an employe not covered by the rules, worked the position. Claim was filed for one day of eight (8) hours at time and one-half rate. The carrier allowed the claim but refused to pay time and one-half as provided for in the rules of the Clerks' Agreement. The employes submit as their Exhibit "A" copy of letter dated December 16, 1944, allowing the claim at pro rata rate.

POSITION OF EMPLOYES: There is in effect between the parties an agreement bearing effective date of December 1, 1943 which contains the following rules:

Rule 20 (Day's Work and Overtime) reads as follows:

"(a) Except as otherwise provided in these rules, eight (8) consecutive hours work, exclusive of meal period, shall constitute a day's work. Time in excess of eight (8) hours on any day, exclusive of meal period, will be considered overtime and paid on the actual minute basis at the rate of time and one-half.

"(b) Employes paid on a tonnage or piece work basis with an hourly, daily, or monthly rate required to perform service in excess of eight (8) consecutive hours exclusive of meal period on any day or on their rest days or any of the specified holidays, shall be paid earnings for tonnage or piece work for the entire tour of duty plus one-half of the hourly pro rata rate for the overtime hours worked, but in no case less than as provided for in paragraph (a) of this Rule 20.

ber 13, 1944 the Agent declined the claim but on December 16, 1944 he advised Buskirk that he had given further consideration to the claim and would allow him eight hours at the pro-rata rate. This adjustment was allowed and included in Buskirk's first half of January, 1945 pay check. The claim was paid even though there is no rule in the agreement which required the Carrier to make such a penalty payment.

The notice in this case dated February 21, 1946, from H. A. Johnson, Secretary of the Third Division, states that the claim of the employes is that the carrier violated the Clerks' Agreement when it permitted the agent at Galion to perform the duties of the Mail Porter and Janitor on Sunday, October 15, 1944.

The Employes claimed that the carrier should now compensate Freight House Foreman H. B. Buskirk for 8 hours at time and a half rate on account of not having been called in place of the regular incumbent who was off sick.

The carrier submits that there is no rule in the Clerks' Agreement which provides that Warehouse Foreman Buskirk should be compensated for 8 hours at time and one-half on account of not having been called in place of the regular incumbent who was off sick.

The employes failed to specify what rule of the Agreement has been violated. Therefore, the carrier has no knowledge as to the basis on which the claim is submitted and is not in a position at this time to make a proper answer to the Employes' submission.

The carrier reserves the right if and when it is furnished with the submission, which may be filed ex parte by the Employes in this case, to make such further answer as may be necessary in relation to all the allegations and claims as may be advanced by the Employes in such submission which cannot be forecast by the carrier at this time.

OPINION OF BOARD: Two questions seem to be presented here: (1) Should Mr. Buskirk have been called to do this work? It seems that the carrier has decided that question by paying Buskirk at the pro rata rate.

(2) Should Buskirk have been paid at pro rata or time-and-one-half rate? In their original submission, the employes contended that Buskirk was entitled to pay at the time and one-half rate because, had he been called, it would have been work on his (Buskirk's) relief day, and therefore he was entitled to pay at the time and one-half rate.

On behalf of the employes it now is urged that the rule is "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 which it was regularly assigned would receive if he had performed the work." Award 3271.

The next question then is, what rate would the employe, to whom the work was regularly assigned, have received had he performed the work on the Sunday night in question? Was Sunday his "day off duty"? If so, under Rule 30(a) he would have been paid, had he worked, at the rate of time and one-half. On the other hand, if Sunday was not his assigned day off duty, he would have been paid straight time for work on Sunday under the same rule.

As to this question we are presented with a remarkable series of statements. The employes in their ex parte submission dated January 28, 1946, say: "The incumbent is assigned a rest day other than Sunday in accordance with the provisions of Rule 30." In their statement of March 19, 1946, the employes say the vacant position was that "of the employe who is regularly assigned to work on Sunday."

The carrier in its statement dated May 10, 1946, says: "It is true that the laborer position works seven days and Sunday was considered the relief day." This was followed by the statement that because of local conditions there was no regular relief day assigned, and the incumbent was paid time and one-half only when he worked the seventh day. Then in its submission of June 10, 1946, the carrier "agrees" with the employes' original statement that "the incumbent is assigned a rest day other than Sunday."

It would seem that this would settle the matter. But not so. The employes in a submission received by this division June 12, 1946, state they were incorrect and the carrier correct when it said that "Sunday was considered the relief day" in its statement of May 10, 1946, and accept the carrier's statement. Then the carrier in its submission dated June 22, 1946, says: "Smart did not have Sunday as his regular assigned relief day because the employes in their ex parte submission on page 3, line 24, say 'The incumbent (Smart) is assigned a rest day other than Sunday in accordance with the provisions of Rule 30.'"

Thus each party at the end clings tenaciously to the position the other party took at the beginning. In the face of such a record, what is this division, and more particularly, what is a referee to decide on the fact question?

Section 3, First (i) of the Railway Labor Act, provides that disputes when submitted to the Adjustment Board shall be accompanied "with a full statement of the facts and all supporting data bearing upon the disputes." That provision of the act should be complied with in order that the division may have facts and not assertions here for consideration. Neither party here has complied fully with the quoted provision.

We undertake to figure out the truth of the matter, so far as we can, from the facts furnished. We are not given the bulletin showing the assignment, if one there was. It would help. In CL-3324, Award 3315, the carrier lists the "present force at Galion, Ohio" and shows "Laborer (Passenger Sta.) 11:00 P. M. to 8:00 A. M.—7 days (Relief Day Sunday)." If we are to assume that this is the "Laborer" position involved, then it may be said that the Relief Day was Sunday. But that does not settle the question.

The carrier undertakes in part to tell the facts rather than make assertions. The fact statements are not denied by the employes. They are that the incumbent, an employe of advanced years, had developed a habit of working and not working at his option, leaving the carrier repeatedly to fill his position without warning. That as a result the incumbent had in fact no relief day, he taking relief days at will, and was paid time and one-half for a seventh day when, if, and as he worked seven days in succession. We are not told whether the Sunday involved was the seventh day although a showing of the payroll of this employe would have disclosed the fact. Neither party offers us a statement of the incumbent employe. The agent apparently anticipated that the incumbent would work on the day in question, for he made no provision for a relief man, indicating it was not the off duty day. In the absence of any other showing by either party, we reach the conclusion that the Sunday in question was not the incumbent's "day off duty" in fact; and hence had he worked, he would have been paid only at the pro rata rate, and Mr. Buskirk's rate for "work lost" would be at the pro rata rate.

On behalf of the employes, it is contended that such a fact conclusion cannot be accepted because Rule 30 (a) requires that the employe "be assigned one regular day off duty in seven, Sunday if possible." We cannot say from this record what day was assigned as the "off duty" day. Both parties have been on both sides of it was and it was not Sunday. Neither party furnishes anything other than first their own and then the other's assertions. The only conclusion from the facts stated is that there was assigned no regular day off duty in fact; that when the incumbent worked seven days in succession he was paid time and one-half for the seventh day; that when he did not show up at the assigned time to work, the agent filled the vacancy catch-as-catch-can from whatever source help could be secured, and when no help was available, doing it himself. There was no objection on the part of other employes to that practice. Everyone was working. We have no doubt that had Mr. Buskirk indicated to the agent that he felt entitled to this relief work, that it would have been given to him even to hunting him out for it, but he had not so indicated, when the agent, confronted with the necessity of getting the job done, did the work himself.

If it be asserted that Rule 30 (a) requires a regular assigned day off and hence an irregular arrangement such as this is without the rule, and that the rule controls over the practice, then the answer is that the employes by

acquiescing in the practice have estopped themselves from claiming benefits retroactive to the date of the claim which in effect protests the practice. See Award 2700.

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

For the reasons stated in the Opinion, it is found that the carrier should have called Mr. Buskirk to perform the duties involved, but that under the circumstances outlined in the Opinion, the carrier is not required to pay Mr. Buskirk at the time and one-half rate for work lost.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 4th day of November, 1946.