Award No. 3416

Docket No. CL-3390

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

GULF COAST LINES; INTERNATIONAL GREAT NORTHERN RAILROAD CO.; THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY CO.; THE BEAUMONT, SOUR LAKE AND WESTERN RAILWAY CO.; SAN ANTONIO, UVALDE AND GULF RAILROAD CO.; THE ORANGE AND NORTHWESTERN RAILROAD CO.; IBERIA, ST. MARY AND EASTERN RAILROAD CO.; SAN BENITO AND RIO GRANDE VALLEY RAILWAY CO.; NEW ORLEANS, TEXAS AND MEXICO RAILWAY CO.; NEW IBERIA AND NORTHERN RAILROAD CO.; SAN ANTONIO SOUTHERN RY. CO.; HOUSTON AND BRAZOS VALLEY RAILWAY CO.; HOUSTON NORTH SHORE RAILWAY CO.; ASHERTON & GULF RAILWAY CO.; RIO GRANDE CITY RAILWAY CO.; ASPHALT BELT RAILWAY CO.; SUGARLAND RAILWAY CO.

(Guy A. Thompson, Trustee)

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

(a) The Carrier violated the Clerks' Agreement when it required Mr. F. J. Boucek to leave his regular assigned position as General Clerk at San Benito, Texas, and work position of Cashier at Weslaco, Texas, and Harlingen, Texas. Also,

(b) Claim that Mr. Boucek be paid at the rate of $8.86 per day for each day he was withheld from his assigned position at San Benito, Texas; this, in addition to the amount he has actually been paid for working at Weslaco, Texas, and Harlingen, Texas. (The above rates to be increased by any general wage increase.)

EMPLOYES' STATEMENT OF FACTS: On October 19, 1945, the Carrier issued Bulletin No. 204 advertising position of General Clerk at San Benito with rate of $8.86 per day, and hours 10:00 P. M. to 6:00 A. M. On October 27, 1945, Mr. Boucek was assigned to the position by Bulletin No. 204-A.

"Regularly assigned employes will not be required to perform service on other than their regular positions except in emergencies. When they are required to perform service on other than their regular positions, they will be paid the rates of the positions they fill but not less than their regular rates and in all cases will be allowed actual necessary expenses while away from their regularly assigned stations.

"In no case will less than one day's pay be allowed for each twenty-four (24) hours held out of their regular positions or away from home stations."

"Aside from all we have heretofore said we think the first and last paragraphs of Rule 13 are controlling of the situation presented in this dispute. Instead of working his regular assignment claimant was shifted to the second trick because of the emergency created by the illness of the telegrapher regularly assigned to that trick. In the face of the provision of Rule 13 the Call Rule (Rule 5) has no bearing upon the case. Under the rules and upon the record claimant was entitled to payment at straight time only for work performed on the second trick (Award 2444); and he was not entitled to a day's pay on account of his regular assignment which he did not work."

In the final analysis the foregoing record shows:

1. No rule in the Clerks' Agreement to support the contention and claim of the Employes.

2. Rule 50 of the Clerks' Agreement here quoted and relied upon by the Carrier not only contemplates employes on occasion being temporarily assigned to other than their regular position, but specifically provides how they will be compensated when they are used on other than their regular position.

3. Mr. Boucek was used and has been compensated in accordance with the provisions of Rule 50.

4. During the period in question Mr. Boucek did not perform service on his regular position in addition to service temporarily performed on the positions of cashier at Weslaco and Harlington, nor could he have done so under the circumstances existing in this case as his regular position was at San Benito.

5. Since Mr. Boucek performed service on but one position on each of the dates in question and could not have performed service on his regular position in addition to service performed on the temporary assignments at Weslaco and Harlingen, certainly there is no justification for the claim presented for two days pay on each of the dates involved in this claim.

6. The principle involved in this case has previously been ruled on by your Honorable Board in Award No. 2511, hereinbefore cited, which denied the Employes' claim for two days pay, i. e., the rate of his regular position in addition to the rate of the position on which he was temporarily used.

7. Award No. 2262, above referred to conclusively supports the position of the Carrier in the case under consideration.

Based on the above, it is the position of the Carrier that the contention of the Employes should be dismissed and the accompanying claim accordingly denied.

OPINION OF BOARD: Claimant was called upon to leave his regular assigned position of General Clerk at San Benito and take over the position of Cashier at Weslaco. After being released from the latter position at Weslaco he was called upon to take over a like position at Harlingen. His claim is for payment at the daily rate of his regular assigned position for the periods he worked as Cashier at Weslaco and Harlingen.

Several rules are cited by the Organization but we think the validity of the claim must be determined by Rule 44, which provides:

> "Employes will not be required or **permitted** to suspend work during regular hours to absorb overtime." (Emphasis supplied.)

We do not think it is open to dispute that overtime was effectually absorbed by suspension of Claimant's work on his own position and taking over the Cashier jobs at Weslaco and Harlingen. This Board has several times sustained similar claims under rules identical in terms with Rule No. 44. See: Awards Nos. 2695, 2823, 2859, 2884.

In those disputes, as in this, the Carrier contended that, under the rule relating to Preservation of Rates, (Rule No. 50 in the Agreement here involved) it had the right to temporarily assign an employe to a position other than that to which he was regularly assigned provided it paid him in accordance with the terms of the rule, which, insofar as pertinent are:

> "(a) Employes temporarily or permanently assigned to higher rated positions or work shall receive the higher rates for the full day while occupying such position or performing such work; employes temporarily assigned to lower rated positions or work shall not have their rates reduced."

The Board rejected the contention of the carrier saying, in effect, that the rule constitutes merely a rating provision and may not be construed in such manner as to impair the effectiveness of a rule prohibiting suspension of work to absorb overtime.

That Claimant may have willingly or "voluntarily" accepted the call to work the Cashier jobs at Weslaco and Harlingen in no wise affects the validity of his claim. It is well settled by the decisions of this Board, as well as a decision of the United States Supreme Court, that rights established by a collective agreement cannot be bartered away by an individual beneficiary covered by it. Award No. 522; **The Order of Railway Telegraphers vs. Railway Express Agency,** U. S. Supreme Court, February 28, 1944.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of January, 1947.

DISSENT TO AWARDS NOS. 3416, 3417, 3418, DOCKETS CL-3390, CL-3411, CL-3413.

These Awards, Nos. 3416, 3417, 3418, finding violations of Rule 44, make declaration that the Board has several times sustained similar claims under

rules identical in terms with Rule No. 44, naming four other late awards, each of which late awards related to different circumstances and, in their Opinions leading to the awards, contained differentiating statements, here disregarded, which reserved, at least in part, the intent and practical application of the rule relating to non-suspension of work to absorb overtime.

Those four awards relied upon, though not as arbitrarily applying the rule to the circumstances therein respectively involved as do the awards in the three instant cases, had their genesis, as a perusal of them will show, in Award No. 2346, discussed, but not referred to in the instant Opinions of Board, which lately preceding the four awards relied upon, gave application of the rule to a circumstance of a temporary assignment of an employe to other than his regular assignment.

That Award No. 2346, however, did note the fact that the claimant there protested the change but was required to make it. The award further contained the statement that "in the absence of proper showing on the part of the Carrier that avoidance of overtime was not the motivating cause, it may be assumed that it was" and, proceeding further to find under another rule there involved that the Carrier "does not show that there was good and sufficient cause for the change of positions", declared violation to be established.

During the existence of this Board prior to the issuance of Award No. 2346, and those later four restrictive awards upon which the instant awards here rely, the records of the Third Division contain numerous cases, showing circumstances of similar temporary assignments as well as claims that circumstances of similar temporary assignments should have been made, which former cases contained statements by employes and carriers alike and, as well, submissions respectively of facts incident to those cases, evidencing the knowledge of the employes' organization presenting the instant claims that such circumstances as are here involved did not comprehend the restrictions of the rule relating to non-suspension of work to absorb overtime.

The finding of a violation of the Agreement through declaration "that overtime was effectually absorbed by suspension" of the claimants' work on their own positions under the respective circumstances of these three cases and through reliance upon the assertion that

> "this Board has several times sustained similar claims under rules identical in terms with rule No. 44. See Awards 2695, 2823, 2859 and 2884."

is one that gives improper application to the rule contrary to its meaning and intent as it has been understood and generally accepted by carriers and employes, including the carrier and employes here involved. This is more particularly apparent when recognition is given to the generally accepted custom of 25 to 30 years since the rule here involved relating to non-suspension of work to absorb overtime was promulgated by the Director General of Railroads and to its subsequent application.

The awards being contrary to the meaning and intent of the agreement between the parties, as evidenced by the records in the cases, are unwarranted.

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