

Award No. 10771

Docket No. CL-10184

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, Referee

PARTIES TO DISPUTE:

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

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

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

1. Carrier violated the rules of the Clerks' Agreement in filling Position No. 433 at Bensenville Yard Office on February 18 and 19, 1957.
2. Carrier shall compensate Employee S. Wroblewski for eight (8) hours at the rate of time and one-half for each date the violation occurred.
3. Carrier shall compensate Employee T. C. Perry the difference between straight time and the penalty rate of time and one-half for each date the violation occurred.

EMPLOYEES' STATEMENT OF FACTS: Employee S. Wroblewski is regularly assigned to First Train Clerk Position No. 433 with hours of 11:00 P. M. to 7:00 A. M. at Bensenville Yard Office. His assigned rest days are Monday and Tuesday and he is relieved on each of those days by Relief Clerk R. Rebesco.

Employee T. C. Perry is regularly assigned to Second Train Clerk Position No. 725 with hours of 11:00 P. M. to 7:00 A. M. at the Bensenville Yard Office. His assigned rest days are Monday and Tuesday and he is relieved on each of those days by Relief Clerk James Whittemore.

On Monday and Tuesday, February 18 and 19, 1957, Relief Clerk R. Rebesco was off due to illness. Sometime between 9:00 A. M. and 9:30 A. M. on Monday, February 18th, Assistant Agent Kunberger called Employee Perry by telephone in order to fill the vacancy on First Train Clerk Position No. 433 from 11:00 P. M. to 7:00 A. M. caused by the absence of Relief Clerk Rebesco.

OPINION OF BOARD: Claimant Wroblewski was regularly assigned to the First Train Clerk Position and Claimant Perry was regularly assigned to the Second Train Clerk Position at the Bensenville Yard Office during the period in dispute. Both were assigned from 11:00 P. M. to 7:00 A. M., Wednesday through Sunday, rest days Monday and Tuesday. Both positions were relieved on these rest days by regular relief employees.

On Claimants' rest days, Monday and Tuesday, February 18 and 19, 1957 Wroblewski's relief (Relief Clerk Rebesco) was absent due to illness. Only the two claimants were qualified to fill the vacancy.

In response to the Carrier's call, Perry agreed to fill the position and he signed a written request for the "temporary vacancy." He was paid at a pro-rata rate. His claim is for the difference between this rate and time and one-half.

Wroblewski claims that he should have been called in place of Perry and paid at the time and one-half rate for 8 hours on each of the two days because the vacancy occurred on his position.

The Carrier states that it called Wroblewski twice to fill the position. Being unable to contact him the Carrier requested Perry to do the work. The Employees state, however, that Wroblewski received no such call although he was at home during all times in question.

The Employees rely on the overtime and service on rest day rules for payment and on Section 4 of Memorandum No. 9 for the procedure to designate the appropriate employee to perform the overtime work. The Carrier relies on The 1954 Memorandum of Agreement in connection with Rule 9(g), concerning new or temporary positions.

Wroblewski's claim for compensation, either at the straight or overtime rate, depends on whether or not he was called to do the work. It is undisputed that he had priority over Perry to fill the vacant position. To decide that Wroblewski was not called requires a finding that the Carrier did not tell the truth, or that it made an insufficient effort to call him. We do not make either of these findings.

There is no showing of motivation or other evidence to suggest that the Carrier deliberately intended to by-pass Wroblewski. There can be no presumption that either party deliberately mis-states the truth. Therefore, Carrier's assertions that the calls were made are accepted as true. In addition, we conclude that the effort made by the Carrier to call Wroblewski was sufficient because Perry was the only other employee qualified to do the work. Since he was on a rest day, the same as Wroblewski, it was important to make an early decision in the matter. The situation is unlike filling a position from the extra-board where a number of employees are qualified and willing to do the work. It is a judgment question.

As to Perry, the substance of the Employees' argument is that he had worked for five consecutive days; therefore, he was entitled to overtime pay for working at the same job for the sixth and seventh days. The Carrier's case hinges on the argument that Perry moved to a new assignment; therefore, making the exception to the overtime rule applicable.

We think the Employees make a stronger case.

Perry did the same work, at the same place, at the same time on his sixth and seventh days as he did on the preceding five. He was not in a different seniority district or group and he was not an extra employee. In fact, he was a regularly assigned employee whose rest days could not be changed without due notice. Since his rest days were not changed and he worked on those days the Employees have made a prima facie case for overtime pay under Rule 33(c).

This rule provides that:

"Service rendered by an employee on his assigned rest day, or days, relieving an employee assigned to such day shall be paid at the rate of the position occupied or his regular rate, whichever is higher, with a minimum of eight (8) hours at the rate of time and one-half."

The Carrier argues, however, that Perry filled a temporary vacancy within the meaning of Rule 9(g), that the procedures in Section 2 of the Memorandum Agreement of 1954 were followed to fill the vacancy, that this constituted moving to a new assignment and, accordingly, that this is an exception to the payment of overtime under Rules 32 (c) and (d).

Assuming that Perry filled a temporary vacancy, as contended by the Carrier, it does not follow that Perry was on a new assignment. Section 2 of the 1954 Memorandum of Agreement, which outlines procedures for filling temporary vacancies under Rule 9(g), applies to eligible employees "after reporting for work on the day of the temporary vacancy." Clearly this implies appointment to work other than what the employee had been scheduled to perform when he reported for work that day. This has the makings of a new assignment. But Perry was called by the Carrier to do precisely the same work he did during his regular assignment. At the point he was called by the Carrier no other employee could have handled the work. Accordingly, rather than take a new assignment, Perry worked overtime on the two days in question.

Even if it could be construed that Perry changed assignments when he filled a temporary vacancy, we do not see how this could operate as an exception to the clear and specific provision in Rule 33(c) that service on rest days shall be compensated at the rate of time and one-half. Awards 9487, 9942 and 9943 among others. The rule is universally accepted that special rules prevail over general rules. Awards 6382, 9487, 9942, 9943 among others. Therefore, Employee Perry's claim should be sustained.

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 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

Items 1 and 3 sustained. Item 2, denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 7th day of September 1962.