

Award No. 9245

Docket No. CL-8214

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carl R. Schedler, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD
COMPANY**

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

1. Carrier violated the Clerks' Rules Agreement when employees occupying positions requiring round-the-clock service were assigned starting times of 5:00 A. M. during the period June 30, 1953 through September 6, 1953.

2. Carrier shall compensate all employees in the Mail and Baggage Department at Minneapolis who were assigned starting times of 5:00 A. M. during above mentioned period for one hour each at the penalty rate of pay applicable to their positions for each day during that period.

EMPLOYEES' STATEMENT OF FACTS: Employee C. A. Grogren, seniority date of February 18, 1943, was regularly assigned to Position #117, Tractor Operator, from 6:00 A. M. to 2:30 P. M.

Employee Stephen Koval, seniority date of June 15, 1941, is regularly assigned to Position #25, Mail and Baggage Trucker, from 6:00 A. M. to 2:30 P. M.

Employee Wm. J. LeMaitre, seniority date of April 10, 1948, is regularly assigned to Position #25, Mail and Baggage Sorter, from 6:00 A. M. to 2:30 P. M.

Employee J. B. Holden, seniority date of March 3, 1944, is regularly assigned to Position #34, Mail and Baggage Trucker, from 6:00 A. M. to 2:30 P. M.

Employees George Knutson, C. E. Matuska, R. E. Milewski, F. E. Waldman and L. H. Stoffel furnished relief on the above positions.

Therefore, even if Rule 14 (c) is held to be applicable here, there is no merit in the claim in behalf of the occupants of the following positions:

M&B Tractor Operator	Position 117
M&B Trucker	Position 25
M&B Trucker	Position 34

There has been no violation as alleged. The claim is not supported by the provisions of the schedule and the Carrier respectfully requests that it be denied in its entirety.

All data contained herein has been presented to the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim alleges a violation of Rule 14 (c) which provides where three consecutive shifts are worked covering the 24 hour period, no shift will have a starting or ending time after 12 midnight and before 6:00 A. M. The Claimants request one hour penalty pay for each day worked during the period from June 30, 1953 through September 6, 1953. The Carrier denies that there has been a violation of the Agreement.

This Carrier serviced trains of another Carrier which operated in and out of its Minneapolis depot. In June 1953 the other Carrier inaugurated a train scheduled to leave Minneapolis at 5:20 A. M. daily except Sunday. This Carrier changed the starting time of some of the Mail and Baggage force so as to be available for handling traffic prior to departure. The starting time for four positions was advanced one hour from 6:00 A. M. to 5:00 A. M. to service the train prior to its 5:20 A. M. departure. The train was discontinued on September 6, 1953 and the positions were assigned back to the beginning time of 6:00 A. M. on that date. The Carrier contends that this change in starting time did not violate the agreement because it had made identical or similar changes, mostly for the summer months, in previous years without protest from the employees. A custom or usage becomes an established past practice when the parties by their tacit approval have acquiesced in the act or custom for a long period of time. On the other hand, a violation may have existed for several years but only recently brought to the attention of the proper official. When such situations occur and a claim and appeal are timely filed, as we find they were in this case, it is our opinion that there has not been mutual acquiescence in the past practice sufficient to establish binding conduct on both parties to the Agreement. The Carrier by way of defense also relies on the last sentence of Rule 14 (d) which we think must be construed as a part of the whole section. To take it out of context does not make it applicable to the instant dispute, as it obviously applies to a different situation.

A review of the many awards concerning Rule 14 (c) indicates that the first test in applying the rule is to ascertain if three consecutive shifts were worked. The Carrier asserts that three consecutive shifts were not in existence at the time involved herein, because all of the various classes and crafts were not employed on each of three shifts, but does admit that a Mail and Baggage Sorter did work three consecutive shifts covering a 24 hour period. It is our opinion, which is supported by several prior awards, that Rule 14 (c) does not require all classes and crafts to be working three consecutive shifts and that it becomes operative if only one position is being worked three consecutive shifts as was the situation in this case. If the parties had meant for the rule to apply only when all positions are working

three consecutive shifts language for that purpose could have been included. We think the test is met if any one class or craft is working three consecutive shifts. Admittedly the four positions included in the claim did start work at 5:00 A. M., or one hour prior to the time permitted in the rule.

This Board has issued many decisions awarding penalty pay as retribution for a Carrier violation, and we will award penalty pay to the Claimants herein at the rate of time and one-half for the one hour worked prior to 6:00 A. M. for the period of time stated. Since the employees have already received straight time for that hour, they are under this award entitled to only half pay for each hour during the period when they began work at 5:00 A. M. instead of 6:00 A. M.

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 Carrier violated the Agreement.

AWARD

Claims sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of February, 1960.

DISSENTS TO AWARDS NOS. 9245, 9246, DOCKETS NOS. CL-8214, 8215

The conclusions expressed in the Opinions in these Awards Nos. 9245 and 9246 are in gross error because they misrepresent the facts and misinterpret Sections (c) and (d) of Rule 14.

In the Opinion in Award No. 9245 appears the statement that "The Carrier asserts that three consecutive shifts were not in existence at the time involved herein, because all of the various classes and crafts were not employed on each of three shifts, but does admit that a Mail and Baggage Sorter did work three consecutive shifts covering a 24 hour period." The Carrier made no such admission. Carrier's Statement of Facts said,

"The only classification which was so assigned as to cover the 24-hour period, although not on the basis of three consecutive shifts, was the Mail and Baggage sorters."

Furthermore, Carrier's Position stated, in part:—

"The employes have entirely overlooked the provisions of Rule 14 (d) and * * * they ignore the fact that 'three consecutive shifts' were not in existence * * *."

Thus, it appears that Carrier did not "admit that a Mail and Baggage Sorter did work three consecutive shifts covering a 24 hour period," but on the contrary Carrier did adhere to the facts.

Certain distinctions that are obvious in the provisions of Sections (c) and (d) of Rule 14 have been ignored. These paragraphs provide:—

- "(c) Where three consecutive shifts are worked covering the 24 hour period, no shift will have a starting or ending time after 12 midnight and before 6:00 A. M.
- "(d) In no event may the starting time of any assignment be between the hours of 12:00 midnight and 5:00 A. M. except by agreement between the Management and General Chairman. Only such assignments as are necessary to meet the requirements of the service may be established with ending time between 12:00 midnight and 5:00 A. M."

Section (c) provides that no "shift" will have a starting or ending time between 12 midnight and 6:00 A. M. where "three consecutive shifts" are worked covering the 24 hour period, and it follows that —

- (1) "Three consecutive shifts" covering the 24 hour period can only be defined as a cycle of three eight-hour shifts, each immediately following the other, since "consecutive" is emphatic, stressing the immediacy of the succession and inasmuch as the 24 hour period accommodates a maximum of three consecutive eight-hour shifts.
- (2) The phrase "no shift" refers to one of the "three consecutive shifts (which) are worked covering the 24 hour period" because the latter quoted phrase is the sole condition precedent to the application of Section (c).

Section (d) recognizes the propriety of starting times of "assignments" any time from 5:00 A. M. to midnight and makes exception for starting "assignments" between 12 midnight and 5:00 A. M. only by agreement. This section also provides assignments may end after 12 midnight, limited to and dependent only upon the requirements of the service; and it follows that —

- (1) This section refers to "assignments" as distinguished from "shifts" referred to in Section (c), with restrictive period between 12 midnight and 5:00 A. M., as distinguished from restrictive period between 12 midnight and 6:00 A. M. as referred to in Section (c).
- (2) The first sentence of this Section specifically concerns itself only with "starting times."
- (3) The second sentence of this Section specifically concerns itself with "ending times."
- (4) There is no provision whatever in this Section which requires "agreement between the Management and General Chairman"

with respect to "ending times", hence that requirement with respect to "starting times" is without application, either expressly or impliedly, to "ending times".

- (5) The term "such assignments" in the second sentence of this Section can only be construed in the sense that it is therein used with respect to the ending times of assignments which are necessary to end after midnight to meet requirements of the service.

Awards Nos. 9245 and 9246 erroneously interpret Rule 14, Section (c), as prohibiting the starting and ending of any assignment between 12 midnight and 6:00 A. M. at points where "three consecutive shifts" are worked and sustain these claims on that basic premise, relying upon awards rendered on entirely different rules on other properties for support. They misinterpret Section (d) by holding (in Award 9246) that the change in ending time provided for in its second sentence is subject to the same agreement condition between the parties which is made a requirement, in its first sentence, for starting an assignment in advance of 5:00 A. M.

While Sections (c) and (d) convey the intent to eliminate, as much as practicable, the starting or ending of "shifts" on the one hand and "assignments" on the other during the early morning hours, it is readily apparent that each Section concerns different types of positions, viz., Section (c) controls the starting and ending of "shifts" in "three consecutive shifts" operations, while Section (d) less restrictively controls the starting and ending of "assignments" independent of "three consecutive shifts" operations.

Clearly, by reason of its own negotiated Agreement rules this Carrier has the contractual right to start any assignment not in "three consecutive shifts" operation at 5:00 A. M., and to end an assignment after midnight when such ending time is "necessary to meet requirements of the service", both without further agreement between the Management and General Chairman; hence these Awards Nos. 9245 and 9246 are without support in Agreement rules or awards of this Division.

For these reasons, among others, we dissent.

/s/ J. F. Mullen

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO
AWARDS NOS. 9245, 9246 DOCKETS NOS. CL-8214, 8215**

The Awards adopted by a majority of the Board in these disputes were proper and in accordance with prior precedents, the relevant facts and controlling Rule 14(c). See Awards 685, 1395, 1591, 3821, 6427.

It is a universal rule of contract construction that special rules prevail over general rules, leaving the latter to operate in the field not covered by the former. Awards 4496, 6311 and 6757.

That Rule 14(c) is a special rule governing the assignment of starting or ending time "where three consecutive shifts are worked covering a 24 hour period", is clear. Consequently, Rule 14(c) prevails over general Rule 14(d) when the circumstances fall within the provisions of the former, as was the case here.

There is also another well established rule of contract interpretation that is controlling here, i.e., "that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section." Award 2490. Rule 14(c) prohibited the assignment of a starting or ending time "after 12 Midnight and before 6:00 A.M." where "three consecutive shifts are worked covering the 24 hour period."

Regardless, of what the Carrier Members' have to say to the contrary, the record in Docket CL-8214, Award 9245, shows that Carrier admitted that Mail and Baggage Sorters were assigned to three consecutive shifts, consisting of 6:00 A. M. to 2:30 P. M., 2:30 P. M. to 11:00 P. M., 3:00 P. M. to 11:30 P. M., 3:30 P. M. to 12 Midnight and 12 Midnight to 8:00 A. M., although it contended such shifts were not consecutive. There is bound to be an overlapping of hours where three consecutive shifts are worked and a lunch period is assigned. However, the Rule is concerned with "shifts" and not hours of service. In denying a similar contention in Award 3821, Referee Swain ruled:

"* * * There is continuity in a series of three when there is no break between the first and second and none between the second and third. That was true of the three shifts here in question. The three shifts were continuous.

We are not impressed with the argument of the Carrier that the shift starting at 2:00 A. M. was not the 'first shift'. There were three shifts within the day and this one started six hours before the next one."

In Award 1819, Referee Yeager overruled Carrier's contention that the term "three consecutive shifts" were confined a particular group or class of work. The Referee ruled:

"* * * It contends further substantially that the rule contemplates shifts, not necessarily of the same size, covering the 24-hour period, performing similar work. As to this contention, we need only say that the question has been previously decided adversely to the Carrier's position in other cases, notably in Award 1641, and we observe no compelling reason for a departure from the pronouncements there made."

Also, see Awards 1641, 1690 and 5923.

The record in both Dockets clearly showed that three consecutive shifts were worked covering the 24 hour period, consequently, Awards Nos. 9245 and 9246 correctly held that Rule 14(c) was violated by the assignments of starting and ending times "after 12 Midnight and before 6:00 A. M."

J. B. Haines
Labor Member