

Award No. 9823
Docket No. CL-9083

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 4-C-1 and 9-A-1, when it used Foreman Earl Daniel to fill an advertised vacancy at Pennsylvania Station, Baltimore, Maryland, former Maryland Division, on May 18 and 19, 1955, and failed to fill the resultant vacancy on Daniel's position.

(b) The Claimant, Foreman J. E. Fowler, who was observing his regularly assigned rest days, and was available, should be allowed eight hours' pay a day, at the punitive rate, for May 18 and 19, 1955, as a penalty. (Docket E-1063)

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employees in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station, and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant, Mr. J. E. Fowler, is a foreman at Pennsylvania Station, Baltimore, Maryland, former Maryland Division, tour of duty 4:00 P. M. to 12:00 Midnight, rest days Wednesday and Thursday. He has a seniority date on the seniority roster of the former Maryland Division in Group 1.

Foreman Earl Daniel is assigned 8:00 P. M. to 4:00 A. M., on Tuesday, Wednesday, Thursday, and Friday, to assist the regular foreman, and from

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employes, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

(Exhibits not reproduced)

OPINION OF BOARD: The following statement of facts has been jointly accepted by the parties:

"J. E. Fowler is regularly assigned as foreman, Pennsylvania Station, Baltimore, Md., tour of duty 4:00 P. M. to 12 Midnight, with relief days Wednesday and Thursday.

Foreman E. Daniel on Wednesday and Thursday, May 18 and 19, 1955, would normally have been assigned to work 8:00 P. M. to 4:00 A. M., he being used to assist the regular foreman on Tuesday, Wednesday, Thursday, and Friday, 8:00 P. M. to 4:00 A. M., and to relieve the regular foreman on Saturday, 8:00 A. M. to 4:00 P. M.

On Wednesday, May 18, 1955, and Thursday, May 19, 1955, relief days for Foreman Fowler, he presented claims for 8 hours punitive rate for each date because the assignment of Foreman E. Daniel was not filled on those dates.

Foreman Daniel on these dates was working position of Foreman 12:01 A. M. to 8:01 A. M., which position was under advertisement."

The issue which confronts us raises the question as to whether, under the Rules Agreement, the Carrier may unilaterally remove one employe from his regular position as established and assign him to another position, with a different tour of duty, in order that a vacancy which is under advertisement may be filled, while at the same time blanking the position of the employe so removed when other employes are available to fill the blanked position.

Rule 4-C-1 provides that:

"Employes will not be required to suspend work during regular hours to absorb overtime."

Since Claimant J. E. Fowler was available for work during the hours when Foreman Daniel's position was blanked on Wednesday and Thursday, May 18 and 19, 1955, this claim is being pressed. It is contended that Carrier has violated not only Rule 4-C-1, but also other provisions of the Rules Agreement, particularly Rule 9-A-1.

"9-A-1. (a) Except as otherwise provided, exceptions to any Rule or Rules in this Agreement will be made only by agreement, in writing, between the parties signatory hereto.

(b) Where provision is made in this Agreement for exceptions or special agreements between the Management and the duly accredited representatives of the employes, agreements with respect thereto will be in writing and numbered consecutively by seniority districts, two copies of each to be furnished the General and respective Division Chairman."

While Carrier claims that Foreman Daniel had no assigned hours, the parties' joint statement of facts clearly indicates that he did have regularly

assigned hours. That this position was blanked on the two days in question, is also clear from the record. It is, therefore, the contention of Claimant that Foreman Daniel was **required** to suspend work on his own assignment for the sole purpose of keeping Claimant Fowler, who was available, from being given this work as an overtime assignment. There is nothing in the record to indicate that Daniel requested this assignment, and the evidence clearly indicates that the decision to fill the position in this manner was unilaterally made by the Carrier.

The Carrier has also contended that Claimant failed to cite any particular rule that had been violated during the handling of this matter on the property. The record does not bear this out. The Carrier admits in its Ex Parte Submission that the Employees had been pressing this claim on the strength of this Division's Awards 4499, 4500 and 4690, which it acknowledges involve the "absorbing of overtime rules". Every indication is that the Carrier was fully aware of the position of the Employees during the handling of this matter on the property.

Finally, the Carrier contends that the situation before us is not covered by Rule 4-C-1. Our attention is called to the fact that the cases cited by the Employees are all cases passed upon by this Board prior to the adoption of the Forty Hour Week Agreement. However, it seems clear to us that Foreman Daniel was suspended from work during regular hours and that his assignment to the work here in question had the effect of absorbing hours of overtime which Claimant, an available employe, could have worked. This was clearly in violation of a reasonable interpretation of Rule 4-C-1.

With respect to pay for the two days in question, the proper rate is the pro rata rate, in accordance with many previous awards of this Board.

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 subject to the following limitation:

Claimant shall be paid at the pro rata rate for eight (8) hours each for May 18 and 19, 1955.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of February 1961.