

Award No. 13158

Docket No. CL-13515

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5187) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-1 (e), and 4-C-1, when on June 7, 1957, it removed Clerk T. E. Sikes from his regular clerical position Symbol No. B-45-G, at Transfer Yard, Indianapolis, Indiana, Southwestern Region, and used him to fill a vacancy on position Symbol No. B-29-G, at Transfer Yard in order to avoid the payment of overtime. The tour of duty of position B-29-G is 7:30 A.M. to 3:30 P.M., while the tour of position B-45-G is 9:00 A.M. to 5:00 P.M.

(b) The Claimant, J. R. Butts, who is senior to Clerk Sikes, should be allowed eight hours' pay, at the punitive rate of pay, for June 7, 1957. [Docket 328.]

EMPLOYES' 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.

On June 7, 1957, Claimant J. R. Butts was the incumbent of regular clerical position Symbol No. B-86-G, tour of duty 10:30 P.M. to 6:30 A.M., rest days Saturday and Sunday. He has a seniority date of December 4, 1951,

OPINION OF BOARD: There is considerable discussion in this case as to the effect of holding this claim in abeyance pending the outcome of another claim which had been processed to this Board. That claim resulted in Award 10109, which sustained the Organization's position in that case. The language which was used in making arrangements to hold this claim in abeyance, is as follows: "We are agreeable to holding the above docket in abeyance pending decision of the Board for the claim in Docket 94 after which further consideration will be given the instant case." It is our opinion that this letter from the Manager, Labor Relations to the General Chairman, did not in any way bind the Carrier to follow the decision reached in Award 10109. As a practical matter, the language amounted to nothing more than a promise to review the claim, after Award 10109 had been issued.

In the instant claim, it is agreed that on the date involved, Claimant Butts was the incumbent of clerical position Symbol No. B-86-G; 10:30 P.M. to 6:30 A.M. and that on June 7, 1957, position B-29-G, 7:30 A.M. to 3:30 P.M. was vacant. Further, that there were no available extra clerks qualified to fill position B-29-G. It is also agreed that Clerk T. E. Sikes, incumbent of position B-45-G, 9:00 A.M. to 5:00 P.M., was removed from his regular position and used to fill the vacancy on position B-29-G. Extra Clerk T. Popplewell was used to fill the vacancy created on position B-45-G, by the removal of Sikes. Popplewell was qualified to fill position B-45-G, but not position B-29-G.

The Carrier is permitted to remove a regular employe from his regular position and assign him temporarily to fill a vacancy of 30 days or less duration, by the terms of the Agreement, if he is the senior, qualified, available employe who has made a request to work a vacancy, and provided there is no Agreement under 5-C-1 which requires the use of an extra employe.

In this case it is agreed that Sikes is junior to Butts. It is also shown that Sikes made no request to fill the vacant position. And that, even though there was an Agreement which required the use of an extra clerk to fill the vacancy, there were no qualified extra clerks available.

Therefore it seems apparent that it was error for the Carrier to remove Sikes from his regular position, B-45-G, and assign him temporarily to position B-29-G. It is also interesting to note that Sikes' regular position overlapped his temporary assignment for six and one-half hours.

It is admitted that the use of Sikes was predicated upon the theory that he would receive compensation at the straight time rate. On the other hand, Butts, who would have just completed a tour of duty, would have to be paid at the overtime rate. We should note that there were no extra clerks available, and there were no regular clerks available—except those who would have received the overtime rate. The Organization alleges that the use of Sikes was merely to prevent the payment of overtime.

The Carrier says that Rule 2-A-1 (e) which says in part "... provided this will not entail additional expense to the Company," means that the Carrier will not have to comply, if the compliance would include the payment of overtime. We are not persuaded that this rule has that interpretation.

The Organization further argues that the use of Sikes was in effect, "a suspension of work during regular hours to absorb overtime," in violation of Rule 4-C-1. The awards on this point indicate that such deprivation may apply to any other employe, i.e. the one whose work is suspended does not

have to be the one who is deprived of the overtime. Therefore, in this case, the net effect of assigning Sikes, was to deprive Butts of his overtime pay for this period.

There is some question raised as to the proper rate of compensation for this violation. Carrier says that if such violation is found, the compensation should be at the straight time rate. The Organization says it should be punitive.

We hold that since Butts would have received the overtime rate, if he had been properly called, he should be awarded eight hours' pay at the overtime rate for this claim.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December, 1964.

DISSENT TO AWARD 13158, DOCKET CL-13515

Rule 2-A-1 (e), one of the rules alleged to have been violated, reads as follows:

"(e) Positions or vacancies of thirty days or less duration may be filled without bulletining. The senior qualified available employee requesting such position or vacancy, pending assignment of a successful applicant, will be assigned, except where agreement under Rule 5-C-1 requires the use of extra employee, provided this will not entail additional expense to the Company."

Had Claimant been used it would have been necessary for the Company to pay the punitive rate of time and one-half instead of the pro rata rate of

pay, since Claimant's use would have entailed a second tour of duty within a 24-hour period.

The majority states:

"The Carrier says that Rule 2-A-1 (e) which says in part ' . . . provided this will not entail additional expense to the Company,' means that the Carrier will not have to comply, if the compliance would include the payment of overtime. We are not persuaded that this rule has that interpretation."

The rule makes no provision for the exclusion of overtime as an item of additional expense. It is all inclusive without regard to reason for additional expense. The statement of the majority is tantamount to writing a new rule—something which is without the power of this Board to do.

For this, and other reasons, the award is erroneous and we dissent.

G. C. White
D. S. Dugan
R. E. Black
P. C. Carter
T. F. Strunck