Award No. 5105
Docket No. CL-5004

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the Clerks' Agreement—

When on dates shown below the Carrier arbitrarily removed regularly assigned Group No. 2 Employes during their regularly assigned hours to perform work in Group No. 1 to absorb overtime in violation of Rule 41 of our current agreement.

1—F. J. Rohr—6/13, 6/19, 6/29 and 7/9/49

2—F. E. Selliers—6/16, 6/17, 6/18 and 6/27/49

3—R. A. Dankenbring—7/11 and 7/12/49.

4—That the above employes on dates shown and in subsequent violations of this character, be compensated the difference between what was actually allowed, and a day's pay on their regular assigned position, plus a day's pay of the position or work they were forced to perform.

EMPLOYES' STATEMENT OF FACTS: Under date of May 26, 1949 the Carrier issued bulletin No. 5 in Seniority District No. 36, abolishing two yard clerk positions from 11:00 P.M. to 7:00 A.M. Copy of this bulletin is attached as Employes' Exhibit "A", and on the same date issued bulletin No. 6, advertising position from 6:00 P.M. to 2:00 A.M. Copy of this bulletin is attached as Employes' Exhibit "B". The positions abolished and the one created had a part of the duties to check perishable trains at the Terminal Car Icing Co. located in this district, when so advised by the Yardmaster and the abolishment of two positions, as shown, and the creation of a new position left the duties to be performed between 3:00 P.M. and 6:00 P.M. and 2:00 A.M. and 7:00 A.M. without a yard clerk to perform same. The Carrier was well aware of these facts as the movement of perishable trains to the Terminal Car Icing Co. for servicing was, prior as well as subsequent to rearrangement of forces, resulting from Carrier's bulletins Nos. 5 and 6, a requirement and incidentally necessitated the services of a Clerk to properly check certain features connected with such transactions.

On the dates shown in claim, these employes were regularly assigned as messengers, group No. 2 employes in District No. 36, and all of those involved had established dual seniority as messengers, group No. 2, and clerks, group No. 1, and participated in the filling of vacancies under Memo-

threat. It is apparent they thought that if they threatened us with the payment of two days' pay in each instance that we would overlook the actual time requirement of Rule 48 and pay the higher rate for the entire day as the lesser of two evils. As previously stated, the assignments were made under Rule 48, which fact has not been contested by organization representatives, and the employes were paid accordingly.

In conclusion, we wish to call attention to the fact that assignments made and compensation allowed under the uncontested application of one rule of an agreement cannot be nullified by the provisions of another rule of the same agreement, both of which must be construed in conjunction with one another and in conjunction with other rules of the agreement in arriving at the intent of the parties. Regardless of any twisted meaning that may be given Rule 41, that meaning cannot be used to offset the uncontested meaning of Rule 48. It is clear that the intent of the parties under Rule 48 was to permit employes to be temporarily assigned to higher rated positions or work, provided they were paid, using the actual language of the rule, "the higher rate while occupying such positions or performing such work," (in other words, the higher rate for the actual time used on the higher rated position or work) and that the claims filed by the employes for the higher rate for the entire day (apparently finally recognized by organization representatives as the ultimate that they could hope for in the way of distorted application, evidenced by the wording of the claims as finally submitted to the Board) are without basis under the contract.

(Exhibits not reproduced).

OPINION OF BOARD: The Claimants, on all dates here in question, held regular assignments as Messengers Group 2, Rule 1, in Seniority District No. 36, with corresponding duties. They had established dual seniority as Messengers Group 2, and as Clerks Group 1, in accordance with rules of the current Agreement but had been furloughed as Clerks, their seniority not being sufficient to hold the latter positions.

On May 26, 1949, by bulletin stating their duties would be assumed by other Clerks, the Carrier gave notice of the abolishment of two Yard Clerk positions, Group 1, Rule 1, in Seniority District No. 36, with assigned hours 3:00 P.M. to 11:00 P.M. and 11:00 P.M. to 7:00 A.M., effective June 1, 1949, occupied by Clerks Parres and Enzwiller, respectively. A third position, hours 7:00 A.M. to 3:00 P.M. was left undisturbed. The duties of such positions were in part to check perishable trains at the Terminal Car Icing Company when advised by the Yardmaster of their arrival. The same day the Carrier posted another bulletin creating a new position of Yard Clerk effective June 1, 1949, with assigned hours 6:00 P.M. to 2:00 A.M., which stated it was established for the purpose of changing the starting time of Parres and that its duties were carding, checking and interchanging cars. This change in assigned positions left Yard Clerks' work at the point involved unassigned and unprotected from 3:00 P.M. to 6:00 P.M. and from 2:00 A.M. to 7:00 P.M.

Following its action as just related the Carrier took the Claimants off their regular assigned positions as Messengers and during a portion of the assigned hours of those positions required them to perform the clerical work theretofore belonging to the two abolished Yard Clerk positions, i.e., check such perishable trains as arrived, during the hours of the day that work was left unprotected by the hours of the newly created Yard Clerk position. When such work was completed they then returned to their respective positions as Messengers. Each Claimant was paid the rate of his regularly assigned position as Messenger for the portion of the day he actually worked that position and the higher rate of a Clerk's position for the part of the day actually worked in checking perishable trains.

The foregoing facts are undisputed. The record, however, as to the hours claimants actually worked outside their regular assignments is far from satisfactory. Even so we need not labor that matter at the moment. For all

purposes essential to the factual picture the Carrier concedes the clerical work giving rise to the claim was performed on the dates specified therein and involved periods of time ranging from 1 to 2 hours on each date, except on June 29. As to that date it concedes Claimant Rohr was taken from his regular tour of duty and required to relieve a Clerk absent from his position because of sickness, for a period of 5 hours and that on such date he was paid 3 hours as a Messenger and 5 hours as a Clerk.

Although other rules of the Agreement are relied on by the parties as persuasive of their contentions with respect thereto it can be said that primarily each bases his position upon single, but entirely different, provisions of that instrument.

The Employes, as will be noted from the claim itself, insist that Rule 41 authorizes and requires a sustaining Award. It reads:

> "Employes will not be required to suspend work during regular hours to absorb overtime."

On the other hand the Carrier contends that Rule 48, titled "Preservation of Rates," is decisive and permitted Claimant's temporary assignment to Yard Clerk work without violation of Rule 41. The pertinent portion of such rule reads:

> "Employes temporarily or permanently assigned to higher rated positions or work shall receive the higher rate while occupying such positions or performing such work, unless absent employe is being paid account of sick leave allowance; . . ."

The Carrier's claim that under Rule 48 it had the right to temporarily assign the Claimants to work of a Yard Clerk's position during their regularly assigned hours as Messengers without regard to the provisions of Rule 41, and hence such rule has no application to a determination of the instant controversy, is not new and we have little difficulty in concluding it cannot be upheld. Such claims have been definitely rejected by repeated decisions of this Division of the Board on the basis that rules similar to Rule 48 constitute merely rating provisions and are not to be construed in such manner as to impair the effectiveness of rules prohibiting suspension of work to absorb overtime. See Awards 3416, 2859 and 2823.

Rule 41 relied on by the Employes is clear and unambiguous. No exceptions are to be found therein. It prohibits the Carrier from suspending work of employes during regular hours for the purpose of absorbing overtime. That its terms encompass overtime absorbed by an employe, suspended during his regular hours, on the position of another employe as well as on his own position is no longer an open question. We have expressly so held in Awards Nos. 2823 (Referee Shake) and 2884 (Referee Tilford). Other decisions placing a like construction upon the rule by sustaining claims based upon its alleged violation by reason of a suspended employe having absorbed overtime on a position other than his own, are so numerous that they hardly require citation. For just a few of them, with reference to the Referee sitting as a member of this Division of the Board at the time they were handed down, see Awards Nos. 4499, 4500, 2695 (Carter); 3873 (Douglas); 3301 (Simmons); 4646, 4690, 4692 (Connell); 2859 (Youngdahl); 4352 (Robertson); 3416, 3417 (Blake); 3582 (Rudolph).

A close analysis of the foregoing Awards, and others examined but not specifically referred to, makes it clear there are three questions which must be given consideration in determining whether a rule such as the one now under consideration (Rule 41) has been violated. First, whether the employe involved was the holder of a regularly assigned position and required to suspend work on that position during its regular hours. Second, if the first question is answered in the affirmative, whether such employe was required to suspend work for the purpose of absorbing overtime. And third, if the record requires affirmative answers to questions one and two, whether the

current Agreement contains any exceptions or limitations susceptible of a construction the plain provisions of such rule have been superseded or rendered inoperative.

There can, we believe, be no question but what the involved employes were the holders of regularly assigned positions and required to suspend work during regular hours in order to perform work on the Yard Clerk's position. This is inferentially conceded, if in fact it is not actually admitted, by the Carrier's assertion such employes were entitled to pay under the provisions of Rule 48 for the time actually worked on the Yard Clerk position. Such rule, it will be noted, has no application unless an employe has been assigned to another position. Although not strenuously argued it is suggested that because the Claimants held dual seniority as Messengers and as Yard Clerks the work was properly a part of the duties of the Claimant's positions and could be transferred at will. This suggestion has little merit. Under the Agreement positions in Group 1 and in Group 2 are separate and distinct. This is definitely evidenced by the provisions of Rule 4 (a) providing that employes desiring positions in other groups may file applications for the same. From what has been heretofore stated it is obvious the first question must be answered in the affirmative.

With respect to the second question the Carrier insists the Yard Clerk work required of the Claimants was not overtime work and that even if it were it was not required for the purpose of absorbing overtime. Stated in its own language "overtime could not have been involved by any stretch of imagination because if the Messengers had not been used for the small amount of clerical work it would have remained undone until a Clerk got to it." We doubt that work on perishable trains would have been deferred as claimed by the Carrier. Even so its position on this point cannot be upheld. The work was required and it was performed at a time when it would have been overtime for either of the occupants of the two existing Yard Clerk positions if they had been called to perform it, hence it absorbed that overtime. We have held many times that an employe cannot properly be required to suspend work on his regularly assigned position in order to work on another position and that requiring him to do so is to be regarded as a suspension of work to absorb overtime in violation of Rule 41 and other rules of similar import. The result of what was required and done, not the purpose behind it, is the test to be applied in determining whether there has been a violation of the rule. The result of what was done here, as we have indicated, was to prevent the payment of overtime to the regular occupants of the Yard Clerk positions. It follows the second question must be answered in the affirmative.

No useful purpose would be served by a prolonged review of the provisions of the current Contract. It suffices to say we have not been referred to and have failed to find any rule of that Agreement, or any Supplement Agreement executed subsequent to its effective date, that can be construed as authorizing the Carrier to suspend the Messengers here involved from their regularly assigned positions and require them to perform the Yard Clerk work in question during a portion of the regular hours of their regularly assigned positions.

We therefore hold that under the existing facts the action of the Carrier in question resulted in a violation of Rule 41 of the current Agreement. Award 3654, stressed by the Carrier as requiring a contrary conclusion, is clearly distinguishable. The sole issue in that case was whether employes assigned to higher rated positions were entitled to the higher rate of pay of such positions and the question whether Rule 41, or one similar thereto, had been violated by their assignment to those positions was not involved.

The conclusion just announced does not, however, mean that the Claimants are entitled to reparation as set forth in the claim. Even though they were required to perform the work of a Yard Clerk in violation of the provisions of Rule 41 they were, nevertheless, temporarily assigned to that position

for the hours in question. The fact they were absorbing overtime on such position does not mean they were engaged in the performance of overtime work themselves for they were not required to work hours in excess of their regularly assigned tours of duty. Under such circumstances we believe Rule 48 does become applicable to the extent it limits their compensation to the higher rate while occupying such position or performing such work. The temporary assignment to that position in violation of the Agreement did not, of course, deprive them of the right to receive the rate of pay of their regularly assigned positions. It follows Claimants are entitled to reparations for the difference between the full rate of their regularly assigned positions plus a Yard Clerk's rate of pay for the time actually spent while occupying that position and what the Carrier has already paid them for services performed on the dates in question.

Heretofore we have indicated the time actually spent by the Claimants while temporarily occupying the Yard Clerk's position is not accurately reflected by the record. That can be determined by the parties on the property. If they are unable to agree with respect thereto that matter may be referred back to this Board for a determination of such issue on a record that will permit its determination.

We are not disposed to labor the one day in controversy while Claimant Rohr was suspended from his position under the conditions and circumstances related early in this Opinion. It will suffice to say adherence to the decisions to which we have heretofore referred impels the conclusion he was required to suspend work during regular hours to absorb overtime in violation of Rule 41. Reparation for this particular day is to be computed on the same basis as the other days here involved with the exception consideration is to be given the fact that on this date he worked five hours on the temporary 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 sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of November, 1950.