Award No. 9106
Docket No. CL-8091

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK CENTRAL RAILROAD COMPANY
(Line West of Buffalo District)

STATEMENT OF CLAIM: (a) Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the rules of the Agreement effective September 1, 1922, as modified or revised on various dates, when on November 18, 1953 Carrier refused to properly compensate A. M. Coleman, General Foreman, Front Street Mail Hall, Cleveland, Ohio, at rate of time and one-half, the rate of his regular General Foreman's position, Position No. 1, for Tuesday, October 6, 1953, on which date he doubled over to fill a vacancy of Clerk on Position No. 311, and

(b) That A. M. Coleman be allowed the difference between what he was paid at the rate of $300.97 per month and what he should have been paid at the rate of $380.13 per month.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, as representatives of the class or craft of employes in which the claimant in this case holds a position, hereinafter referred to as the "Brotherhood" and the New York Central Railroad, hereinafter referred to as the "Carrier".

On October 6, 1953, Mr. A. M. Coleman was regularly assigned to Position No. 1, General Foreman at New York Central Front Street Mail Hall, Cleveland, Ohio, which position is fully subject to all rules of the agreement and which carries a rate of $380.13 per month.

On Tuesday, October 6, 1953, after completing his regular assignment, Mr. Coleman was used on a double-over as the senior available qualified employe to fill a short vacancy occurring on Clerk Position No. 311 and performed eight (8) hours of service on this position.

another entirely separate assignment and took the rate of that other assignment for the day or days that he worked thereon. In the instant case, involving the one day when the General Foreman at Front Street Mail Hall worked a second trick Clerk assignment, the claimant similarly took over the rate of the other assignment which he worked during overtime hours, and he was properly paid on the basis of the rate of the second trick Clerk assignment because he (the General Foreman) had volunteered for such other work and had placed himself on the second trick Clerk assignment under operation of the "Availability List".

It is the Carrier's opinion that the several Awards cited here, when duly associated with the relevant facts set forth elsewhere in this ex parte submission, conclusively refute the claim of the Organization in this docket.

CONCLUSION:

The Carrier has shown that:

1. There was no violation of rules, and the rule cited by the Organization, Rule 38, does not support the claim;

2. Claimant General Foreman worked the second trick Clerk assignment October 6, 1953 because he chose to do so and made known his willingness to work such vacancies by signing the "Availability List".

3. Claimant General Foreman was properly paid at time and one-half the rate of the second trick Clerk assignment which he worked, and for which he voluntarily made himself available. He did not carry his General Foreman rate with him when he worked the second trick Clerk assignment because he did not work that second trick Clerk job under circumstances contemplated by Rule 38;

4. Awards of the Third Division support the Carrier's position;

5. The Organization's position with respect to work performed by the Claimant General Foreman as second trick Clerk October 6, 1953 is without support and should be denied.

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

(Exhibits not reproduced.)

OPINION OF BOARD: On October 6, 1953, Mr. A. M. Coleman, General Foreman, Front Street Mail Hall, Cleveland, Ohio, after he had worked his tour of duty on that day, doubled over and worked eight hours, in filling a vacancy in Clerk Position No. 311. For that extra service Mr. Coleman was paid for time and one-half at the rate of pay of the Clerk for whom he worked. Mr. Coleman's rate of pay in his regular position was higher than that of the Clerk Position for which he doubled.

The Organization claims that Mr. Coleman should have been paid at the rate fixed for his regular position and asks that he be compensated for the differential in the rates.

The Carrier maintains that the Rule invoked does not control the situation presented; that Mr. Coleman, because of his higher rated position and his supervisory authority should not have taken the assignment to the Clerk's position, that he was a pure volunteer and that by an agreement, referred to throughout the record as an Availability List Circular, he was restricted to the pay of the lower rated position; and finally that he had waived any right to the claim here urged.

The Availability List Circular was addressed to "All Class 1 and Class 2 Employes at the Cleveland Union Terminal and Front Street Mail Hall Carried on the New York Central and Cleveland Union Terminal Common Roster." At the beginning, it provided that the employes who signed agreed that "in case of any overtime to be worked at Front Street Mail Hall" they would "be available for such work when assigned on a seniority basis, either for overtime, a double over or for work on rest days." It continued and set out how and in what order the assignments of the employes, signers for overtime should be made. We note that the language of this agreement, which was chosen by the Carrier, designates the appointments to be made thereunder as assignments.

Rule 38, upon which Claimant relies, provides:

> "Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced."

A "temporary assignment" is then defined. The assignment here clearly is comprehended by this definition.

We have set out almost verbatim the terms of the Availability Agreement.

It may not be said that this Agreement was made for the sole benefit of the employes who signed it. Obviously, promulgated by the Carrier, it was expected that when completed it would have some benefit in the expedition of its operations. It had mutual advantages to Carrier and employes who signed it.

There is no mention of compensation in the Agreement, nor is there any subject matter from which it may be inferred that compensation was to be affected by its terms, or that the signers waived any of their rights to compensation under the controlling rules of their working Agreement. If the signers may be classified as volunteers because they became parties to the Availability Agreement, they volunteered to do only that which it provided and to be bound only to the extent that it limited their rights. The Availability Agreement was approved by the Organization.

Rule 38, if applicable, accorded to Mr. Coleman the rate of pay to which he was entitled in his regular position as General Foreman. This construction seems clear from both parts of the first paragraph of the rule. It is specifically so provided in the second part of the paragraph. The first part assures to those assigned to higher rated positions that rate of pay. If nothing had been added, it might be argued that where the holder of a higher rated position was assigned to a lower rated position, he should receive the lower rate of pay. Such a surmise is removed by the second part of the paragraph when

it expressly provides that "employes * * * assigned to lower rated positions shall not have their rates reduced."

The claim of the Carrier is not well made that Mr. Coleman, because of his supervisory position, should not have accepted the assignment here involved. If this objection was valid it should have been asserted when the agreement was signed or, at the latest, before the General Foreman was repeatedly assigned to the work.

That Mr. Coleman did not perform the duties of a Foreman when he doubled for the Clerk is true, but the conclusion that because of that fact he should not be compensated as claimed is, in our judgment, non sequitur in view of Rule No. 38. This same claim could be made in every instance where a higher rated employe was temporarily assigned to a lower rated position were it not for the interposition of Rule 38, which controls the rate of compensation.

The Carrier points out that after certain employes, who had signed the Availability Agreement, had been paid at a rate higher than the rate in their regular positions, they were notified by the Carrier that the payments had been made in error and some settled on that notification. Later, all of the employes, parties to the Agreement, were notified that thereafter the pay in the overtime assignments would be at the rate of the employe whose position was being filled and such specific notice was given to Mr. Coleman. That in one instance, he had been paid and accepted the pay at the lower rate.

If Mr. Coleman had the authority to waive his right to pay for the services involved accorded him by the applicable Rule, we would unhesitatingly hold that he had done so and that he was estopped to assert the claim here made. The difficulty with applying this doctrine is that the Organization, which alone, in the situation here presented, could bind the employes involved, was not a party to any of the occurrences heretofore stated, did not acquiesce in the construction which the Carrier made of its rights under the Availability Agreement and the Rules of the controlling working Agreement. The notices to Mr. Coleman did not bar him from asserting his rights to compensation under the controlling Agreement. Awards 3256, 5924, and awards there cited, this Division of the Board.

The compensation which should have been paid to Mr. Coleman for the overtime service sought in this claim is controlled by Rule 38, should have been at the rate he was paid in his regular position and nothing in this record requires the holding that the rule is inapplicable or should be modified.

The Award entered here is supported by Awards 2687, 3413, 4469 and 5924, all of this Division of the Board.

We have examined all of the awards cited by the Carrier. It would serve no good purpose to discuss them at length. Suffice to say, some of them arose in emergencies or by the exigencies of war, wherein employes volunteered to work lower rated positions at their pay, Awards 2670, 2671, 2672, 2679, 2680, this Division. In others the Organization was held to be a party to the agreements which were not covered by any applicable rule, several were made without opinion. In some there were no eligible employes available when the assignments in controversy were made.

The late Award 8898, Murphy, Referee, this Division, at first glance, seems to hold contra to our conclusion in this submission. However, a close

reading of the opinion discloses that the Award was based, in part, at least, upon the finding that the Organization was a party to an arrangement which in the judgment of the Board, precluded allowance of the Claim.

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 has been violated.

AWARD

Claim allowed in both branches (a) and (b).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December, 1959.