Award No. 12805
Docket No. CL-12219

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

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

ILLINOIS CENTRAL RAILROAD COMPANY

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

(a) Carrier violated the Clerks' Agreement at the Freight Agency, Memphis, Tennessee, when on November 18, 1958, it denied Clerk B. B. Jefferson the right to displace a junior employe, withholding him from the position until November 19, 1958.

(b) B. B. Jefferson be compensated a day's pay at the pro rata rate of $19.16 per day for wage loss sustained on November 18, 1958.

EMPLOYES' STATEMENT OF FACTS: Prior to November 18, 1958, Claimant Jefferson held position No. 164 in the Memphis Freight Agency. The hours of the position were 8:30 A.M. to 5:30 P.M. with one hour for lunch.

November 14, 1958, notice was issued by Agent Mueller that position No. 164 would be abolished effective with the completion of the tour of duty on November 17, 1958. See Employes' Exhibit No. 1.

Mr. Jefferson notified Chief Clerk Briggs that he desired to displace a junior employe from position No. 159 effective 8:00 A.M., November 18, 1958. He was not permitted to displace on November 18, but was withheld from the position until 8:00 A.M., November 19. This resulted in a loss of a day's pay by Mr. Jefferson.

November 28, 1958 claim was filed with Agent Mueller. It was declined by him on the premise that Claimant would have had two starting times in a twenty-four hour period which would have necessitated the payment of thirty minutes overtime (8:00 A.M. to 8:30 A.M.). See Employes' Exhibits Nos. 2-A and 2-B.

OPINION OF BOARD: The essential facts are not in dispute.

Claimant was assigned to Position No. 164 with hours from 8:30 A.M. to 5:30 P.M. Monday through Friday. Position No. 164 was abolished effective with the close of tour of duty on November 17, 1958. Claimant exercised his seniority rights and advised Carrier that he desired to displace a junior employe from Position No. 159 effective 8:00 A.M. November 18, 1958. The assigned hours for Position No. 159 was 8:00 A.M. to 5:00 P.M. Monday through Friday. Carrier did not permit Claimant to displace the junior employe on Position No. 159 until 8:00 A.M. on November 19, 1958. The claim is for wage loss of $19.16 for November 18, 1958.

Carrier's position is best stated in a letter dated January 20, 1959, from the Terminal Superintendent to Petitioner's Division Chairman which, in part, says:

> "When investigating this claim find that Mr. Jefferson's former position carried tour of duty from 8:30 A.M. to 5:30 P.M. and was abolished at the completion of the tour of duty, that is, at 5:30 P.M., November 17, 1958, and Mr. Jefferson requested that he be permitted to exercise his seniority on position No. 159, with tour of duty starting at 8:00 A.M., on November 18, 1958, but was not permitted to do so because of conflicting hours of service with the previous day which would have resulted in two (2) starts within 24 hours."

The parties disagree on the definition of "day". Petitioner says that Claimant's day on Position No. 164 ended the calendar day of November 18, 1958, and Carrier says it ended at 8:30 A.M. on November 18, 1958.

The mere fact that Claimant would have been entitled to thirty minutes pay at the time and one-half rate had he been permitted to work on November 18 is of no consequence to this dispute. That in itself does not give Carrier the right to withhold Claimant from service on November 18.

Rule 28 obligates the Carrier to provide regularly assigned employes forty hours of work each week consisting of five days of eight hours each.

Under Rule 18 an employe, whose position has been abolished, may displace a junior employe within ninety days from the date his position was abolished.

Claimant's position was abolished effective 5:30 P.M. on November 17. He immediately requested the right to displace the junior employe on Position No. 159 effective at 8:00 A.M. on November 18. There is nothing in Rule 18, which governs Claimant's seniority and displacement rights, to limit his right to displace the junior employe only beyond the 24 hours after his previous starting time. There is also nothing in Rule 18 which defines the Claimant's "day" as the calendar day nor as the 24 hour period beyond the previous starting time.

Carrier argues that under Rules 28 and 37 (a) an employe's "day" is a 24 hour period commencing with the time the employe commences his work. In support of its position Carrier cites Award 687 and Award No. 10 of Special Board of Adjustment No. 169.

Rule 28 defines a day's work as "eight (8) consecutive hours exclusive of meal period". Rule 37 (a) says that work "in excess of eight (8) hours,

exclusive of meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half". Neither of the Rules are applicable. We are not concerned here with the rate for overtime pay. We are obliged to protect the seniority and displacement rights of the Claimant. The mere fact that he would have been entitled to thirty minutes at the overtime rate had he started work at 8:00 A. M. on November 18 does not affect his right to displace the junior employe at that hour on November 18. Claimant was a regularly assigned employe who was entitled to forty hours of work in five consecutive eight hour days. By refusing Claimant the right to work on November 18, Carrier violated the provisions of Rule 28.

In Award 687 the Organization contended that the word "day" in the overtime rule meant "a twenty-four hour period computed from the starting time of a previous assignment". The Carrier contended that it meant the calendar day. Rule 49 involved in that case is similar to Rule 37 (a) of this Agreement. We sustained the claim and held "that in computing a tour of duty within the meaning of Rule 49, the word should be taken to mean a period of twenty-four hours computed from the beginning of a previous assignment". No seniority displacement right was involved.

The facts in Award No. 10 Special Board of Adjustment No. 169 are quite different from those in this dispute. In the former, the Claimant was a senior extra man who completed work at 4:30 P. M. on one day and asked to fill a temporary vacancy starting at 8:00 A. M. the following day. The Special Board held that Claimant was not available and that Carrier was privileged to use another extra employe who had not received forty hours of work that week.

In Award No. 30 Special Board of Adjustment No. 174, it was held that an employe, who completed the filling of a temporary vacation vacancy, was entitled to return to his regular position even though Carrier was obliged to pay him 3½ hours at the overtime rate.

In Award 12459 Claimant requested the right to displace a junior employe effective at 7:00 A. M. on September 12, 1958. Carrier refused and instead set the effective date of replacement for September 14 because "if the request, as made, was granted it would have been required to pay Claimant overtime rate for September 12." While the claim was sustained primarily because of the violation of Rule 35 (b), the basic principle is the same. There is nothing in Rule 35 (b) which defines "day" as Carrier desires in this dispute. There is also nothing in Rule 35 (b) which gives Carrier the right to refuse Claimant the displacement right effective November 18.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12805, DOCKET CL-12219
(Referee Dolnick)

In their rebuttal the employes frankly admit that claimant was not entitled to displace other employes on the same day that he last worked on the abolished position. This admission debunks the arguments advanced in their initial submission. In an attempt to still justify this claim in spite of their admission, the employes go on in their rebuttal to assert that Claimant's last day on the abolished position ended with the calendar day on which his last service was performed. They state:

> "* * * Claimant did not desire to displace immediately. He only wanted to displace the **next day.** * * * (Emphasis theirs.)
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> * * * * *
>
> Carrier's arguments on pages 4 and 5 that Employes contend that Claimant should have been permitted to displace on a position at 6:00 P. M., thirty minutes after completing his 8:30 A. M. to 5:30 P. M. assignment is ridiculous. **At no time since the Agreement became effective in 1922 has the Organization ever contended that any employe had the right to displace on the same calendar day his position was abolished thereby adding an additional day of work to his work week."** (Emphasis ours.)

Thus we have complete agreement of the parties on the point that the claimant was disqualified from displacing other employes immediately after completing service on his former position, or at any time prior to the end of the last day on which he worked that position; the only point of difference between the parties concerns the ending of that last day, the employes taking the position that claimant's day on his former position ends with the calendar day on which service was last performed, and carrier taking the position that the day ends with the expiration of the 24-hour period that marked the workday of claimant on the abolished position. Carrier has consistently argued that:

> "* * * The Claimant here began work at 8:30 A. M. on November 17, and his twenty-four hour day did not expire until 8:30 A. M. on November 18 * * *"

Stated otherwise, the controlling issue is whether the last "day" charged to claimant on his former position ended 24 hours after it commenced (i.e., on-duty time) or whether it ended 15½ hours after it commenced (end of the calendar day).

In order to fairly appraise the employes' position in this case, it is essential to take note of the fact that the word "day" in the Basic Day and Overtime Rules of the controlling Agreement (first paragraph Rule 28 and Rule 37 (a)) constitutes a 24-hour period commencing with on-duty time. The calendar days have no significance whatever in the application of these rules. The parties are in complete agreement on this point, for they both recognize that claimant's last day on the abolished position, for the purposes of applying the Basic Day and Overtime Rules, did not end until 8:30 A. M. on the following calendar day.

Carrier takes the entirely logical position that the claimant's last day on the abolished position ends at the same time for the purpose of applying the Displacement Rule as it does for the purpose of applying the Overtime and Basic Day Rules. The employes take the inconsistent and completely arbitrary position that claimant's last day on the abolished position ended 24 hours after on-duty time on that position for the purpose of applying the Basic Day and Overtime Rules, but ended eight and one-half hours earlier (with the turn of the calendar day) for the purpose of determining claimant's eligibility and availability in applying the Displacement Rule.

The position thus taken by the employes is contrary to their own reasoning. They say that it would be ridiculous to allow claimant to displace on the same calendar day that he performed service on the abolished position because allowing him to do so would make it possible for him to work an additional day in a work week. By the same token it would be ridiculous to allow claimant to displace on the same day, as that word is used in the Basic Day and Overtime Rules (24-hour period) and thereby add an additional day's work in a single day. (While the claimant in this case would have worked only 30 minutes additional during the day attributable to his former position, he might have had a 4:00 P. M. to 12:00 Midnite position on the former job and might have demanded an 8:00 A. M. to 4:00 P. M. position on the following calendar day under the employes' theory). The result in the case which the employes call ridiculous is precisely the same as the result in the case which they argue for insofar as carrier is concerned; namely, the payment of overtime for eight hours of work that could and should have been performed at the straight time rate of pay by the displaced employe. In both cases the basic intent and purpose of the Overtime Rules is frustrated.

While we see nothing but inconsistency in the employes' position, carrier's position is consistent with all provisions of the agreement. It is consistent with the expressed understanding of what constitutes a day in applying the Basic Day and Overtime Rules; it is consistent with Rule 39 which reserves to carrier the right to determine when overtime will be worked, it is consistent with the intent and purpose of the Overtime Rules, namely, to restrict carrier from working an employe more than eight hours in a 24-hour period; it is consistent with the Seniority Rules for claimant's rights were recognized as soon as he was eligible to displace others; it is consistent with the Guarantee and Absorbing of Overtime Rules for during the interim between the abolishment of Claimant's position and the time that he properly placed himself on his new position he was unassigned. No inconsistency between carrier's position and any rule of the agreement has been demonstrated.

AWARD 12459, Dorsey, is cited as controlling in this case, but that award misses the point here. It is expressly based on provisions in Rule 35 (b) which were applicable to that case but which are admittedly not applicable to this case.

The award that is most significant in this case, for it deals directly with the specific issue with which we are confronted, is Award No. 10 of Special Board of Adjustment No. 169, which denied a claim of this petitioning organization on a basis that is directly in point and should be controlling here, *namely, that an employe who has performed eight hours of service in a day* (24-hour period) is not available for additional service when other employes in the same seniority class and district are available for service at the straight time rate. This result is reached by necessary implication from the intent and purpose of the parties in adopting the Overtime Rules. The award states:

> "The real difference between the parties is whether or not claimant was available for service. He had worked one shift within the twenty-four hour period prior to the starting time of the job for which the claim is made, which would have made it necessary for the carrier to pay him penalty rates of pay for a part of the shift for which he is making claim.
>
> That brings up a much discussed question as to whether or not the Carrier is required to use a man and pay him penalty rates of payment when another employe is available at straight time rates. That goes back to the origin and history of penalty rates of payment. Penalty rate payments have always been argued for by the Organizations as not a right of the employes but as a prohibition against the carriers using men more than the prescribed hours in their assignments. Raney had no right as a right to claim a job that would pay him penalty rates of payment and the Carrier's position in avoiding the payment of penalty rates by using another employe who is entitled to the work has always been protected and that penalty payments should only be paid when the carrier uses a man in excess of the time the agreement provides for their normal use.
>
> In the instant case, under the agreement, this claimant was not available at straight time rates and was, therefore, not available for service under the interpretation of the agreement and the carrier was privileged under the provisions of the agreement to use the man they used instead of using the claimant in this case."

The record establishes that carrier has complied fully with the applicable provisions of the Agreement. This award is palpably wrong in holding otherwise.

G. L. Naylor
W. M. Roberts
R. E. Black
W. F. Euker
R. A. DeRossett

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 12805 (DOCKET CL-12219)

It, of course, is unfortunate that in handling disputes, arguments are made and rebutted which have no relevancy to the basic issue. The basic issue in this dispute is correctly resolved by the Referee in the following language:

"Under Rule 18 an employe, whose position has been abolished, may displace a junior employe **within** ninety days from the date his position was abolished.

Claimant's position was abolished effective 5:30 P. M. on November 17. He immediately requested the right to displace the junior employe on Position No. 159 effective at 8:00 A. M. on November 18. There is nothing in Rule 18, which governs Claimant's seniority and displacement rights, to limit his right to displace the junior employe only beyond the 24 hours after his previous starting time. There is also nothing in Rule 18 which defines the Claimant's 'day' as the calendar day nor as the 24 hour period beyond the previous starting time." (Emphasis ours.)

In other words, an employe whose position is abolished has no further attachment to the abolished position and may, at any time **within** the stated period, displace a junior employe.

The Award is correct and the dissent does not detract one iota from the soundness thereof.

D. E. Watkins
Labor Member
9/9/64