

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:

(a) The Carrier violated the General Working Agreement effective January 1, 1950 when on October 3, 1954, it failed to compensate Ticket Seller Albert Acker at the rate of time and one-half for services performed on that date, and

(b) That the Carrier now be directed by proper order of the Board to compensate Mr. Acker an additional half-day's pay in the amount of \$11.19.

EMPLOYEES' STATEMENT OF FACTS: Ticket Seller Albert Acker holds Relief Position No. 1 in the Ticket Office at Union Station, St. Louis, Missouri, Monday through Friday with Saturday and Sunday as his assigned days of rest. During the days of his assignment, he is regularly assigned to relieve Ticket Selling Positions No. 11, No. 12, No. 13, No. 14 and No. 15, and for this service, he receives the rate of pay of the respective positions relieved. Position No. 14 is the Day Ticket Agent Position which carries a monthly rate of \$487.87 or a daily rate of \$22.38 which is the rate of pay Mr. Acker receives on Thursday. Mr. Acker has held the Relief Ticket Seller Position No. 1 since September 1, 1949.

On Sunday, October 3, 1954, Day Ticket Agent Toenges was scheduled to work from 3:00 P. M. to 11:00 P. M., but he notified the office that he was sick and would be unable to report for duty.

Mr. Acker was called in by the Supervisor in charge of the office who requested that he work Position No. 14. Mr. Acker complied with the request and reported for duty at 3:00 P. M.

When Mr. Acker received his pay-check on October 25, he discovered that he had been paid only straight time pay of \$22.38 for services performed on his rest day, Sunday, October 3, instead of \$33.57 which he should have received under the Rules of the Agreement.

It is affirmed that all data herein submitted in support of claimant's position has been submitted in substance to the Carrier and made a part of this claim.

CARRIER'S STATEMENT OF FACTS: The claimant, Clerk Albert Acker, is regularly assigned as Ticket Seller, Union Station Ticket Office, a position fully covered by the Scope of the effective schedule agreement. Claim is made for the difference between the pro rata rate allowed and the punitive rate for services performed on his rest day, October 3, 1954, while filling position of Day Ticket Agent, who was absent account illness.

The Day Ticket Agent, a so-called "excepted" position, is covered by Rule 1—Scope—of the agreement of January 1, 1950 but, as specified therein, is subject only to Rules 1, 4 (d) and 14 (and 24 and 25 in event of complete separation from the service), none of which applies to the wages or hours of service. Occupants of "excepted" positions are paid monthly rates to cover all services rendered.

When Day Ticket Agent Toenges reported being unable to work, October 3, 1954, due to illness there were no furloughed or extra employees available. Claimant Acker, being the senior employee off duty on his rest day, was notified at home of the vacancy and he agreed to fill it. He was allowed the pro rata rate of the Day Ticket Agent's position which was higher than that of his own and which the Day Ticket Agent would have received had he worked.

POSITION OF CARRIER: During the handling on the property, the Employees contended that Rules 39 and 40 supported their position. As before stated, the "excepted" position of Day Ticket Agent is included in the Scope of the agreement but only to the extent specified therein. Rules 39, Overtime, and 40, Notified or Called, are not specified as applying to "excepted" positions, leaving them without application.

The circumstances involved were very similar to those in Award 6564, involving claim for punitive rate for work performed on the same position on a holiday, which was denied. As pointed out in that award, we are obligated under Rule 1 (d) to use the senior qualified employee to fill the vacancy in the "excepted" position, in this instance Acker. He was not obligated to do so, he could have declined it as he did in Award 6564, but when he agreed to fill the vacancy he assumed all the conditions of the Day Ticket Agent's position, including the rate of pay.

The Employees argued that Memorandum Agreement No. 22, which has since been canceled, was the deciding factor in Award 6564 and its cancellation nullified the effectiveness of the award, which is not true. The Referee stated, "And while the Memorandum Agreement merely implements Rule 10, which is not directly applicable to the Agent's position, Paragraph (d) of Rule 1 does obligate the Carrier to give consideration to employees covered by the agreement in filling the Agent's position, thus making it indirectly applicable." To implement means to carry out and that was confirmed in the first paragraph of Memorandum Agreement No. 22. It established a procedure to follow in applying Rule 10 (c). It made no change in the provisions of the rule and the cancellation of the Memorandum Agreement did not lessen the effectiveness of the award.

The claim is not supported by any rules of the agreement and should be denied.

All data submitted in support of Carrier's position has been presented to the duly authorized representative of the Employees and made a part of the particular question in dispute.

OPINION OF BOARD: Claimant is regularly assigned to Relief Position No. 1 in the Ticket Office at Union Station, St. Louis, Missouri, Monday

through Friday with rest days Saturday and Sunday. One of the positions he regularly relieves is that of Day Ticket Agent, which is a partially excepted position, being subject only to Rules 1, 4 (d), 14, 24 and 25 of the Agreement. On Sunday, October 3, 1954, the incumbent of the Day Ticket Agent position was sick and Claimant was requested by the Supervisor to work in his stead. Claimant worked the position and was paid at the straight time rate. The claim is for an additional half-day's pay.

The pertinent portions of the rules applicable to the dispute are:

"Rule 1. Employees Affected.

These rules shall govern the hours of service and working conditions of the following classes of employees that come within and under the craft or class of clerical, office, station and storehouse employees, subject to the exceptions noted below:"

(Claimant's position is included as fully covered by the rules; the Day Ticket Agent position is listed as excepted except for the rules set forth above.)

* * *

"(d) In filling any of the positions listed above, consideration shall be given to employees coming under the provisions of this agreement."

"Rule 40. Notified or Called.

* * *

Employees notified or called to perform work on their assigned rest days or on holidays shall be paid a minimum of eight (8) hours at time and one-half rate."

It is Claimant's contention that he is entitled to time and one-half for the work he performed on Sunday, October 3, under Rule 40. Carrier contends that the position Claimant worked on that day is excepted from the coverage of Rule 40, and he is entitled only to the pay which the incumbent of that position would have received if he had worked that day.

There is no doubt that Claimant in his regularly assigned relief position is subject to Rule 40. Similarly, there is no doubt that the incumbent of the Ticket Agent position is not subject to Rule 40. The question is whether Claimant, when he worked in the place of the Ticket Agent on the day in question, lost the coverage of Rule 40. We think he did not. Rule 40 is clear and unequivocal in granting to employees the right to time and one-half payment if called to work on their rest days. The rule does not refer to positions, but attaches the right directly to "employees". Absent a clear expression of intention elsewhere in the Agreement that employees normally entitled to time and one-half for rest day work shall lose that right when assigned temporarily to work an excepted position, the plain meaning of the rule must prevail. Carrier sees such an expression in Rule 1, particularly in the requirement therein that in filling excepted positions, consideration shall be given to employees coming under the provisions of the agreement. We think it is clear under Rule 1 that if Claimant had been changed permanently from his assigned position to the position of Day Ticket Agent, he would have lost all rights under Rule 40 or any other rule not applicable to the Ticket Agent position. However, we do not see any clear intent in that rule that employees assigned temporarily as in this case should lose the time and one-half pay clearly guaranteed them in Rule 40 for rest day work.

In our view, the filling of the excepted position by Claimant on a temporary one-day basis during the illness of the incumbent did not make him

in every way the counterpart of the regular occupant of the excepted position. He retained the rights he had acquired under Rule 40 by virtue of coming under that rule in his regular assignment. In this connection, we follow the reasoning of the Board in Awards 2905 and 3444. Although those awards dealt with fully excepted rather than partially excepted positions, we think the principle involved was the same.

Award 6564, between the same parties, reached a different conclusion on somewhat similar facts; however, that award was based at least in part on a Memorandum Agreement which expressly provided that employees filling temporary vacancies under the circumstances of that case "will assume the duties, rest days, rate of pay, starting time, and all other conditions of the position filled" (Emphasis ours). No similar provision is present in this case.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 1st day of October, 1956.