Award No. 5927
Docket No. CL-5986

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY (Lines West of Mobridge)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement:

(a) When, effective February 16, 1948, it required Ice House Laborer Mr. C. B. Thibadeau, Harlowton, Montana, to suspend work on his regular position Monday and Saturday of each week to relieve Perishable Freight Inspectors J. F. Ranney and B. F. Reidl regularly one day in seven; and

(b) That Perishable Freight Inspectors J. F. Ranney and B. F. Reidl be compensated at rate of time and one-half for each Sunday and Monday respectively, that their work was taken over by Ice House Laborer Thibadeau, commencing February 16, 1948, and continuing until the violation is corrected, and

(c) That Ice House Laborer Thibadeau be paid a day's pay at pro rata rate each Monday and Saturday required to suspend work on his regular position and work in place of Inspectors Ranney and Reidl commencing February 16, 1948, and continuing until the violation is corrected.

JOINT STATEMENT OF FACTS: Perishable Freight Inspector J. F. Ranney was regularly assigned as such at Harlowton, Montana, 7:00 A. M. to 4:00 P. M., less one hour meal period, daily except Sunday.

Perishable Freight Inspector B. F. Reidl was regularly assigned as such at Harlowton, Montana, 10:00 P. M. to 7:00 A. M., less one hour meal period, daily except Monday.

Ice House Laborer C. B. Thibadeau was regularly assigned as such 11:59 P. M. to 8:59 A. M., less meal hour, daily except Sunday.

Thibadeau held seniority date as perishable freight inspector, Seniority District No. 48, of November 26, 1947; and seniority date as ice house laborer, Seniority District No. 150, of September 10, 1943.

employes Ranney and Reidl be used on their rest days and paid the time and one-half rate. It was pointed out to the General Chairman that there w: no overtime involved and there is no provision in the overtime or call rules, or in any other rule of the agreement, requiring the Carrier to use regularly assigned employes on their rest days, causing application of the time and one-half rate, when there is an extra employe available who holds seniority in that seniority district. On the other hand, had the Carrier failed to accord the extra work to which he was entitled by reason of seniority to extra PFI Thibadeau in accordance with his expressed desire, it would have been subject to time claims for Mr. Thibadeau for any loss in earnings which might have accrued to him, which is evidenced by the fact that Thibadeau at no time presented claim or grievance because of his utilization as an extra perishable freight inspector in Seniority District 48. Under the circumstances which prevailed, claimant Ranney as a regularly assigned perishable freight inspector, had earnings six day per week. Likewise, claimant Reidl as a regularly assigned perishable freight inspector had earnings six days per week. Employe Thibadeau who properly held seniority under the schedule rules as an ice house laborer and as a perishable freight inspector had earnings four days per week as an ice house laborer and two days per week in promoted service as a perishable freight inspector. An extra ice house laborer had earnings as an ice house laborer three days per week (on employe Thibadeau's rest day plus the two days on which Thibadeau performed the promoted service) in addition to any other extra ice house laborer work which became available to him.

The effect of a sustaining award, which the employes seek in this case, could only be that claimant Ranney would have earnings as a perishable freight inspector seven days per week, one day at the overtime rate of pay. Likewise, claimant Reidl would have earnings as a perishable freight inspector seven days per week, one day at the overtime rate of pay; employe Thibadeau would have his earnings limited to six days per week at the ice house laborer's rate of pay and the extra ice house laborer would have his earnings limited to one day per week. Does it seem sensible, practical, or logical that claimants Ranney and Reidl should have an opportunity for earnings one day per week in excess of that guaranteed them by rule (causing additional and unnecessary expense to the carrier by reason of the overtime rate that would be involved) resulting in a substantial decrease in the straight time earnings of employe Thibadeau and the extra ice house laborer?

The Carrier reiterates that the provisions of Rule 3 (d) are rather uncommon and this case should not be confused with cases which have been referred to the Third Division from other properties where the services of clerical employes holding a seniority date in one seniority district have been utilized in another seniority district where they held no seniority rights.

Carrier calls attention to Third Division, National Railroad Adjustment Board Award 2618 which appears to be a comparable case and which denied claim of the employes that the use of a Group 2 employe to fill a Group 1 position on the rest day of the regularly assigned employe was improper. In the instant case there is no question but that employe Thibadeau properly held seniority rights as a perishable freight inspector as well as an ice house laborer.

While, as indicated above, the Carrier strongly feels there is no merit to the claims as presented, in no event would PFI'S Ranney and Reidl be entitled to the time and one-half rate when not required to work their assigned rest days. See Awards 4244, 4728 and numerous others.

All data submitted herewith in support of the Carrier's position has been presented to the employes or their duly authorized representatives.

OPINION OF BOARD: This is a joint submission and it is conceded the Agreement effective January 16, 1946, governs the rights of the parties, hence the salient and controlling facts can be briefly stated. Without reference to their historical background it can be said that at Harlowton, Montana, on

February 16, 1948, the Carrier maintained two (2) Perishable Freight Inspector Positions, Group 1, Rule 1, in Seniority District No. 48, occupied by regularly assigned employes J. F. Ranney and B. F. Reidl, with respective assigned hours and rest days of 7:00 A.M. to 4:00 P.M., daily except Sunday and 10:00 P.M. to 7:00 A.M. daily except Monday, both positions being seven (7) day positions necessary to the continuous operation of the Carrier; that on the same date and at the same point the Carrier also maintained several Ice House Laborers Positions, Group 3, Rule 1, in Seniority District No. 150, hours 11:59 P.M. to 9:00 A.M., Monday through Saturday with Sunday as the day off; that prior to such date the occupants of the two (2) seven (7) day positions worked their respective rest days, there being no relief assigned for those days, and were paid time and one-half therefor; that on such date C. B. Thibadeau, hereinafter referred to as the Claimant, who was regularly assigned to one of the Ice House Laborer Positions in Seniority District No. 150 but who theretofore had established and retained seniority in Seniority District No. 48 was assigned by the Carrier to work the Sunday and Monday rest days of positions occupied by Ranney and Reidl; and that in order to make this last assignment effective the Carrier suspended Claimant from his regular assigned Ice House Position on Mondays and Saturdays from 11:59 P.M. to 9:00 A.M., thus changing his rest day from Sunday to Saturday and filled such position on Mondays and Saturdays with an extra Ice House Laborer.

Much is to be found in the submissions and arguments respecting the status of Thibadeau's regular assignment as an Ice House Laborer, the Organization insisting it is a six day position, not necessary to continuous operation of the railroad, and the Carrier contending to the contrary. The record contains evidence which, if it could be believed and correctly analyzed, would sustain either view but the parties, either deliberately or unintentionally, have left that issue in such a confused state that to pass upon it would require us to do so by guess and speculation. That we refuse to do. However, since the parties have ample means of ascertaining the facts, it should perhaps be stated that if the record was in such state as to permit a conclusion the Organization's contention respecting the status of such position is correct we would have little difficulty in holding that the use of an occupant of a six (6) day position to fill a temporary vacancy in a regular seven (7) day position, necessary to the continuous operation of the Carrier, would result in a violation of the existing and controlling Agreement. See Awards 336, 2282, 3514, 3770 and 4500.

Notwithstanding what has just been stated we think there are other sound and compelling grounds for holding the Carrier's action in assigning Thibadeau to work the rest days of Ranney and Reidl resulted in violations of such Agreement. They will be stated briefly without detailing the rules (all of which are relied on by the Organization) or laboring the facts responsible for our conclusions.

Rule 14 (b) provides in part that when the assigned rest day of a regularly established position is changed the position will be considered as a new one and will be bulletined. It is undisputed the assigned rest day of Thibadeau's regularly established position was changed and that such position was not rebulletined. Therefore the Agreement was violated in that particular.

Rule 32 of the Agreement provides employes will not be required to suspend work during regular hours to absorb overtime. There can be no question about the status of Thibadeau's regularly assigned position or his availability to fill the rest days involved. The hours of his regular position were such he could not be available for the latter purpose without suspending work on his regular assignment. The position has never been abolished or rebulletined. In fact Thibadeau continues to occupy it under his former assignment except on the days he is permitted to suspend work thereon to work the two rest days in question. For what purpose? Under the facts and circumstances of record it seems clear and we so hold that it was for the purpose of absorbing overtime on the rest day positions which otherwise Carrier would have been required to fill by their regular occupants at the overtime rate. Having deter-

mined the fact, and we pause to note its decision is a question of fact (Award 5811), there can be no doubt but what the Carrier's action was in violation of Rule 32. We have held many times that an employe cannot be required to suspend work on his regularly assigned position in order to work another position where—as here—no emergency exists and that to do so in violation of this principle is to be regarded as suspending work to absorb overtime (Award 4499). To the same effect and holding the terms of such a rule encompass overtime absorbed by an employe on the position of another employe, as well as on his own, is Award 5105 and the numerous Awards there cited. Other decisions of this Division recognizing and applying the principle announced in the foregoing Awards are legion. For our most recent decision dealing with the subject, cited only to demonstrate the principle announced in the foregoing Awards are still adhered to, see Award 5895.

In concluding the Carrier's action was in violation of Rule 32 we have carefully considered arguments advanced by the Carrier to the effect Thibadeau was permitted to fill the rest days in question at his own request and that by reason thereof it cannot be said he was required to suspend work on his regular position in order to absorb overtime. This fact is denied and by no means satisfactorily established. Even so we do not agree. The basic trouble with this position lies in the fact it overlooks the fundamental concept on which all collective bargaining agreements are predicated, namely, that they are promulgated in the interest of all employes coming within their scope, not for the benefit of just a few, and ignores the well established rule of this Division that an individual employe covered by and subject to the terms of such an agreement cannot disregard or negate its provisions by his own agreement with his employer. See, e.g., Awards 2602, 3416, 5793 and 5834.

Nor have we overlooked Carrier's contention to the effect Rule 3 (f), providing "seniority rights of employes covered by these rules may be exercised only in cases of vacancies, new positions or reduction of forces, except as otherwise provided in this Agreement," is controlling and compelled it to take the action giving rise to this dispute. Again we must disagree. We are inclined to the view that under the existing facts and circumstances, when all of its rules are considered together, the Agreement does not contemplate that Thibadeau could hold his regularly established position in Seniority District No. 150 and at the same time exercise seniority in Seniority District No. 48, but we need not pass upon that question. Under sound decisions (see Awards 2823 and 4646) we have held that a seniority rule such as Rule 3 (f), included in the Agreement for the protection of the employe, is not to be construed as relaxing in any manner the requirements of a rule like Rule 32 providing that employes will not be required to suspend work during regular hours to absorb overtime.

In view of related conditions and circumstances, and for reasons set forth in Award 2631, we think there should be no pyramiding of penalties for violations of the Agreement indicated in the Opinion. Therefore, we hold reparation should be limited to the penalty usually assessed for a violation of Rule 32 or other rules of similar import. That, under our decisions (see Award 4499 and decisions there cited), is eight hours at the pro rata rate for each day Thibadeau failed to work his regular position while he was suspended for purposes of absorbing overtime under the terms of the Agreement then in force and effect.

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 Agreement was violated.

AWARD

Claims (a) and (c) sustained to the extent indicated in the Opinion and Findings. Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 12th day of September, 1952.