

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

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

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY—
Chesapeake District**

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

(a) The Carrier violated and continues to violate terms of Clerks' Agreement No. 7 when it failed and refused to call the regularly assigned incumbent of position of Messenger, office of General Agent, Huntington, West Virginia, on Sunday, March 21, 1948, and each Sunday and holiday thereafter to perform duties attached to the position, and

(b) That the regularly assigned incumbent of position of Messenger shall now be paid on a call basis for Sunday, March 21, 1948, and each Sunday and holiday subsequent thereto until correction is made, and

(c) That employes used on work here in question be paid at time and one-half rate for Sunday, March 21, 1948, and each Sunday and holiday subsequent thereto until correction is made.

EMPLOYEES' STATEMENT OF FACTS: Group 2 employe Johnnie G. Wiser is the regularly assigned incumbent of position classified as Messenger. This position is located in the office of the General Agent, Huntington, West Virginia, freight station. This position is assigned in service not necessary to the continuous operation of the Carrier and, therefore, is assigned to work six days each week, Monday to Saturday, inclusive. Immediately prior to March 21, 1948, the incumbent of the position was required to report regularly on Sundays and holidays to perform work assigned to the position for which the incumbent was paid on a call basis. During the week of March 14-20, 1948, Mr. Wiser was notified by the General Agent that he would no longer be required to report regularly for work on Sundays and holidays as he did in the past. On Sunday, March 21, 1948, the incumbent of Group 2 position of Crew Caller and the incumbent of Group 1 position of Interchange Clerk were instructed to and did perform work usually performed by the incumbent of position of Messenger on week days and which he performed on a call basis theretofore on Sunday. The positions classified as Crew Caller and Interchange Clerk, respectively, are positions recognized as necessary to the continuous operation of the Carrier and are so assigned seven days each week and Sunday work is paid for at pro rata rate. Instead of calling Mr. Wiser to perform work in connection with his position the Carrier transferred the

"Furthermore, to sustain the claim under the particular circumstances we find here would have the effect of transforming a regular six-day position into a seven-day position. This we may not do; it is beyond our jurisdiction.

"Accordingly, the claim must be denied."

The principle of the above award was reaffirmed by your Board as recently as in January, 1950, in Award 4691 in which it was said:

"In the instant case both Claimant and Dillon were yard clerks, working under the same Agreement, performing the same class of work, and both are qualified to do both inside and outside work. When the positions were both seven-day positions, the record shows it was the practice for Claimant and Dillon to work alternate Sundays alone, when the man working performed all the work of both positions. The Carrier shows that on occasion Clerk Dillon performs work outside such as checking cars, on days other than Sunday, while Claimant is working.

"The Carrier in its submission cited Awards 4031 and 4074 which are in point with the issue here, and in the former award it was held, 'From the facts before us we cannot definitely determine that the work performed on Sundays by the Clerks regularly employed on Sundays constitutes overtime work that is necessary on Claimant's position, as prescribed by Rule 20(e). Consequently, the requirements of that rule have not been met, and it does not support the claim on the facts before us.'

"Furthermore, to sustain the claim under the particular circumstances we find here would have the effect of transforming a regular six-day position into a seven-day position. This we may not do; it is beyond our jurisdiction.' We concur with the reasoning of these awards, and hold that the work performed on Sunday by Clerk Dillon was assigned to him in accordance with the Agreement."

It follows that the claim of the employees in the instant case is without support under the rule and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood claims the Carrier violated the terms of the Clerks' Agreement on Sunday, March 21, 1948, when it failed to call the regularly assigned incumbent of the position of messenger in the office of the General Agent at Huntington, West Virginia, to perform the duties attached to that position and that it has continued such violation on all Sundays and holidays subsequent thereto.

It asks that the regularly assigned incumbent of that position be paid on a call basis on March 21, 1948, and on each Sunday and holiday subsequent thereto until the violation ceases. It also asks that the employees used to perform the work on these Sundays and holidays be paid at the rate of time and one-half.

The parties' Agreement, effective January 1, 1945, which is the one herein involved, contained Rule 33. This Rule is as follows: "Except where it is otherwise agreed between the proper officer and Division Chairman or Local Chairman authorized to act in his stead, in working overtime before or after assigned hours, employees regularly assigned to class of work for which overtime is necessary shall be given preference; the same principle shall apply in working extra time on holidays and Sundays. It is understood, however, that when a small amount of work is required on each of two or more positions and only one employee is required, the employee regularly assigned the majority of the work to be performed will be used."

On January 1, 1945, there had been bulletined and assigned in the office of the General Agent, Huntington, West Virginia, the position of messenger. It was a regular six-day position, Monday through Saturday, with Sunday as relief day, with hours from 7:00 A.M. to 4:00 P.M.

For many years prior thereto, and up to January 1, 1945, the work or duties of that position, which it was necessary to have performed on Sundays and holidays during the hours of the assignment, were performed by either extra messengers or the occupant of the position. It was paid for on the basis of overtime as provided by Rule 39 of the parties' Agreement effective November 16, 1936. After January 1, 1945, when Rule 33 of the parties' Agreement effective that date came into effect, the regular incumbent of the position performed the work or duties thereof that it was necessary to perform on Sundays and holidays during the hours of the assignment and was paid therefor at overtime in accordance with Rule 39 of their then effective Agreement. The duties of the position which it was necessary to perform on Sundays and holidays were the handling of waybills between the Carrier's 16th Street office and its freight house. On and after Sunday, March 21, 1948, the duty of so handling these waybills, which it was necessary to have performed between the hours of 7:00 A.M. and 4:00 P.M., the hours of the messenger's assignment, was generally performed by crew callers although occasionally it was done by the Interchange Clerk. Just how long this practice continued the record does not show.

Crew callers are Group 2 employees, the same as messengers, but have seven-day assignments. The record does not show that on weekdays, between the hours of 7:00 A.M. and 4:00 P.M., the handling of waybills between Carrier's 16th Street office and its freight house was any part of their regularly assigned duties although occasionally they had performed such work when the messenger was not available and they were requested to do so.

Interchange Clerks are Group 1 employees with seven-day assignments. Handling of waybills in the manner hereinbefore set forth was no part of their regularly assigned duties. Although they had occasionally handled them between Carrier's 16th Street office and its freight house it was voluntary on their part and done to expedite their own work. Under this situation any claim on their part is without merit as employees cannot voluntarily do work outside of their assigned duties and then ask to be paid therefor in addition to the regular pay of their position.

Under the facts as disclosed by the record we find that on weekdays between the hours of 7:00 A.M. and 4:00 P.M., which were the regularly assigned hours of the messenger, the work of handling waybills between the 16th Street office and the freight house was part of the regularly assigned duties of the messenger and not crew callers, although the latter did occasionally perform such work when requested to do so; that under Rule 33 Carrier was obligated to call the incumbent of the position of messenger and have him perform it on Sundays and holidays whenever Carrier found it was necessary to have such work performed on those days between the hours of 7:00 A.M. and 4:00 P.M.; and that Carrier was required to pay therefor on the overtime basis, as provided by Rule 39 and in accordance with Rule 34 (c), depending upon the amount of work performed on those days by either crew callers or Interchange Clerks.

Under Rule 36 an employee cannot properly be required to suspend work on his regularly assigned position in order to work on another position except in case of emergency. No emergency is here involved. To do so here was a suspension of work to absorb overtime. That is prohibited by the Rule.

Having the crew callers perform this work on Sundays and holidays between the hours of 7:00 A.M. and 4:00 P.M. was in violation of Rule 36.

The amount of such work performed on Sundays and holidays on and after March 21, 1948 is not shown by the record and is a matter that must be computed by the parties on the property. Nor is the length of time such violation of Rule 33 continued shown. However, it could not have ex-

tended beyond September 1, 1949, when the revision of the rules of the parties' Agreement caused by putting into effect the 40 hour week resulted in Rules 33 and 39 being changed.

We therefore sustain the claim as made on behalf of the regularly assigned incumbent of the messenger position and also the callers used to perform this work on Sundays and holidays, both as long as the violation continued, but denied as to any Interchange Clerks who performed it.

The penalty rate for work improperly assigned is the rate which the occupant of the regular position to which it belonged would have received if he had performed it which, in this case, is overtime or time and one-half.

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) and (b) sustained as long as the violation continued; claim (c) sustained as to crew callers doing the work as long as the violation continued but denied as to Interchange Clerks.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of November, 1950.

Dissent to Award 5115, Docket CL-5131

The record shows the positions of messenger and crew callers are in the same seniority district, and the names of the occupants of such positions appear on the same roster.

Bulletins advertising for bids on positions of messengers and crew callers did not show the assigned duties.

Also, in addition to other duties, the messenger carried waybills between the freight station and 16th Street yard between 7:00 A.M. and 4:00 P.M. During the hours 4:00 P.M. to 7:00 A.M. crew callers handled waybills between the same points. For twenty-five years crew callers also carried waybills during the hours a messenger was on duty.

In view of the facts, as well as the long custom and practice followed in handling waybills, this claim should have been denied.

/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ R. H. Allison
/s/ A. H. Jones