Award No. 5091
Docket No. CL-5095

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

ILLINOIS CENTRAL RAILROAD COMPANY

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

1. Carrier violated rules of the Agreement governing working conditions of the employes effective June 23, 1922 (revised September 1, 1927) when on or about June 15, 1946 (first semi-monthly payroll period for June 1946) and thereafter during the first and second half payroll periods each month until June 1947, inclusive, it assigned to Elizabeth McKenna, et al, Comptometer Operators (employes holding seniority rights exclusively on Roster 1-B as Machine Operators) in the local freight office at South Water Street, Chicago, clerical (timekeeping) work in the Timekeeper's Office which is regularly a part of the work permanently assigned to clerical workers in the Timekeeper's Office (employes holding seniority rights exclusively on Roster 1-A).

2. That clerical workers Gus Quater, Charles Lahoda and Hugh Kilday, employes in the office holding seniority rights on Clerks' Roster 1-A be compensated for wage loss sustained representing the number of hours at their respective rates of pay on an overtime basis for all time lost resulting from Carrier's employment of Misses McKenna, et al, Comptometer Operators, in handling of timekeeping work during the two payroll periods that properly belonged to employes in the Timekeeper's Office on Seniority Roster 1-A for period June 1946 to June 1947, inclusive.

EMPLOYES' STATEMENT OF FACTS: 1. There is employes in the Carrier's local freight office at South Water St., Chicago, a group of clerical employes whose working conditions are governed by our current Agreement with the Carrier effective June 23, 1922, (revised Sept. 1, 1927) and whose normal duties are those incident to timekeeping work. This force consisted of:

1. Timekeeper—Rate $10.74 per day.

2. Assistant Timekeepers—Rate $9.79½ per day.

These employes' seniority rights were established by Rules 4 and 5 of our working conditions agreement and so recorded on the seniority roster for Group 1-A employes, effective when this claim arose—June 1946. (Employes' Exhibit A.)

There is also attached, as Employes' Exhibit B, copy of Seniority Roster for Group 1-B employes as of the effective date when this claim arose. These employes are within the group of Machine Operators and have a separate

In the instant case Claimants Quater, Lahoda and Kilday worked their regular assignments and were deprived of no work on their regular assignments. The claimants are requesting work (at the overtime rate) to which they were not entitled. In forming Opinion of Board of Award 4731, the Board, assisted by Referee Francis J. Robertson, stated:

> "However, employes are not guaranteed any overtime by the agreement. . ."

The summarized position of the Carrier is:

1. There has been no violation of any rule in the effective rules agreement.

2. The Carrier acted entirely within its rights in using the machine operators to assist the timekeepers in the preparation of the pay rolls.

3. The work subject of the instant dispute properly belonged to the Timekeeping Department—a department separate and distinct from the departments in which claimants are employed.

4. The work subject of the instant dispute was work not incident to or in any manner connected with positions occupied by claimants.

5. To sustain the Brotherhood's claim would require placing in the agreement new rules not now provided for and not within the province of this Board.

The claim should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: We think the Organization has made out its case on the facts and interpretations of the rules. Contentions of the Carrier have failed to hold up under the close scrutiny of the Board and must fall one by one under the weight of the agreement, Board precedent, and the facts of the case.

It would only serve to unduly lengthen this opinion to do more than point out that Rule 4(d) permits division officers of the Carrier and the local committee of the Organization to subdivide the territorial seniority district and rosters enumerated in Rule 4. The rights thereby conferred have been exercised by creating a separate roster for female employes along with other subdivisions of the territorial seniority roster for the Chicago freight station.

For sixteen years employes holding seniority rights on Roster 1-B covering "ladies employed on machine jobs" with one exception, satisfactorily explained in the record, were not permitted to perform the work of Roster 1-A employes to prevent the latter from making overtime. The departure therefrom first came about in connection with the second payroll period in June, 1946, thereby provoking this controversy.

That such departure was in violation of the agreement, Board precedent and contrary to basic principles governing seniority rights and application of seniority rules is so pronounced as to hardly call for citation of authority.

For instance, the record clearly shows that the effect or result of the Carrier's action was to suspend Roster 1-B employes from their own work "during regular hours to absorb overtime" regularly worked at payroll closing periods, twice monthly, by claimants who are Roster 1-A employes. Such conduct seemingly was in violation of Rule 38 of the subject agreement. Compare Awards 3417, 4352, 4644, 4672 and 4692.

In addition, the Carrier acted contrary to Board precedent when it permitted or required Roster 1-B employes instead of Roster 1-A employes to perform the work in question to the detriment of the seniority rights of the employes on the latter seniority roster. Compare Awards 4076, 4653, 4667. That the Carrier could not have been unaware of the Board's views in such matters is evidenced by Award 2050 involving the same parties and the same agreement, in which the Board held in part as follows:

> "Rule 4(a) provides that seniority rights of employes will be confined to their respective seniority rosters. This board has repeatedly held that positions or work may not abritrarily be removed from the confines of one seniority district and placed in another, as was here done. (Citing a number of controlling awards)."

The Board is not unmindful that when the Carrier first crossed seniority lines there was some provocation for doing so. The exigency of the situation, however, was a matter for joint handling of the parties rather than for unilateral action of one party to the agreement. Neither is there any satisfactory explanation for continuing a violation of the agreement for almost one year. There is a similar lack of explanation as to why new charts could not have been prepared either before or immediately after the first payroll period involving changes in the pay schedules. Further, and a controlling consideration is that the Board, which has only the power to interpret and apply the rules, is powerless to grant relief from rule violations on pleas of extenuating circumstances. The Act creating the Board does not make of it a court of law nor of equity. For other considerations bearing on this proposition see Awards 2282, 2506.

We come now to considerations which have provoked greater argument within the Board than that occasioned by a difference of opinion on facts and applications of rules. It has been urged that the agreement out of which comes Roster 1-B amounts to rank discrimination and is class legislation. It has been vigorously argued that machine operators have been deprived of valuable rights guaranteed by the rules of the basic agreement and that the local agreement is against public policy.

The answer is that the local agreement was made pursuant to authority delegated by the basic agreement. It is between parties competent to contract. The Organization is the designated representative of the class and craft of employes concerned. It is duly authorized by law to enter into firm and binding agreements governing hours of work, rates of pay, working conditions and other terms of employment for its craft and class of employes in the Carrier's service. An agreement thus made fixes the rights, duties and responsibilities of all employes coming within the scope of the agreement. The question is whether or not this Board may set aside all or any portion of an agreement, thus made, on the grounds that it is discriminatory, class legislation and against public policy.

That the Board probably has come close to invading a field which perhaps more appropriately should be left to courts of law requires a re-examination of and further comment on Awards 2217 and 2636. Both cases had to do with employment rights of married women. In each case the question involved enforcibility of individual employment contracts between the Carrier and the employe involved. The Board, after correctly deciding that the individual employment contracts could not be upheld where the employe was deprived of some right or benefit accruing to him under the collective bargaining agreement, most likely extended itself beyond the requirements for a decision in Award 2217, when it adopted language, here treated as dictum, to the effect that agreements tending to create an unreasonable restraint on marriage are entitled to no force and effect. Again, as dictum in Award 2636, the Board comments on a fundamental concept of substantive law in terms following:

> "A contract whereby a party obligates himself not to marry is generally regarded as against public policy, since the marital rela-

> tionship is the recognized institution by virtue of which the human race is legitimately perpetuated; but a private contract of employment by which a party merely agrees to surrender up a position in the event of his marriage is usually treated as valid, since he is left free to marry or not to marry as he chooses."

Neither case is authority for holding that the classification of employes under a collective bargaining agreement according to sex and marital status, and the assignment of work to a given class accordingly, is discriminatory or against public policy.

As shown by the quoted language from Award 2636 there are lines of distinction and demarcation in legal jurisprudence as to when a given agreement is or is not in restraint of marriage and therefore against public policy. The same holds true as to what is public policy. It frequently varies between states. It is only of comparatively recent date that the legislatures of some states have passed laws prohibiting sex discrimination in employment practices. Therefore, the Board entertains serious doubts that, constituted as it is of laymen, it should try to cope with such a complex question of law as that concerning public policy. We are not satisfied that the power to strike down agreements or portions thereof, on the grounds of public policy, or related considerations, is within the Board's limited jurisdiction, and we here hold that it has no such power of authority at present.

The foregoing is not to be construed that the Board looks with favor upon working rules which tend to serve as a restraint on marriage or to unfairly discriminate between sexes. This is only to say that such matters are appropriate subjects of legislation or collective bargaining.

Having concluded that the Agreement has been violated, there remains the question whether payment to claimants should be at the rate of time and one-half or pro rata. There exists what amounts to almost hopeless conflict of authority on this question.

One line of authorities holds that the right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned and that only pro rata rates of pay are proper. See Awards 4196, 4244, 4815.

The same result is reached in another line of cases on the theory that the penalty rate for work lost, because it was given to one not entitled to it under the agreement, is the rate which the regular occupant of the position would have received if he had performed the work. See Awards 4571, 4603, 4447, 4467. Under this rule, however, recovery of punitive rates has been sanctioned where claimants were the regular occupants of the position to which the work belonged and by reason thereof had they performed the work they would have been entitled to overtime. See Awards 3277, 3371, 3375, 4877.

The record here shows that in the past Claimants had been used regularly, on an overtime basis, to assist the Timekeepers in the compilation of pay rolls. Therefore it appears they were in a sense the regular occupants of the position, to whom the work belonged, at overtime rates of pay, and had they not been wrongfully deprived of the work, the Carrier would have been compelled to compensate them at one and one-half times their regular rates of pay. That this is a proper measure of compensation under similar circumstances, seems borne out by the foregoing awards. See also Award 3744.

Another reason that we are persuaded overtime rates of pay are proper in this case is that the Board has and does impose punitive rates as a penalty and to uphold the sanctity of the agreement. See Awards 685, 2282. There appears some justification for invoking that principle in this case.

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 hercin; and

That the Carrier violated the agreement as contended by the petitioner.

AWARD

Claims (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of November, 1950.