Award No. 6520
Docket No. CLX-6385

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

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

(a) The agreement governing hours of service and working conditions between the Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated at the Fredericksburg, Virginia, Agency, when A. D. Peyton was denied work in unassigned service; and

(b) He shall now be compensated at the rate of time and one-half for August 5, September 23, 30, October 14, December 2 and 9, 1950 and January 6, 13, 20 and 27, 1951.

EMPLOYES' STATEMENT OF FACTS: A. D. Peyton, with an established seniority date of April 27, 1928, is the regular occupant of a position titled Clerk-Vehicleman, Group 7, Position 3-A, hours of assignment 8:00 A. M. to 5:00 P. M., days of rest Saturday and Sunday, at the Fredericksburg, Virginia Agency, salary $240.04 basic per month.

M. D. Limbrick, with an established seniority date of October 25, 1926, is the regular occupant of position titled Cashier-On Hand Clerk, Group 8, Position 2, hours of assignment 8:00 A. M. to 5:00 P. M., days of rest Saturday and Sunday, at the Fredericksburg, Virginia Agency, salary $252.15 basic per month.

The duties of Position 3-A (Peyton's position), covered by Bulletin No. 66, dated June 30, 1949, (starting time 4:45 A. M. to 1:15 P. M. with 30 minutes for lunch) are:

"Work trains, Pick Up and Delivery cross town route, Dahlgren, Va., Transfer and General Warehouse Work."

The duties of Position 2 (Limbrick's position), also covered by Bulletin No. 66, dated June 30, 1949, are:

"Cashier & O. H. accounts, Clerical work, Book out drivers, work trains."

"I have again reviewed this case in compliance with your request but must again sustain Superintendent VanDenbergh's decision and deny claim for 7 days at punitive rates in favor of junior employe Peyton for time not worked."

Claim was then docketed with this Board on September 10, 1952.

POSITION OF CARRIER: Employes raise the issue that the assignment of Cashier Limbrick to the performance of extra work on Saturdays constituted a violation of paragraph (j) of Rule 45-A. That Rule reads as follows:

"**(j) Work on Unassigned Days.** Where work is required by the management to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases, by the regular employe."

It is quite obvious that the Rule prescribes the manner in which extra work may be assigned. It is also apparent that since this office was operated on a five day basis any work performed on Saturdays would necessarily become work which was "required by the management to be performed on a day which is not a part of any assignment". The issue, therefore, narrows itself first to the identity of the work, and from that to the identity of the proper assignee. Addressing ourselves to the identity of the work the record reveals that the work involved was general in character, including in addition to pick-up and delivery service and warehouse work, the performance of work normally assigned to the Cashier-On Hand Clerk. Considering this factual situation in the light of the Rule quoted above, the only tenable conclusion that could be reached was that the work was properly assigned to Cashier Limbrick. There were no extra or unassigned employes available and, in such circumstances, the Rule required that the work be performed by the "regular" employe. That term as used in the Rule has been defined as meaning the regular employe entitled to the work under the existing Agreement. There can be no question that Limbrick was entitled to the work here for if it be concluded that the work performed on Saturday can be identified with the work of his regular position, he was entitled to the work on that point alone. On the other hand, if the work was so general in character so as not to be particularly identified with any other assignment at the office, (see quotation above from Mr. Wade's letter of January 23, 1951), Limbrick was entitled to the extra work on the basis of his superior seniority at the office. The record establishes the performance of some pick-up and delivery work on the Saturdays in question as well as some of the duties customarily performed by the Cashier. Limbrick's assignment on Saturdays therefore, on the basis of the identity of the work of his position, or on the basis of his superior seniority, was proper under the Rules. Employes' claim for punitive rate for time not worked on the Saturdays in question is completely without merit and should be denied.

All evidence and data set forth have been considered by the parties in correspondence and conference.

(Exhibits not reproduced)

OPINION OF BOARD: On the Saturdays for which claims are made, the work done was not part of any assignment. Rule 45A(j) of the Agreement between the parties governs "Work on Unassigned Days", and this rule reads:

"Where work is required by the management to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases, by the regular employe."

The Employes charge that the management violated this rule by denying the Saturday work to the Claimant Clerk-Vehicleman, and using instead of him a Cashier-On-Hand Clerk. The Carrier contends that the latter was chosen because he was the senior employe in the office, and also because the Saturday service required "the performance of work normally assigned to the Cashier-On-Hand Clerk". Also, that the work on Saturdays "was so general in character as not to be specifically identified with either the Cashier or Clerk-Vehicleman's position, in which case, the assignment to the senior employe (the Cashier) was in keeping with the . . . Agreement."

It is admitted that there were no furloughed or extra men available. Therefore, the last clause in the rule applied, namely: "the regular employe" should be given the work. The record shows that the Saturday work was not precisely the same as either the Clerk-Vehicleman's or the Cashier's work on their regular assignments. That is not unusual when unassigned work is compared with the work of regular assignments, especially in a small office such as is here involved. But the Saturday work has a fixed rate of pay when done by extra or furloughed employes, regardless of variations in the composition of the work which on different Saturdays might include more or less of the duties of the Cashier and of the Clerk-Vehicleman.

The issue here is whether the wrong regular employe was chosen to do the Saturday work. Since the contract fixes a rate for this work, the right employe would normally be the one whose regular assignment pays the same rate as the Saturday work, where, as in this case the two employes concerned get different rates of pay on their regular assignments. The Cashier's rate is $250.80 and the rate of the Clerk-Vehicleman is $238.80. The latter is also the rate of the Saturday unassigned work when extra or furloughed employes are available to do it.

The Employes state that when the Saturday work was performed by furloughed and extra employes (both before and after the 40-hour week became effective), "they were paid too at the rate of the work performed by Clerk-Vehicleman Peyton," (the Claimant). The Carrier does not deny this statement, and the record shows also that since this dispute arose a new position of Clerk-Vehicleman has been established working Tuesday through Saturday, so that the Saturday work is now regularly done at the rate of $238.80 by a Clerk-Vehicleman.

It is argued in behalf of the Carrier, however, that on the Saturdays for which claim is made here, the amount of cashier work was about 20 per cent, and therefore the Cashier would normally be assigned to the Saturday work. Thus admittedly at least four-fifths was Clerk-Vehiclemen's work on dates of claim; and we find no evidence in the record to show that these Saturdays were unique in the amount of Cashier work required. Nor is there any evidence to show that on other Saturdays when clerk-vehiclemen were doing the work at their rate of pay, no cashier work was done by them, or none to the extent that was necessary on the particular Saturdays here in question.

We conclude, therefore, that the parties have interpreted their contract to require that the rate of pay fixed for clerk-vehiclemen is the rate that is applicable to the unassigned Saturday work, although the duties may not be exactly the same as the duties on the days of the regular assignments. Accordingly, the Claimant Clerk-Vehicleman was "the regular employe" entitled to the unassigned work under Rule 45A(j). By using the cashier instead of the clerk-vehicleman, the Carrier violated this rule of the Agreement.

The claim is for compensation at the rate of time and one-half for the specified Saturdays. The Claimant did not work on those Saturdays, and under such circumstances the Division has held in many cases that penalty compensation shall be at the straight time rate. Although the Referee has some doubts about these rulings, especially in view of the recent Award

6474, he feels nevertheless that the facts in the instant case require that the long line of precedents should be followed. The claim should be sustained, therefore, at the straight-time rate.

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

Claim sustained at straight-time Clerk-Vehicleman's rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of March 1954.

DISSENT TO AWARD NO. 6520, DOCKET NO. CLX-6385

Just what is this Award? That question is seriously pertinent because the Opinion here emphasizes the Referee's complete confusion between the field of mediation and the office of interpretation.

Mediative efforts are usually used to assist in the revision or formulation of rules. Here the Referee takes an existing 80%-20% division of remnant Saturday work of a Vehiclemen and a Cashier and formulates a rule to the effect that when not more than 20% of the work involved is higher-rated work, it may be done by a lower-rated employe. This Referee-made rule then supports the Referee-conclusion that the Vehicleman was the "regular employe". Having thus promulgated a rule, and having thus interpreted that new rule, it is found that the **junior** man should have been used to perform Saturday work of which one-fifth was the higher-rated work of the **senior** man who was used.

The Referee makes the concession to the record that "the Saturday work was not precisely the same" as that of either the Vehicleman or the Cashier. Then, venturing a surmise to fortify his new rule, he says the Saturday work "might include more or less of the duties of the Cashier and of the Clerk-Vehicleman". Finally, and although the **senior** man, the Cashier, was used by the Carrier to do higher-rated Cashier work on the Saturdays in question at the higher rate of pay, this Referee announces that "the contract fixed a rate for this work"; that it is "the rate of pay fixed for Clerk-Vehiclemen", and he holds that the Carrier should have used the **junior** man at the **lower** rate of pay.

There is no such rate of pay "fixed in the contract". True, extra Vehiclemen worked on Saturdays until they all voluntarily waived their rights to

Saturday work, but they did not perform Cashier work. The Referee does not "find" that Cashier work was done by extra Vehiclemen prior to the claim period. He simply guessed that there was and, in doing so, mentions the **absence** of evidence showing that the claim-date Saturdays were "unique". What an inversive way of stating an erroneous assumption that Cashier work was done on **other** Saturdays by extra Vehiclemen because it was done by the Cashier **himself** on the specific Saturdays of the claim! A more appropriate use of the word "unique" is its application to the processes by which this claim was sustained.

It may very well be that the Carriers will be most receptive to the Leiserson rule, asked for by the Employes in this Docket, that the lower-rated man is the "regular employe" when up to one-fifth of the work is higher-rated work, but, as Carrier Members of this Board, we can no more accede to the unlawful publication of what might be a favorable rule than we can to what might be an unfavorable one. This is true because the Board is not a legally constituted rule-making body. Hence this dissent.

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp