

Award No. 5625

Docket No. CL-5636

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

**THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY**

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

(a) The Carrier violated the Clerks' Agreement when it required clerk Charles Hammond to leave his regular assigned position in the Tariff Bureau, at Pier 13, New York City, N. Y., and work another position in the same Bureau, and;

(b) Claim that Clerk Hammond be paid at the rate of his regularly assigned position for each day he was withheld from his assigned position in addition to the amount he has actually been paid for working the position to which transferred.

EMPLOYEES' STATEMENT OF FACTS: Employee Charles Hammond entered the services of the Carrier on June 30, 1947, and established seniority on that date under Rule 23, in the Carrier's Freight Traffic Department at New York City, N. Y. (See Employees' Exhibit "N")

On January 16, 1950, the Carrier issued Bulletin No. 142 to Clerical Workers in the Freight Traffic Department Seniority District and Employee Hammond bid for and was assigned to the position of Tariff Clerk, rate \$254.98 per month, assigned duties of compiling freight tariffs in accordance with ICC and State Commission's tariffs and regulations, by the Carrier's Bulletin No. 144 issued January 24, 1950. Copies of those bulletins are attached and identified as Employees' Exhibits "A" and "B".

The following are the regularly assigned positions, which existed during the period clerk Hammond was withheld from his regular assigned position and work:

2 Fourth Section Clerks
5 Tariff Compilers
2 Tariff Clerks
1 Tariff File Clerk

All the above positions have service hours assigned—8:30 a.m. to 5:00 p.m.—with one-half hour lunch period.

fully supported by Rule 18. Where, for example, a clerk temporarily took over the duties of a higher rated position he was paid the rate of that position if higher than his own rate, but if temporarily assigned to a lower rated position he was paid the rate of his own (higher rated) position. This is the first claim of this nature, notwithstanding the practice of over 20 years. Accordingly Clerk Hammond was properly paid under the practice and the claim should be denied.

In First Division Award 8145 it was said:

"It appears that the practice of the carrier complained of began over twelve years ago. The Claims were not filed until 1941. Such a delay indicates concurrence in construction of agreement made by carrier."

Third Division Award 4342 is to the same effect where the Board said that "* * * such factors should be seriously considered in determining the intent of the parties to the Agreement."

The Board's attention is called to the nature of the claim. Paragraph (b) of the claim demands that the claimant be paid not at the monthly rate of \$234.98 for each day he performed work on Mr. Tennyson's position but at the rate of \$254.98 for each day he performed on Tennyson's position in addition to his own rate which is \$254.98.

It is clear that in making such a demand, the Organization has unwittingly conceded that both the letter and spirit of Rule 18 is applicable and particularly the provision that

"* * * employees temporarily assigned to lower rated positions shall not have their rates reduced."

It is respectfully submitted that the Board should consider the transaction as a whole, which, in summary, is as follows:

(a) Clerk Tennyson was assigned temporarily to other work in accordance with his request; that the carrier had the right to make this assignment is not disputed.

(b) Clerk Hammond, without objection, took over Clerk Tennyson's work; had he not done so, this work would have been absorbed by the other clerks in the group.

(c) No overtime was worked or involved.

(d) Clerk Hammond sustained no monetary damage.

(e) The situation is unlike that obtaining in Awards 3416 et seq. which arose on another property under different rules and these cases should not be extended to the present case.

(f) Finally, the claim is contra to the practice obtaining for over 20 years on this property under the interpretation of Rule 18, which has never been questioned until the present case arose.

Obviously the claim is an attempt to impose upon the carrier decisions respecting another property under different rules and circumstances which have no application here.

The claim has been handled on the property in accordance with the provisions of the Railway Labor Act.

It is respectfully submitted that the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant holds a regular assignment as Tariff

Clerk, rate \$254.98 per month. During the period involved in this claim he was temporarily assigned to fill a position of Tariff Clerk, rate \$234.98, while the occupant of that position was attending Trunk Line meetings. Both positions are in the same office and have the same assigned hours of work. During the time that Claimant worked the lower rated position he was paid his regular rate.

Employees assert that Rule 5 providing that employees will not be required to suspend work during regular hours to absorb overtime has been

violated by this action of the Carrier. Carrier contends that Claimant was properly paid under the rule providing for the preservation of rates and that no overtime was absorbed by the assignment of Claimant to the lower rated position.

The principle is well settled by awards of this Board that payment in accord with the "Preservation of Rate" rule is not a defense to a claim such as the instant one if the temporary assignment of a regularly assigned employee to another position has the effect of a suspension of hours and the absorption of overtime, whether the overtime absorbed is on the Claimant's own position or the one to which he was temporarily assigned. Thus, there is but one issue to be decided here and that is whether or not this temporary assignment, in fact, had the effect of absorbing overtime on either position. In the absence of any evidence to the contrary, prior awards of this Board appear to raise a presumption that overtime is absorbed by suspending an employee from his regular assignment to work another over an extended period. However, the presumption disappears in the light of evidence and in this instance Carrier shows by affirmative evidence that the work of Claimant's position, or of the position he worked during the period involved in the claim, could have been permitted to accumulate for a month or more without prejudice to Carrier's business; and that it would not have been necessary to have ordered overtime if Claimant had not been temporarily assigned to the lower rated position. It follows that in this instance the effect of the temporary assignment was not to absorb overtime and therefore, a denial award is required.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois this 22nd day of January, 1952.