

Award No. 5577

Docket No. CL-5468

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

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

DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY

STATEMENT OF CLAIM: (1) Claim of the System Committee of the Brotherhood that the Carrier violated rules of our Agreement of September 1, 1941, and as revised, effective September 1, 1949, governing rates of pay, hours of service and working conditions, at its Stores Department, Jackson, Ohio, in the use of Mrs. Marie Dobbins, the wife of the General Store Keeper and a former employe but now without seniority rights, as an extra Clerk-Typist on each of nine (9) days from September 21 to 30, 1949, exclusive of Sunday, September 25th, or for a total of 72 hours, and that

(2) O. J. Apel, a regular clerk, assigned to work 10:30 P. M. to 7 A. M., Wednesday through Sunday with Monday and Tuesday as his assigned rest days, be allowed 72 hours at punitive rate on account of being deprived of overtime work to this extent.

(3) That the Carrier violated Rule 55—Preservation of Rates, when it compensated Clerks Charles Dixon, Jr. (32 hours), E. K. Farrar (40 hours), O. J. Apel (44 hours), Richard Grow (44 hours) and Geo. McGinnis (24 hours) at their rates of \$12.08 and \$11.50 for typing inventory on Form A-220 instead of \$12.82 which was paid Mrs. Marie Dobbins for the same kind of work, and that

(4) The clerks named in item 3 shall be compensated at the rate of \$12.82 for all straight and overtime hours worked in the typing of inventory on Form A-220 to the extent of the number of hours shown in that item.

EMPLOYES' STATEMENT OF FACTS: During the life of these claims the Stores Department at Jackson, Ohio, consisted of:

The Clerks' Agreement provides for increasing and decreasing the force and in all cases where employees are involved seniority prevails. During the period that Mrs. Dobbins was employed not a single Stores Department employee lost time on that account.

The Clerks' Organization processed a case against the Missouri Pacific Railway, quite similar to this, in which a stenographer was employed about two weeks per month to help out when the work was heavy and this Board, in Award 4731, made the following observation in regard to other employees being deprived of overtime:

"It may be true that overtime work is lost to holders of regularly assigned positions. However, employees are not guaranteed any overtime by the Agreement and the fact that the Agreement contemplates the performance of work by extra employees indicates that it is the Carrier's prerogative to eliminate overtime by the use of such employees. It is also true that by Carrier's handling, a fairly sizable amount of work does not become subject to the application of seniority by regularly assigned employees. But we do not see anything in the Agreement which prohibits that. We can not conclude, therefore, that Carrier's practice with respect to the assignment of this work is evasive of the rules of the Agreement."

In our case the Carrier, in employing Mrs. Dobbins, was not doing so to avoid overtime, but employed her in order to get the work done. It will be observed that Stores Department employees did nevertheless work considerable overtime.

The second part of the Employees' claim, that is, the part claiming that the 5 Stores Department employees, other than Mrs. Dobbins, who helped type Form A-220, should be paid at the rate of \$12.82 per day (rate paid Mrs. Dobbins) for the actual time spent typing Form A-220 is without merit.

The rate of \$12.82 per day is the typists' rate of pay. No one of the 5 employees was a qualified typist. No claim has been made that they were.

These five clerks all ran a typewriter every day in the performance of their regular work. Some of them spend half of their time typing. They do a lot of other things too. But they are not paid a different rate for each different kind of work done. They are paid a rate calculated to compensate for all work performed. The rates of pay are agreed upon rates.

If the inventory work had progressed to the extent that the regular force could have done it, the five clerks here involved would have typed all or nearly all of Form A-220, in which event there would have been no claim as here presented.

This claim is of extreme importance to the Carrier. If supported it threatens to deprive the Carrier of a means of compensating for the fluctuation in business and the increases and decreases in work caused thereby or due to other causes. It is significant that the Carrier has not been charged with the violation of any rule of the Agreement. In fact, the Agreement has in no way been violated and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves two issues which must be treated separately.

First. It is claimed that the use of Mrs. Marie Dobbins as a clerk-typist from September 21 to 30, 1949, was a violation of the Agreement. The work involved was simply typing information upon a blank form by copying from a handwritten form as a part of the annual inventory record.

Rule 11 provides for filling new positions or vacancies of thirty days or less duration without bulletining. It provides in part as follows:

"New employes or employees from other branches of the service filling new positions or vacancies which have not been bulletined, will not be considered as establishing seniority under Rule 3."

Thus, the Agreement clearly permits the hiring of new employees to fill new positions such as this, the only restriction being that they do not thereby establish seniority. Hence, the only question involved in this issue is whether Mrs. Dobbins was a new employee.

It clearly appears that she was treated and recorded as a new employee by the Carrier and that the only unusual phase of her employment was that she was permitted to do the work at her home due to the fact that she had an invalid mother. She there used the Carrier's equipment and supplies and there is no showing that she was not there subject to the continuing authority of the Carrier to supervise and direct the manner of her service as contemplated by the National Railway Labor Act as amended.

The awards of the Express Board of Adjustment No. 1 and of this Division holding that certain part time workers were not bona fide employees were based upon the fact that such workers owed a primary allegiance elsewhere due to the fact that they held full-time employment elsewhere, were in the Army or were receiving veterans' educational benefits under the law. No such impediment is shown in this case. Under all of the facts and circumstances of record, it appears that she was a new employee filling a new position of less than thirty days' duration in accordance with Rule 11.

Second, It is claimed that five employees receiving less than \$12.82 per day, the amount paid to Mrs. Dobbins, are entitled to be paid that rate for time spent typing inventory information on Form A-220. That claim is based upon Rule 55 providing in part:

"Employees temporarily assigned to higher rated positions subject to this agreement shall receive the higher rates of pay while occupying such positions; . . ."

It fairly appears from the evidence that each of the employees involved is required as a part of his regular duties for his regular negotiated rate of pay to perform some typing. As stated above the typing here involved was of the simplest type, copying information from one form to another. The assignment of additional typing to one whose regular duties include typing does not constitute a temporary assignment to a higher rated position and to so hold would be destructive of the regularly negotiated pay scales.

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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of December, 1951.