Award No. 6563

Docket No. CL-6624

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

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

(1) When on Thursday, September 14, Monday, September 18, and Tuesday, September 19, 1950, Carrier utilized regular assigned Messenger and unassigned Clerk K. E. Wilderman, Decatur, Illinois, to work eight (8) hours as Ventilation Clerk after he had worked his regular assigned work day as Messenger on each of the specified dates, and failed and refused to compensate him at the punitive rate for the eight (8) hours he was utilized as Ventilation Clerk on September 14, 18 and 19, 1950.

(2) K. E. Wilderman shall be compensated for the difference between straight time rate he was paid and punitive rate for eight (8) hours he was worked as Ventilation Clerk on September 14, 18 and 19, 1950, account Carrier's action in violation of a proper application of the Agreement.

JOINT STATEMENT OF FACTS: K. E. Wilderman was, on the dates in question, an extra clerk holding seniority on the Decatur Division Clerks' roster dating from March 8, 1950, and also holding seniority as a Messenger at Decatur dating from September 7, 1949, and on the dates in question was regularly assigned on Position No. 6, Messenger, in "XD" Office, Decatur, rate $9.30 per day, hours 7:00 A. M. to 3:00 P. M., rest days Saturday and Sunday.

Job No. 53, Ventilation Clerk, rate $11.91 per day, was assigned to work 3:30 P. M. to 11:30 P. M., Sunday through Thursday, with Friday and Saturday the assigned rest days.

By reason of the absence due to illness of the employe assigned to work Job No. 53, Ventilation Clerk, Sunday through Thursday, Wilderman was used to fill the temporary vacancy on that assignment on the dates and to the extent indicated below.

During the period Monday, September 11, through Saturday, September 23, Wilderman worked and was off as follows:

uncertain duration, Mr. Wilderman worked both assignments for several days before the supervisors' attention was directed to what he was doing. When they became aware of it, he was immediately confined to working the Ventilation Clerk's vacancy.

As previously stated, Wilderman occupied the same status as the regular occupant of the Ventilation Clerk's assignment on September 18 and 19, and there is no rule in the Schedule requiring the payment of time and one-half to an employe for work performed on his assignment within the hours of that assignment (except on holidays, and no holidays are involved here).

The claims presented are not justified under the rules of the Schedule for Clerks and should be denied.

The substance of all matters referred to herein have been the subject of correspondence or discussion in conference between the representatives of the parties hereto and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties have agreed on the facts in this case. Claimant held seniority on the Decatur Division as a Messenger in Group 3 as classified by the Agreement, and also in Group 1 covering Clerks. But he was regularly assigned to a Messenger position working from 7 A. M. to 3 P. M. By reason of absence of a Ventilation Clerk due to illness, Claimant was used to work this Clerk's position on September 14, 18 and 19 and certain other days with which we are not concerned here. On the three days in question he worked his own assignment until 3 P. M. and also the Ventilation Clerk's assignment beginning at 3:30 P. M. He thus was used to work 16 hours within a period of 24 hours.

For each of the two 8-hour assignments he was paid the regular straight time rate. The claim is that the Carrier violated Rules 2 and 7 of the Agreement by not paying the overtime rate after he had completed 8 hours' work on each of the three days. These rules provide:

> Rule 2 (a) "Eight (8) consecutive hours, not including the meal period, shall constitute a day's work.
>
> Rule 7 (a) "All work in excess of eight (8) hours exclusive of the meal period on any regular work day will be considered overtime and paid on the actual minute basis."
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> (Paragraph (b) fixes time and one-half as the overtime rate, and (e) stipulates: "No overtime hours will be worked except by direction of proper authority. . . .")

Judged by these plain provisions, the violation charged and the claim for overtime pay are clearly justified. But the Carrier contends that a long established practice, accepted by the Employes and on which they have even based claims, has set aside Rule 7 and permits working 16 hours within 24 at straight time pay for the second 8-hour assignment. The provisions of Rule 7 have been in the Agreements between the Parties for about thirty years, and much of the record is filled with correspondence and discussion of a case that arose in 1939 and was settled on the property in 1942, which does show that the Employes not only accepted the practice, but in that case based their claim on it, though it was in plain violation of the Agreement.

Although the Employes argue in the present case that "The Clerks' Committee has never accepted nor agreed to the practice referred to by the Carrier," they nevertheless admit that they "are not in a position to dispute the fact that such a practice existed." They contend, however, that the "Committee, if not informed by the employe through filing of overtime claims,

have no definite knowledge of such violations and in most violations of this nature the individual employe is a party to the violation." The record shows that the Committee, as well as the Carrier, was responsible for permitting a practice to be established that was specifically prohibited by Rule 7.

This Division has repeatedly and consistently ruled that a practice in violation of the plain intent of a rule cannot be upheld. But we do not have to rely on those Awards in determining the instant dispute; for while the practice relied upon by the Carrier did exist, another practice existed at the same time which was in conformity with Rule 7.

There is in evidence a letter written by Division Superintendent Johnston during the processing of the 1939 case, which attests to the fact of the two contradictory practices existing at the same time. This letter, dated August 29, 1939, was addressed to the General Chairman in reply to a letter from him regarding the so-called "Gaunt Case." After stating that Gaunt "was not allowed to work his Caller's job (on April 25, 26, May 4 and 6) because he would have worked 16 hours within 24, which is prohibited," the Superintendent wrote:

> "You advise that the overtime rule would not apply in such a case as this. However, within the last two years the Local Chairman of the Clerks at Peru has handled with us the necessity of paying clerks worked 16 hours within 24 time and a half for the second eight hours and **within the past year we have paid a claim on the same basis.** (Emphasis added).
>
> "We have regularly worked clerks so that they did not perform 16 hours service in any 24 and it is not understood how you can interpret the rule one way in one case and then the opposite way in another case."

Apparently, therefore, there were two conflicting policies on this railroad, one in violation of the Agreement which continued to be protested locally; the other in conformity with it, and under the latter overtime was paid. The Carrier contends, however, that "a Division Superintendent is not authorized to represent the Carrier in placing interpretations on wage schedule rules * * * (and) that no officer authorized to represent the Carrier * * * took the position * * * that Gaunt would have been entitled to overtime had he been used in the manner contended by the Committee * * *" This is true enough. But the Superintendent was not interpreting rules when he stated that an overtime claim was paid and when he wrote that Gaunt was not allowed to work 16 hours within 24, "which is prohibited" unless overtime is paid after 8 hours. He was testifying to facts, and we believe he knew what was being done on the Division.

The record thus shows that the practice in the past was to pay straight time for working a second assignment on the same day in some cases, and to pay the required overtime in other cases. Such a contradictory policy does not constitute an authentic established practice which can be held to be an interpretation of Rule 7 mutually assented to by both parties. Moreover, the practice does not interpret the rule; its meaning being undisputed. The contention is that the alleged practice changed it to mean something else than what it says. No written agreement or memorandum of understanding was presented in evidence to prove that Rule 7, as it appears in the Agreement, had been changed by the parties.

Accordingly, the Carrier violated the Agreement, and the claim is valid.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1954.

DISSENT TO AWARD NO. 6563, DOCKET NO. CL-6624

This award falls into harmful error for the reason that the conclusion is based upon the incorrect premise that a long-established practice existed on this Carrier which permitted Group 3 clerical employes to work a second shift in the same 24-hour period on a Group 1 clerical position at straight time pay for the second eight-hour assignment. The conclusion is that Rule 7, being clear and unambiguous, such a practice cannot be upheld.

But—the correct premise is that the parties placed a mutually understood and agreed to Interpretation upon Rule 7 (in writing) that is contrary to the contentions of the Employes in this dispute.

The General Chairman on November 12, 1942 interpreted Overtime Rule 4 (present Rule 7) in writing to the Carrier in this language:

> "We are agreeable to withdrawing the claim for two days pay at $4.15 per day with the understanding that there will not be a repetition of such handling as in the case of Extra Clerk Gaunt, who was required to lose six days on his regular assignment as caller in order to work four days as a clerk, although he could have resumed his regular duties within the same twenty-four hour period, and, as we contend, received the daily rate of his regular assignment of caller; which is in keeping with the seniority provisions of the Schedule for Clerks and to which situation the overtime rule was not applicable."

The Carrier accepted this Interpretation.

In our Award 4549, interpreting an identical rule, it was there said:

> "Rule 39 is plain and unambiguous and unless there was a mutually understood and agreed upon interpretation thereof contrary to the meaning of its language, effective with the adoption of the present Agreement, the claim as here made is meritorious."

That exception is present in this docket for there was a mutually understood and agreed upon Interpretation of Rule 7—Overtime—by the parties.

In Award 6589 again the Board held with respect to a plain and unambiguous rule:

> "In the Exhibits referred to in Petitioner's presentation (exchange of letters between the Carrier's Vice President and General Manager and the General Chairman of the Organization), it would

appear that the parties have placed their own interpretation of Rule 50 as the same applies to this claim and that it is contrary to the position of the Carrier in this dispute."

The majority place some reliance upon a letter written by Carrier's Superintendent Johnson. Completely overlooked or disregarded, however, is the fact that this letter was written on August 29, 1939, whereas the agreed upon Interpretation to Rule 4 (present Rule 7) was not made until November 12, 1942.

For the foregoing reasons we dissent.

/S/ J. E. Kemp
/S/ C. P. Dugan
/S/ R. M. Butler
/S/ E. T. Horsley
/S/ W. H. Castle