

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY

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

(a) Yard Clerk, Donald Raison, Needles, California, be compensated in the amount of eight (8) hours at pro-rata and eight (8) hours at punitive rate of his regular assignment \$7.16 per day on August 20, 1942, less amounts of \$7.16 and \$8.27 which he was paid, account working his regular assignment and in addition being required to work excepted position of Crew Dispatcher starting at 8:00 P. M. same date and completing assignment at 4:00 A. M. August 21st; and,

(b) Yard Clerk, Donald Raison, be compensated for eight (8) hours at his regular rate \$7.16 per day on August 21, 22, 23, 24, 25, 26, 27 and 28, 1942, account of being instructed to vacate his regular assignment of Yard Clerk, 7:00 A. M. to 4:00 P. M., to fill position of Crew Dispatcher, an excepted position, hours of assignment 7:00 P. M. to 7:00 A. M.; and

(c) Yard Clerk, Donald Raison, be compensated in the amount of twelve (12) hours at punitive rate of his regular assignment, \$7.16 per day, for August 21, 22, 23, 24, 25, 26, 27 and 28, 1942, less amount of \$8.27 per day which he was paid on each of these dates, account of being required to work excepted position of Crew Dispatcher, starting at 7:00 P. M. and ending 7:00 A. M. outside of his regular assigned hours, 7:00 A. M. to 4:00 P. M.

EMPLOYEES' STATEMENT OF FACTS: Donald Raison, Yard Clerk, worked his regular assignment on August 20, 1942 from 7:00 A. M. to 4:00 P. M. He was called at 8:00 P. M. same date to protect excepted position of Crew Dispatcher from 8:00 P. M. to 4:00 A. M. the following morning. For this service he was paid \$7.16 for Yard Clerk assignment and \$8.27 for the eight (8) hours worked as Crew Dispatcher.

On August 21, 1942, Raison was instructed by the Agent to forego reporting for duty on his regular assignment as Yard Clerk, but to report instead at 7:00 P. M. to protect Crew Dispatcher position, an excepted position with a twelve (12) hour assignment. Following these instructions, Raison continued working this assignment until released on August 29, 1942. For these eight (8) days, he was paid \$8.27 per day.

POSITION OF EMPLOYEES: There is in evidence an Agreement between the parties, bearing effective date December 1, 1929 in which the following rules appear:

to so-called excepted clerical positions such as the crew dispatcher position at Needles.

While the provisions of Article XII, Section 3(a) cited by the employees were not applicable to Mr. Raison while assigned to the crew dispatcher's position, the Carrier deems it appropriate to direct the Board's attention to the fact that Mr. Raison was paid the monthly rate of \$256.35 attaching to the crew dispatcher's position which was the equivalent of \$8.27 per day as compared to the rate of \$7.16 per day attaching to the position of yard clerk from which he was temporarily promoted. The Board's attention is also directed to the tabulation appearing in the Carrier's Statement of Facts which discloses that the payment as finally requested by the Employees in the instant claim which was presented on March 1, 1945, some two and one-half years after the handling complained of occurred, contemplates payment to Mr. Raison of \$23.27 for each of the days August 21 to 28, inclusive, for eleven hours actual service. The payment claimed is the equivalent of \$2.12 per hour as compared to the pro rata hourly rate of \$.89 attaching to the position of yard clerk. It is, therefore, apparent that the instant claim is nothing more than an attempt to collect exorbitant penalties in circumstances where no penalties are provided for under the agreement rules and certainly none were intended.

In conclusion, the Carrier asserts that the claim is completely without merit or schedule support and should be denied for the following reasons:

(1) The monthly rate of \$256.35 attaching to the excepted crew dispatcher's position and paid to Mr. Raison covered all services rendered by him while assigned to that position on the dates in question.

(2) Mr. Raison was assigned to the excepted crew dispatcher position pursuant the terms of Article III, Section 19(d) of the Clerks' Agreement and assumed the hours of service, working conditions and rate of pay for that position.

(3) The payment allowed to Mr. Raison was in accordance with the long established and accepted application of the agreement rules and is not violative of any agreement rule.

(4) The agreement rules relied upon by the employees are not applicable to employees either temporarily or permanently assigned to excepted clerical positions such as the crew dispatcher position at Needles.

(5) The instant claim is an attempt by the employees to abrogate their agreement in Article I, Section 1, paragraphs (a), (b) and (c) of the Clerks' Agreement that the rules of that agreement upon which they now rely were not applicable to employees occupying excepted clerical positions. The parties' agreement in Article I, Section 1, Paragraphs (a), (b) and (c) may only be changed by negotiation pursuant the provisions of Section 6 of the Railway Labor Act as amended.

(6) The presentation of the instant claim was too long delayed to warrant consideration.

OPINION OF BOARD: Claimant, a yard clerk, temporarily served as night crew dispatcher, an excepted position, because of the illness of the regular incumbent.

The question for decision is whether claimant was removed from the coverage of the agreement while temporarily filling the excepted position. We hold he was not.

This Division has ruled that where an employee covered by an agreement is used temporarily to fill an excepted position, such employee is not thereby removed or excepted from the agreement but remains covered by its rules.

Consequently, Carrier in such a case is subject to penalty for any violation of the rules. Awards 2905, 2906, 2943, 2944, 2986.

It was contended on behalf of the Carrier these awards do not govern here because of different rules and circumstances and also Section 19-d of Article III which states: "In filling excepted positions, preference shall be given to employees coming under the provisions of this agreement." To comply with this rule, Carrier contends it must use employees who are under the agreement who desire to fill the position, and such employees, in turn, must accept the terms of the excepted position. If these contentions are sustained, then an employee who desires to fill temporarily an excepted position may thus by his own action expand the number of those excepted from the agreement. But an employee may not change the agreement. Therefore construing the agreement as a whole Sec. 19-d must apply primarily to permanent assignments. Filling a permanent vacancy in an excepted position does not increase the number of those excepted from the agreement.

Carrier also contends that by long established custom and practice it has temporarily filled excepted positions with employees covered by the agreement without any claim of violation of the agreement. But custom and practice cannot change definite rules. Ordinarily, established practice and failure to prosecute claims have no bearing upon the interpretation of a written agreement where the terms of the agreement are clear and unambiguous. Awards 212, 561, 1492, 2053.

Carrier further contends the delay of two and one-half years in presenting this claim should bar its consideration. There is no time limit imposed by the agreement for making claims. Moreover, Carrier makes no claim it has been hurt by the delay.

In reaching the conclusion that claimant was subject to the agreement while temporarily filling the excepted position and Carrier was subject to penalty for violating it, the question of the extent of the penalty presents itself. Should Carrier be assessed a separate penalty for each rule violated? Claimant seeks a penalty because he was suspended from his regularly assigned hours, and seeks another penalty for working hours outside his regular hours. But this Division has refused to assess double penalties in Awards 2346, 2695, 2823, 2859 and 2884.

We will follow those awards in the belief that only a single penalty for a single unauthorized act is justified, even though several rules of an agreement may be violated in doing the act. However, those awards imposed the heaviest of the penalties claimed. We will do likewise. We note a recent award of this Division, No. 3301, assessed a double penalty but without any discussion of the reason which prompted such a ruling under the circumstances there involved.

The result of Carrier's act required claimant to work the hours of 7:00 P. M. to 7:00 A. M. which were outside his regular assigned hours of 7:00 A. M. to 4:00 P. M. He was required to work these hours at the lower rate of 69 cents per hour instead of his regular rate of 89½ cents per hour.

Accordingly, claimant should be paid the penalty rate for the 8 hours he worked on August 20, and the penalty rate for the 12 hours he worked on the other dates, based on his regular rate of 89½ cents per hour. But he should not also be paid for the 8 hours of his regular assigned position which he did not work, as that would impose a double penalty.

It follows Claim (a) must be sustained; Claim (b) denied; Claim (c) 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 and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 Carrier violated the agreement.

AWARD

Claim (a) sustained; Claim (b) denied; Claim (c) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 4th day of March, 1947.