

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on Sunday, August 3, 1947, as the result of the Carrier's action in
 - (a) Permitting the regularly assigned relief clerk B. J. Valenti, scheduled to relieve General Clerk G. F. Heckman, rate \$8.64 per day, hours 7 A. M. to 3 P. M., rest day Sunday, to lay off, it
 - (b) Shifted regularly assigned General Clerk B. F. Chatman rate \$8.64 per day, hours 7 A. M. to 3 P. M., rest day Saturday, from his own regularly assigned job to Clerk Heckman's job, and
 - (c) Called Clerk G. W. Newland who had no established seniority rights on any roster covered by the Clerks' Agreement to fill Chatman's job and work **AUTHORIZED OVERTIME ON SUNDAY**, and failed and refused to call the regularly assigned incumbent, G. F. Heckman to perform the **AUTHORIZED OVERTIME** work to which he was entitled under Agreement provisions, Rules 6 (a) and 25 (b) and other related rules:
2. Clerk G. F. Heckman shall be paid for eight hours at the time and one-half time rate for Sunday, August 3, 1947, amount \$12.96, account Carrier's action in violation of the Agreement which action was a prohibited discrimination against the claimant.

EMPLOYEES' STATEMENT OF FACTS: On August 3, 1947, the Carrier maintained at its Kansas City, Missouri Topping Avenue Yard Office a "pool" of six (6) regularly established and assigned positions, relieving and being relieved, all of which came within the category of "necessary to the continuous operation of the Carrier", as provided in the second part of Sunday and Holiday Rule 26 of the current Clerks' Agreement, and to which "pool" there was a regularly assigned Relief Clerk as follows:

the employes for a day of rest could be accomplished, we now find them coming before this Board and claiming that a man who was given his day of rest should not have been given his day of rest but should have been worked at the penalty rate of time and one-half.

What the Carrier did in this instance was, first, to set up a relief position relieving clerks on six jobs which were necessary to continuous operation so that actually seven employes worked the six jobs and no employe worked more than six days in a week, and, second, when an employe who had been regularly assigned to a position as a relief clerk was absent for good and sufficient reason on Sunday, August 3, another employe was shifted to fill his vacancy. This in accordance with the established agreement and understanding of the application of the agreement, and, third, the Carrier filled the position of the employe who was shifted by working an extra or unassigned employe, and because of the agreed upon application of the rule that employe was paid at the rate of time and one-half because it was Sunday.

The Carrier feels that it has shown that Claimant G. F. Heckman was not the incumbent of the general clerk position on Sunday, August 3, because the position on that date was assigned to B. J. Valenti. The Carrier also feels that it has shown that the payment to G. W. Newland was not in the form of authorized overtime but that he was paid at a penalty rate under Rule 26.

As to that portion of Rule 25, paragraph (b), reading:

"To avoid discrimination as between employes to be used on authorized overtime work, the incumbents of positions which require overtime hours will be used if possible",

the Carrier has this to say in its Position: It has been the Carrier's understanding of this portion of paragraph (b) of Rule 25, since the rule was written, that it was for the sole purpose of avoiding discrimination as between employes to be used on authorized overtime work. Discrimination could be shown either by requiring an employe to work overtime or by failure to require an employe to work overtime. The working of overtime hours may be undesirable to an employe because he may have made certain plans for recreation or the handling of personal business, and if required to work overtime such plans would have to be altered or abandoned. An employe could be discriminated against by requiring him to work overtime on a position other than his own.

On the other hand, there are certain employes who have a desire to work overtime hours in order that their total earnings might be increased. Such an employe might be discriminated against by using another employe to work overtime hours completing work on the first mentioned clerk's assignment.

In the application of that portion of Rule 25 having reference to discrimination, the Carrier has understood that if there is an accumulation of work on a certain position, or some unexpected situation arises pertaining to the work on that position, and additional hours are needed to be worked in order to perform the duties that are regularly attached to that position, then the employe assigned to that position is the one who should be worked the additional hours over and above the regular 8-hour assignment. By making application in this manner there is no discrimination between the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: As of Sunday, August 3, 1947, the Carrier maintained in its Topping Avenue Yard Office, Kansas City, Missouri, a pool of six regularly assigned 7 day positions, necessary to its continuous operation. Relief Clerk, Valenti, was regularly assigned to relieve each position one day per week. G. F. Heckman, General Clerk, was working in this pool and Sunday was his designated rest day. Relief Clerk Valenti was regularly assigned to work Heckman's position on Sundays.

On the Sunday in question Valenti was permitted by proper authority to lay off. Instead of permitting Heckman to work his position in Valenti's absence, the Carrier filled it with another regularly assigned employe, General

Clerk Chatman, who assigned day off duty was Saturday. The Carrier then called unassigned Clerk Newland, who had no seniority rights on the roster, to work Chatman's position. He filled the position and was paid the punitive or overtime rate for that service. Heckman, who possessed the necessary seniority rights and was concededly available was not permitted to work any of the vacancies thus created and now claims pay for time lost at the penalty rate.

Although this case is based on a different factual situation the record presents the same issues, requires construction of identical rules, and necessitates application of similar principles, as those brought into question in Award No. 4037 this day rendered. Actually they are companion cases. Therefore this Division reaches the same conclusion as it did in the Award just mentioned and in Awards 3860, 3861 and 3862 with respect to the Agreement and holds that the Carrier's action violated the rules of that instrument as therein stated.

Claimant was entitled to fill Chatman's position to which Newland was assigned. Chatman had a regular 7 day assignment but his relief day was Saturday. He worked Sunday which was a work day of his regular assignment. Hence he would not have been entitled to pay at time and one-half had he worked his own position. It follows under repeated decisions of this Division, fixing the penalty rate for time lost at the rate the occupant of a regular position would have received had he worked it, that claimant Heckman is only entitled to be compensated at the pro rata rate of Chatman's position.

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 allowed but on a pro rata instead of a penalty basis.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of August, 1948.

DISSENT TO: Award 4038, Docket CL-4117

The Opinion in this Award rests on the holding in Award 4037. For the same reasons stated in dissent to that award, by reference made a part hereof, similar dissent is here registered.

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