Award No. 8204
Docket No. CL-7961

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Sidney A. Wolff, 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:

(1) The Carrier violated the rules of the Clerks' Agreement at Pier 41, New York City, when it failed to call the employes enumerated below, to perform work on Saturday, January 29, 1955; and

(2) That the Employes shall be reimbursed in the amount stipulated herein, as a result of the Agreement violation.

Laborers		
J. Grant	9½ hours	$24.13
D. Rivers	" "	24.13
F. Spinella	" "	24.13
F. Murphy	" "	24.13
J. Barry	" "	24.13
H. Dixon	" "	24.13
N. Adornetto	" "	24.13
S. Donald	" "	24.13
G. DeFazio	7 "	17.78
H. Dables	" "	17.78
N. Morgan	" "	17.78
C. Bellezza	6 "	15.24
		$261.62
Checkers		
G. Devlin	9½ hours	$26.05
V. Burke	" "	26.05
A. Leadbeater	5½ "	15.25
R. Scheffer	4½ "	12.55
		$79.90
Foremen		
J. Drexler	9½ hours	$28.59
L. Thiebauth	" "	28.59
		$57.18
	Grand Total	$398.70

unassigned days in lieu of being required to work regularly assigned employes at time and one-half rate."

In the instant case the Foremen, Checkers and Laborers who were working on shifts starting at 5:00 P. M. and 9:00 P. M. on January 28 were required by the Carrier to complete certain scheduled work tendered for carriage by the Acme Fast Freight Company. Neither the Acme people nor the Carrier had anticipated the exceedingly large volume of work which was received at Pier 41 for transfer from highway vehicles to railroad cars during the early hours of January 29, 1955. It was the responsibility of the Carrier to perform the work as required by the shipper in order to retain its business and the work which was done on the overtime basis was work regularly assigned to the employes who performed it but who were unable to finish it within 8 hours, which the Carrier asserts was not in violation of any rule but a practice of long standing on this property.

The following Overtime rule has been in the Clerks' Agreement since January 1, 1939:

"Except as otherwise provided time in excess of eight (8) hours exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

The payroll record shows that there were 15 other employes at Pier 41 who started work on January 28, 1955 and worked 3 and 4 hours overtime which they were required to work before going off duty on January 29, 1955, clearly indicating that the above quoted Overtime Rule is applicable on this property. In all instances the overtime hours worked were January 29th.

Your Board has repeatedly ruled that overtime work or extra work belongs to employes regularly assigned to the class of work for which overtime was necessary. (See Award 2388.) It is also a well established principle that overtime work arising out of a particular position belongs to the occupant of that position. (See Award 5346.)

The Carrier asserts that the Employes have failed to show that the claimants as shown in the Statement of Claim are the proper claimants for the work claimed.

The Carrier denies each and every allegation of the Employes and the validity of every argument advanced by it at variance with the Carrier's position and pleadings in this case.

The claim is without merit and should be denied.

All data in support of the Carrier's position in this case have been handled with the Employes on the property.

OPINION OF BOARD: Carrier operates a freight handling station at Pier 41, New York City, on a five day a week basis. The normal work week for the employes engaged in the freight handling is Monday through Friday, with Saturday and Sunday as their assigned rest days.

These employes are designated as "day shift" and "night shift", although the tour of individual members of a particular shift will vary since they start work at different times, i.e., the starting time of a number of members of the "day shift" on January 28, 1955 started at varying hours from 7:00 A. M. to 11:30 A. M. On that same day the night men had starting times of 5:00 P. M. and 9:00 P. M. when 3 foremen, 11 checkers and 32 laborers worked, making a total force of 46 night men.

On that Friday night January 28, 1955, at about 8:00 P. M., it appeared to the Carrier that the night men would have their work completed by 7:00 A. M. Saturday, January 29th, but not later than 8:00 A. M. However, during the night an unexpected heavy volume of freight arrived from the Acme

Company (practically all of the freight handled by the "night shift" is for this Company). Rather than hold this freight over to Monday, the Acme Company insisted that it be processed and shipped on Saturday, January 29th. All of this work arrived prior to 6:00 A. M. and the Carrier then used the "night shift" on a continuous basis for the performance of this work with some of the night men putting in overtime varying from 4½ to as much as 9½ hours. Some 18 men were used on this Saturday with a total of 151 overtime hours paid, averaging more than 8 hours to each of the night men.

It is claimed that the work which was done on Saturday, January 29, 1955, came within the provisions of Rule 8½ reading:

"Work on Unassigned Days

> Where work is required by the Carrier 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."

The work which was performed on Saturday, January 29, 1955, a rest day, came within the application of Rule 8½. To deny to Claimants the right to this work would completely vitiate the whole purpose of the Rule. See Award 7190 (Carter); Award 6562 (Leiserson); Award 6019 (Parker).

In an effort to excuse its failure to use the regular "day shift" employes, the Carrier asserted that it "contacted every employe in the checker and laborer category that had a telephone number listed with the office at Pier 41 on Saturday morning. We were not able to get a single individual to come into work."

This, however, appeared for the first time in the Carrier's rebuttal to this Board and to this, the employes responded by affidavit that they "were home and available for work on Saturday, January 29, 1955 between the hours 6:00 A. M. and 8:00 A. M. and were not called for work."

The state of the record is completely inconclusive on this point. It was the obligation of the Carrier to establish to our satisfaction that it offered the available work to the men on the "day shift" rightfully entitled thereto. The Carrier has not met that responsibility.

Nor is the record sufficiently clear to us to determine which of the members of the "day shift" were rightfully entitled to the Saturday work. It appears that the "night shift" normally suspends work at 5:30 A. M. and that the first members of the "day shift" do not start work until 6:00 A. M. with other members of the "day shift" coming in at different hours, i.e., 8:30, 9:00, 9:30, 10:00, 10:30, 11:00 and 11:30 A. M.

Since only 18 men were used on January 29, 1955, this claim should be restricted to the members of the "day shift" who normally begin work no later than 8:30 A. M. since 18 men had a starting time by that hour. If any of them were not available, then those with the next starting time may be considered. It is for the parties, to whom the records are available, to make the determination as to which claimants should receive the compensation awarded.

We sustain paragraph 1 of the claim and direct that payment be made on a pro rata basis to the Claimants to be determined by the parties to whom the matter is remanded.

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 to the extent stated in the Opinion.

AWARD

Claim 1 and 2 sustained with the matter remanded to the parties in accordance with the Opinion herein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of January, 1958.