Award No. 10712
Docket No. CL-10326

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Wilson, Referee

PARTIES TO DISPUTE:

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

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

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

(1) Carrier violated the terms of the Clerks' Agreement in the manner it changed the hours of assignment and meal period on Railroad Mail Clerk, Job No. 317, effective June 19, 1957, from that specified in the bulletin at the time the position was advertised; and

(2) Carrier shall now pay an additional two hours at the pro rata rate of Job 317 to Clerk W. Stevenson for June 19, 20 and 21, 1957, to Clerk H. Bourgo for June 24, 1957 and each day thereafter until the violation is corrected, and to any other employe affected who has worked Job 317 subsequent to June 19, 1957; which represents one hour's pay for time not permitted to work which is within the prescribed hours of service of Job 317 as bulletined, thirty minutes' pay for time worked outside the bulletined hours of Job 317, and thirty minutes' pay for being required to work during the meal period provided for in the bulletin.

EMPLOYES' STATEMENT OF FACTS: Prior to June 19, 1957 the hours of service on position of Railroad Mail Clerk, Job No. 317, in the Baggage Department at Portland, Oregon, were from 3:00 P. M. to 11:30 P. M., Monday through Friday, with thirty (30) minute meal period. These conditions were established some years ago by means of a bulletin advertising this position for seniority choice. The last bulletin on record advertising Job 317 as a permanent vacancy was issued October 19, 1953 and reads as follows:

"THE NORTHERN PACIFIC TERMINAL COMPANY
OFFICE OF MANAGER

BULLETIN

#3095
Portland, Oregon, October 19, 1953

"Because of retirement of Matt Mattson, position of Railroad Mail Clerk, Job No. 317 in the Baggage Department, is open for bids:

CONCLUSION

This attempt by the Clerks to over-ride the approval given by the Division Chairman to a long- and well-established practice on the property of changing meal periods of assignments without bulletining those positions most assuredly should not be sustained by this Honorable Board. Irrespective of that issue, the Claim is completely without foundation, and the Carrier requests the Board to deny same in its entirety.

* * * * * *

The Carrier asserts that the data contained herein have been furnished the Clerks or are well known by them.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to June 19, 1957 the hours of service on position of mail clerks job No. 317 in the baggage department at Portland were from 3:00 P. M. to 11:30 P. M., Monday through Friday with a thirty minute meal period.

Claimant H. Bourgo is the regular occupant of the position and was on vacation June 17 through 21 and extra clerk Claimant, Clerk W. Stevenson filled the position on June 19, 20, 21, 1957.

The Carrier on June 18, 1957 addressed a notice to the Claimant which was placed in his mail box advising that effective June 19, 1957, the hours of job 317 would be 2:30 P. M. to 10:30 P. M. A copy of the notice was posted on the Clerks Board.

"Portland, Oregon, June 18, 1957

"Harry M. Bourgo
Railroad Mail Clerk

"Effective Wednesday, June 19, 1957, the hours of Railroad Mail Clerk, Job No. 317, will be changed to 2:30 P. M. to 10:30 P. M.

/s/ Geo. Knoche
Baggage Agent"

"cc: Board Clerks
B. Hess, Genl. Chairman
B of R & SC"

The Claimants allege that proper notice was not given in accordance with the provisions of the Agreement between the parties.

The applicable rule involved in this case is Rule 14, paragraph (a) which reads as follows:

"Regular assignments shall have a fixed starting time which shall be the same each day, except for relief positions, and a designated point for the beginning and ending of tour of duty. The starting time of regular assignments shall not be changed without at least thirty-six (36) hours notice to the employes affected."

The notice was dated June 18, 1957 and was posted the afternoon of that day thus, the change became effective approximately 24 hours after

the notice was issued. On its face the notice does not meet the 36 hour time specified in the Rule.

Carrier shall pay an additional two hours at the pro rata rate of Job 317 to Clerk W. Stevenson for June 19, 1957.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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.

AWARD

Claim is sustained as indicated in this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 26th day of July 1962.

LABOR MEMBER'S DISSENT TO AWARD 10712 (Docket CL-10326)

The Referee has erred in his Opinion in Award 10712.

Particular attention is called to the last four (4) paragraphs of the Opinion which for ready reference read as follows:

> "The Claimants allege that proper notice was not given in accordance with the provisions of the Agreement between the parties.
>
> The applicable rule involved in this case is Rule 14, paragraph (a) which reads as follows:
>
> > 'Regular assignments shall have a fixed starting time which shall be the same each day, except for relief positions, and a designated point for the beginning and ending of tour of duty. The starting time of regular assignments shall not be changed without at least thirty-six (36) hours notice to the employes affected.'
>
> "The notice was dated June 18, 1957 and was posted the afternoon of that day thus, the change became effective approximately 24 hours after the notice was issued. On its face the notice does not meet the 36 hour time specified in the Rule.

Carrier shall pay an additional two hours at the pro rata rate of Job 317 to Clerk W. Stevenson for June 19, 1957." (Emphasis ours.)

The Statement of Claim reads in part as follows:

"(2) Carrier shall now pay an additional two hours at the pro rata rate of Job 317 to Clerk W. Stevenson for June 19, 20 and 21, 1957, to Clerk H. Bourgo for June 24, 1957 and each day thereafter until the violation is corrected, and to any other employe affected who has worked Job 317 subsequent to June 19, 1957; which represents one hour's pay for time not permitted to work which is within the prescribed hours of service of Job 317 as bulletined, thirty minutes' pay for time worked outside the bulletined hours of Job 317, and thirty minutes' pay for being required to work during the meal period provided for in the bulletin."

The claim was filed as a continuing one, and nothing in the record indicates Carrier's challenge of that fact. The Agreement was violated on June 19, 1957; the violation continued on June 20 and on each and every subsequent day, because absolutely nothing occurred on either June 19 or on a later date to change and/or estop the continuance of the violation.

Carrier could easily have prevented the continuance of the violation by issuing a proper notice in accordance with the explicit provisions of Rule 14(a) on any one of the more than 1,800 days after the violative notice of June 18; it failed to so do. As a consequence of such failure to right its wrong, the only course open to prevent the continued violation is to assess a penalty on Carrier in order to force its compliance with the Agreement.

A most grievous error was committed by the Referee when in the "Findings" he holds that the Agreement was violated but in the "Award" states: "Claim is sustained as indicated in the Opinion." It is obvious the "Opinion" does not sustain the Employes.

The Labor Members did not move for adoption of the Award, but the Carrier Members hastened to do so. If the Referee was at that moment still of the opinion that his decision was fair and just, all such illusions should have immediately vanished with the Carrier Members' action in moving for adoption of an Award supposedly sustaining the Employes.

The moment of decision had arrived: If the Referee was to retain his unbiased status and vote with the Labor Members had they moved for adoption, he would have had the power of his own conviction that the Award sustained the Employes. Such did not occur. When the Carrier Members moved for adoption, and the Referee voted with them, thereby voting against the party he had sustained, such action was proof without question that although the Award contains the words: "sustained as indicated in the opinion", it is in reality an act of denial to the party he sustained and a sustention to the party who violated the Agreement.

Such decision is a subterfuge and a travesty of justice.

Had his neutral status prevailed, the Referee had two sound alternatives: (1) to vote with the Labor Members if his so-called "sustained" decision was intended to favor the Employes, at that moment realizing that his Opinion was erroneously written; or (2) to refrain from voting, thereby preventing the adoption of the Award.

In either instance, the dispute could then have been reassigned to another Referee and due process would have been fulfilled.

The decision is unfair because it is based on partial judgment.

The decision is unjust because it is not in accord with legal justice.

For the above reasons, I dissent.

C. E. Kief

C. E. Kief, Labor Member
August 1, 1962

CARRIER MEMBERS' COMMENTS ON THE LABOR MEMBER'S DISSENT ON AWARD 10712 DOCKET CL-10326

If there is error in Award 10712, it lies only in the payment of two hours' compensation to Claimant Stevenson. He was an extra man, and it is doubtful that he was an "employe affected" as contemplated in Rule 14. Otherwise, the decision is entirely correct and proper.

The Carrier Members voted for the adoption of the Award in the knowledge that on the main issues it is sound. While we question the applicability of Rule 14 to Claimant Stevenson, we believe that adoption of the decision was preferable to further delay in adjudicating the case.

The claim had no merit, and the dissent simply reflects a misunderstanding, real or feigned, on the part of the dissenter, as to the principles involved.

/s/ O. B. Sayers
O. B. Sayers

/s/ G. L. Naylor
G. L. Naylor

/s/ R. E. Black
R. E. Black

/s/ R. A. De Rossett
R. A. De Rossett

/s/ W. F. Euker
W. F. Euker