Award No. 13087
Docket No. CL-12890

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5044) that,

(a) The Carrier violated the Agreement when, at Greenville, South Carolina, it allegedly blanked or suspended Group 1 positions assigned to Wyatt Dacus, P. F. Walters and H. M. Ross, Clerks, Greenville, South Carolina, for one day, Monday, September 5, 1960 (holiday).

(b) Claimants Wyatt Dacus, P. F. Walters and H. M. Ross shall now be paid one day each at the time and one-half rates of their respective positions for Monday, September 5, 1960 (holiday), in addition to all other earnings.

EMPLOYES' STATEMENT OF FACTS: At the Yard Office, Greenville, South Carolina, three shifts are worked seven days each week. On the first shift, 7:00 A. M. to 3:00 P. M., there is a Chief Clerk and an outside Clerk; on the second shift, 3:00 P. M. to 11:00 P. M., there is a Desk Clerk and an outside Yard Checker; on the third shift, 11:00 P. M. to 7:00 A. M., there is a Desk Clerk and an outside Checker.

Claimants Wyatt Dacus, P. F. Walters and H. M. Ross are assigned to work "outside" positions, while the Chief Clerk and the two Desk Clerks, one assigned to each of the three shifts as above described, are assigned to work "inside" positions.

The first shift, 7:00 A. M. to 3:00 P. M., "outside Clerk" position has as assigned preponderating duties the following:

"Checking trains and yard tracks, keeping vent and refrigerator records, posting car records and conductors placing slips, and other general office duties." (Employes' Exhibit I.)

The second shift, 3:00 P. M. to 11:00 P. M., "outside Yard Checker" position has as assigned preponderating duties the following:

them, or it may not. If the former alternative is chosen, the penalty is time and one-half pay as provided in Rule 32. Although all regularly assigned clerks have forty-hour work weeks as provided in Rule 25, by the express exception contained in Rule 46 (f) (1) carrier has the right or option to reduce the number of days below five in weeks in which designated holidays occur. In the above mentioned awards, the Third Division has consistently adhered to the standard rule of contract construction that the provisions of a specific rule supersede those of a general rule.

Award 6080 denied the claim of a clerk for a day's pay when his position was blanked on a holiday and another clerk in the same office performed all the work necessary to be done in the office that day. Again, in denial Award 7137, the factual situation is stated in the first paragraph of the Board's opinion to be as follows: "On Thursday, January 1, 1953, a holiday, claimant's position was blanked and other clerical employes performed the necessary work of the position on that day." Finally, and most significant, the very issue here in dispute has been decided on this property in Award 8872, which involved an identical claim of yard clerks at Meridian, Miss., for two holidays in 1955.

The evidence of record does not support the employes' contention that carrier violated the effective agreement by blanking claimants' positions on September 5, 1960, nor does it support the claim for pay. To the contrary, the evidence shows that the positions were properly and justifiably blanked in accordance with the specific terms of Rule 46 (f) (1). For the reasons stated herein, carrier respectfully requests that the claim be denied.

OPINION OF BOARD: We will sustain the claim on the weight of past decisions, but we think this line of decisions tends toward an undesirable result which probably was not intended by those who negotiated the holiday rules.

On Labor Day, 1960, three "outside" Yard Clerks were blanked or laid-off (there is a difference here between the parties but it is not important) because of reduction in business due to the holiday. Three "inside" Yard Clerks performed what outside yard work remained as well as their own work.

Since some (the amount is not indicated) outside work was performed by the inside Yard Clerks, the organization contends the outside clerks should have been called and paid at time and a half rates. The Carrier maintains, that it was permissible to blank the outside jobs on a holiday and for the work to be absorbed by the inside clerks since both groups were Yard Clerks and the job content was similar and in some respects identical.

The Carrier relies primarily on Rule 46 (f) which provides in pertinent part:

> "Nothing herein shall be construed to permit the reduction of days for regularly assigned employes . . . below five (5) per week, except that this number may be reduced in a week in which holidays specified in Rule 32 occur within the five days constituting the work week by the number of such holidays."

The employes rely primarily on Rule 28—Assignment of Overtime—which provides in Section (a):

"(a) When necessary to work overtime before or after assigned hours, the employe occupying the position on which overtime work is necessary will be given preference.

When necessary to work extra time (as distinguished from relief work, regularly assigned or otherwise) on rest days or holidays, the above principle shall apply.

It is not intended that this rule shall require the calling of employes on rest days or holidays to perform less than one hour and thirty minutes work when there are other employes (either non-schedule or schedule supervisory employes or schedule employes of the same or a higher classification in the same group) already on duty in the department who can perform the service."

Each side cites a number of previous awards to support its position.

Chief among the awards relied on by the Carrier are 8872 (Murphy); 10499 (Hall); and 10819 (Moore) involving the same parties.

In Award 8872, relied on most heavily by the Carrier, the claim was denied because the employes who were called to work on a holiday absorbed the work of other employes who were doing identical work. That case is distinguished from this one in that the clerks called here (the inside clerks) performed work regularly done by other clerks (the outside clerks). Implicit in Award 8872 is the conclusion that if there had been a mixing of duties as here) the claim would have been sustained, for the Board said:

"There is no evidence contained in this record to show that any of the called employes performed work which they were not entitled to perform as part of their regular assignment."

In Award 10499, it was found that the clerk called performed his regular work, with the exception that the work regularly done by the Claimant was, as the Carrier contended, well within the one hour and thirty minute exception of Rule 28 (a). In this latter respect, we note that the one hour and thirty minute exception is an affirmative defense to when a regular employe must be called on a holiday. As such, it must be pleaded and supported by the Carrier, neither of which was done by the Carrier in this case.

In Award 10819, the claim was denied for the same reason given in Award 8872, viz. there was no evidence to show that the employes called were not entitled to do the work in dispute "as part of their regular assignment."

The employes rely principally on Awards 7318 (Carter); 8563 (Weston); Award No. 32 of Special Board of Adjustment, No. 174 (Wyckoff); and 12957 (Wolf).

In Award 7318, the claim was sustained when the employe working on a holiday worked outside the hours of his regular assignment and within the regular daily assignment of the Claimant. Decision 2 of the Forty Hour Week Committee was relied on for the conclusion that work on a holiday which is not part of any assignment belongs to the regular employe — authority which is applicable in this case. Pertinent in Award 8563 is the fact that the disputed work consumed only twenty-five minutes, but the claim was sustained

in the interest of protection of job classifications. In that case, however, the one hour and thirty minute exception does not seem to have been applicable—at least it was not discussed by the parties or the Board. It may be argued, therefore, that where, as here, the hour and thirty minute exception does apply, the parties have agreed on a specific standard to determine when a regular employe must be called on a holiday. The fixing of the standard alleviates the inequitable results of Award 8563; at the same time, however, it obligates the Carrier to observe the time requirement strictly.

In Award No. 32 of Special Board of Adjustment, No. 174 (1961) involving inside and outside work by clerks, (much like this case) the claim was sustained because it was not the practice for the inside men to do outside work and the bulletins for the inside clerks did not include the performance of outside work.

Finally, in Award 12957 the claim of a bill clerk for holiday pay was sustained where other clerks absorbed this work on the grounds that, "It (the work) may not be performed by any other employe unless the work is normally part of that employe's position."

Based on this precedent, therefore, we conclude that the Carrier should have called the outside clerks, as claimed.

However, it is frightening to speculate where this line of decisions (to which we reluctantly add our own) will take the industry. If there is no further Agreement between the parties, this trend will doubtlessly continue and the railroads may very well be caught in an ever tightening web of deciding to whom they should assign work. The task is already difficult, as evidenced by the number of claims filed against the Carrier on jurisdictional disputes between crafts. If there is added the problem of selecting the regular employe as between "inside" and "outside" Yard Clerks, or by examining the "preponderating duties" of each employe in the same classification to see if they are identical, it is clear how the web may be closed. Certainly is this true of holiday work.

Rule 46 (f) obviously was intended to give relief to the Carriers when going to the 40 hour week. The need to apply associated rules, such as the overtime rule, has all but negated this relief.

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 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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1964.

CARRIER MEMBERS' DISSENT TO AWARD 13087, DOCKET CL-12890

Referee Robert J. Ables

This Award 13087 misconstrues provisions of the effective agreement which have been in existence over a period of many years. It finds an artificial distinction between this case and Award 8872 which denied an identical claim between these parties, and reluctantly follows a "line of decisions" involving other carriers but points out that this "line of decisions" tends to a disturbing result not intended by those who negotiated the holiday and 40-hour week rules. It overlooks the fact that the rules and established practices on the individual carriers relating to (1) blanking positions, (2) reducing the number of regular clerks on holidays, (3) performance of necessary holiday work on a call basis, and (4) work on unassigned days are by no means the same.

Whether or not the actions of the carrier in this dispute violated any of the Clerks' agreements in effect on other carriers was not the issue before the Board. The question for determination was whether or not the claim is supported by the applicable rules and provisions of the effective agreement between the parties to this dispute.

Rule 46 (f) was in effect for several decades prior to establishment of the 40-hour week of 1949. Also the 1 hour 30 minute provision in Rule 28(a) was first negotiated in 1938 by the parties themselves as part of the revised agreement effective October 1, 1938. It was purposely designed by the parties to mean only one thing; that the carrier may utilize the 1 hour, 30 minute provision in lieu of calling a regular clerk on his rest day or a designated holiday for a "minimum call" of two hours at the time and one-half rate for two hours work or less, as specified in Call Rule 33(c) reading:

> "(c) Employes assigned, notified, or called to work **for less than eight (8) hours** on their assigned rest day or days and/or the holidays specified in Rule 32 **will be paid for a minimum of two (2) hours at time and one-half rate for two (2) hours or less,** additional time calculated on minute basis at same rate." (Emphasis ours.)

When the 40-hour week was established, the parties expressly reformed their existing agreement so that the 1 hour, 30 minute provision would continue to mean the same and only the same as it had in the past. This was accomplished by making it a part of revised Rule 28(a) which is applicable to regular clerks who are used on a call basis for less than 8 hours on their rest days or holidays, thus separating it from "Work on Unassigned Days" in new Rule 28(b) which is applicable to extra clerks who are used and paid for a minimum of 8 hours at straight time on unassigned days other than holidays, and to regular clerks who are used for 8 hours at time and one-half on their rest days or holidays. Except when filling temporary vacancies in regular assignments, extra clerks are not used for less than 8 hours on a call basis under Rules 28(a) and 33(c), or for 8 hours of holiday work under Rule 28(b). (See Forty Hour Week Committee's Decision 37—CL/Sou.Ry. System, and Award 7240, same parties.)

Thus under Rule 28(b) an extra clerk may be used for 8 hours on an unassigned day, consisting for example of five hours of work assigned to Clerk A and three hours of work assigned to Clerk B. Neither A nor B has any claim account not being used on their rest day. By the same token, when C's position is blanked on a holiday as provided in Rule 46(f), and regular

Clerks A and B are retained on their higher-rated positions to perform the necessary holiday work during their 8-hour tours of duty, the 1 hour, 30 minute provision is not applicable and C has no valid claim. There is no "odd-lot" or extra time of less than 8 hours necessary to be performed on a call basis under Rule 28(a) in either situation.

Award 13087 erroneously construes the 1 hour, 30 minute provision to be applicable to situations covered by Rule 28(b) and hence a limitation on carrier's right to blank positions on holidays under Rule 46(f) and to retain the number of higher-rated positions needed to protect necessary holiday work under Rule 28(b). There has never been any such limitation or yardstick, between these parties, either prior to the 40-hour week or subsequent thereto. To so hold at this late date, and sustain the claim on the ground that carrier did not plead the 1 hour, 30 minute provision as an affirmative defense — when in fact it was never argued by the organization or the carrier during the handling on the property, or in their submissions to the Board, or in the panel argument before the Referee — is patently wrong.

Award 8872 denied an identical claim for 8 hours at Meridian yard office in 1955. The printed award shows that at no time during the entire handling of that dispute did either party argue the 1 hour, 30 minute provision in support of their respective positions.

Award 10499 denied a holiday claim at Rome freight office. The claim was not for 8 hours alleging carrier had no right to blank positions. It was a claim for 4 hours, 45 minutes on a call basis alleging claimant should have been used for that amount of time instead of the clerk actually used. The printed award shows that the Division Chairman identified all items of work in dispute, and the time element for each. The case fell squarely under Rule 28(a) for less than 8 hours on a call basis.

Award 10819 involved a claim at Atlanta freight agency for 8 hours under Rule 28(b) on a designated holiday. Neither party argued the 1 hour, 30 minute provision in their respective positions. The Board followed Award 8872.

The opinion states that the employes relied primarily on Rule 28, then quotes only Section (a). The printed award will show that the organization quoted, among other rules, Rule 28. But the organization and the Labor Member emphasized the third paragraph of Section (b), not Section (a).

Instead of following Award 8872 as controlling precedent, the majority agrees with the organization's belated contention that there is a distinction between this 1960 claim and the 1955 claim. Actually, the 1960 claim was almost an exact duplicate. The claim as presented to carrier by the Division Chairman's letter dated September 11, 1960 (Employes' Exhibit A) reads:

> "On September 5th, at Greenville Yard office you cut off Mr. Wyatt Dacus, Mr. P. F. Walters and Mr. H. M. Ross who are assigned on Monday as a regular assigned day on seven day per week positions.
>
> In addition to receiving Holiday pay for this Labor Day September 5th, these three employes were supposed to work and therefore this letter is claim for an additional eight hours pay at time and one half for the three employes referred to above for Monday, September 5 (Legal Holiday).

To blank a seven day position on a holiday, would be to violate the provisions, intent and purposes of the Seven Day Position Rule. The rule means that a position is to be filled seven (7) days per week. The Holiday-Rule 32, provides just how the employe who works on the holiday will be paid, it does not give the carrier the right to blank a seven day position on a holiday.

So therefore this is a violation of Rule 25 of our agreement and I respectfully request that you allow the above claim on the next period payroll."

The claim did not even mention Rule 28. The claim did not contend that carrier retained the wrong yard clerks on the holiday. Not a single item or amount of disputed work was identified, or any reference to "inside" or "outside" work. It was nothing but another claim alleging that the carrier had no right to blank positions at yard offices on designated holidays. The printed award will show that carrier defended against the claim as presented, and also dealt with the "inside" and "outside" argument. That argument was injected by the organization as a complete afterthought, and with no supporting proof that it had any bearing on the long-established and accepted procedure for reducing the number of regularly assigned clerks (blanking positions) on holidays at yard offices on carrier's system. Despite carrier's denial, the organization argued before the Board that in applying Rule 46(f) at yard offices, the reductions are made separately as between "inside clerks" and separately as between "outside clerks," citing denial Award 8872 as proof. (Note the organization's admission that positions are blanked at yard offices on holidays.) As stated, there are numerous yard offices (large and small) on carrier's lines. The mere fact that the reduction at Meridian happened to be between inside clerks (denial Award 8872) is no proof of limitation on reductions made on holidays at other yard offices. Moreover, the vacancy bulletins at Greenville yard office show that claimants themselves were assigned to perform both inside and outside yard clerical work, and that their five assigned work days per week were "subject to reduction by the number of stated holidays in any week."

R. A. DeRossett
W. F. Euker
C. H. Manoogian
G. L. Naylor
W. M. Roberts

LABOR MEMBERS' ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 13087, DOCKET CL-12890

For the most part the Dissentor merely reiterates that which was argued in panel discussion and again points to what are asserted to be controlling Awards.

Award 13087 clearly shows that, while the Awards relied on by Carrier were between the same parties, they were distinguishable on the facts. The Referee quite properly set forth the distinguishing facts and rendered Award 13087 based on the facts of the case before him.

Except for the one and one-half (1-½) hour exception written into the Agreement here involved, the Rules governing work on unassigned days and holidays can quite properly be called standard. Regardless of any alleged past practice, the fact that the claim was before the Referee indicates the parties were in dispute as to the meaning and intent of the Rules; and that dispute was resolved by this well reasoned decision, which merely leaves the Carrier with only what is written in the Agreement Rules.

Insofar as work on unassigned days and holidays is concerned, this Board has consistently held that a position is blanked only when no one works it; and, if work is required to be performed on a holiday, the regular employe is to be used.

As between the parties here involved under the Agreement arrived at through the process of collective bargaining, the standard application is called for excepting the one and one-half (1½)-hour provision which saves Carrier from calling the regular employe for less than 1½ hours of work normally and regularly performed on his position.

As for Award 8563 and the Referee's remarks as to "the one hour and thirty minute exception", the answer is that in that Agreement there is no exception as there is here.

In Award 13087 the Referee correctly recognized the distinction as well as the exception and rendered the proper decision.

The Dissent does not detract one iota from the soundness of the Award.

/s/ D. E. Watkins
Labor Member
1-4-65