

Award No. 13365
Docket No. CL-13766

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5274) that:

(1) The Carrier violated the Clerks' current Agreement at Pine Bluff, Arkansas, on July 30, 1961, when it failed to use the proper employe for performing necessary work on the Rate Clerk position in the Agent's office.

(2) Mr. W. C. Owens be compensated for eight hours at the time and one-half rate of Rate Clerk rate of pay for Sunday, July 30, 1961.

EMPLOYEES' STATEMENT OF FACTS: Mr. Owens is regularly assigned to position of Bill Clerk in the Agent's Office at Pine Bluff, working 10:00 A.M. to 7:00 P.M., Monday through Friday. He worked the position of Rate Clerk in the Agent's Office July 26, 27 and 28, 1961, and prior thereto he had worked the Rate Clerk position and was qualified to perform the duties of such position. Mr. Owens was available on Sunday, July 30, 1961, to perform the required work on the Rate Clerk position, but Carrier used a junior employe instead of Mr. Owens. Claimant Owens has a Group 1 seniority date of September 11, 1942.

Carrier used junior employe, Mr. C. B. Rice, with Group 1 seniority date of March 20, 1951, to work the position of Rate Clerk on July 30, 1961. Mr. Rice is regularly assigned to Relief Clerk position at Pine Bluff, working Saturday as Rate Clerk, 9:15 A.M. to 6:15 P.M., Sunday as Check Clerk, 1:00 P.M. to 9:30 P.M., Monday and Tuesday as Foreman at Transfer Shed, 12:30 P.M. to 9:30 P.M., and Wednesday as Check Clerk, 1:00 P.M. to 9:30 P.M. His off days are Thursday and Friday. The Check Clerk position regularly relieved by Mr. C. B. Rice was blanked on Sunday, July 30, 1961.

Neither Mr. M. M. Laws, Jr., Assistant Chief Clerk, nor Mr. B. M. Johnson, who is regularly assigned as a Rate Clerk, was available for the Rate

In conclusion, the Carrier respectfully submits that the facts show plainly there is no basis for the claim under the existing rules and that the claim should be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier needed someone to work the position of Chief Clerk. The employee who usually filled the position was unavailable. There were no extra unassigned employees available. A rate clerk was taken from his regular assignment and used. The rate clerk's regular position was blanked, consequently, he was paid straight time. The Claimant was senior to the rate clerk who was used. Petitioner contends that Claimant should have been used at time and one-half rate.

We find no rule of the Agreement which requires the Carrier to assign the work to the Claimant. Certainly 32-8 is not applicable for the Claimant is not an extra or unassigned employee.

All other matters being equal, the work should be assigned to the senior employee. In this dispute however the man who performed the work could do so at straight time. Therefore all other matters were not equal. This Board held in Award 5331 that:

"Where the Carrier can get the work done at straight time rates without violating . . . the Agreement, it is within its province to do so."

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1965.

LABOR MEMBERS DISSENT TO AWARD 13365, DOCKET CL-13766

The purpose of my dissent here is so that Carriers will look closely at the Agreement before seizing upon the rather loose language of this Opinion

and proceeding to call employees without regard to their seniority rights when, as here, work is required to be performed on a day not a part of any assignment.

Rule 32-8 most certainly covers who shall perform such work. Contrary to the Opinion, there was no vacancy to be filled. The position of Assistant Chief Clerk is only assigned Monday through Friday of each week. The "billing work" here involved arose on a Sunday.

While it is true that work which the Chief Clerk normally performs during his regular assignment, Monday through Friday, was found to be necessary on Sunday, July 30, 1961, it does not follow that because Claimant was not an "extra or unassigned" employee Rule 32-8 did not apply. There were no extra or unassigned employees and "the regular employee", i.e., the Asst. Chief Clerk, was unavailable. Therefore, Carrier was forced to call upon others in seniority order in order to have this "work arising on a day not a part of any assignment" performed.

In so doing they bypassed Claimant, a senior employee, and chose instead to have a Check Clerk (not Rate Clerk) suspend work on his regular assignment of 1:00 P. M. to 9:30 P. M. and perform the work of billing outbound carload freight from 9:00 A. M. to 6:00 P. M. His Check Clerk position was "blanked".

In the handling of this claim Employees did not specifically assert a violation of Rule 32-5 which reads:

"Employees will not be required to suspend work during regular hours to absorb overtime."

However, in view of that Rule, and in the face of the many Awards of this Board interpreting it and similar rules, it is clear that the case at hand did not meet the "test" set out in the quoted portion of Award 5331 holding that:

"Where the Carrier can get the work done at straight time rates without violating . . . the Agreement, it is within its province to do so." (Emphasis ours.)

The point is that it was not within Carrier's province to act as it here did, for to do so violated Rule 32-5 of the Agreement. Such language as is used in the Opinion might tend to lead Carrier into believing that it might, with impunity, juggle its forces by suspending employees from their regular assignments and causing them to perform work which otherwise accrued to other employees as overtime work, whether because of their seniority right to it or because it attached to or arose from their own positions. There is a long line of Awards of this Board which hold that Carrier may not do so.

This dissent, therefore, is in the nature of a caveat, for the Opinion is not as broad and authoritative as the language thereof might be taken to imply.

D. E. Watkins

Labor Member

3-2-65

**CARRIER MEMBERS' ANSWER TO
LABOR MEMBER'S DISSENT TO AWARD 13365 (MOORE),
DOCKET CL-13766**

The Dissentor admits that "there were no extra or unassigned employes and 'the regular employe'" as that term is used in the Unassigned Day Rule "was unavailable", but then erroneously concludes "Carrier was forced to call upon others in seniority order" to have this work performed.

The facts show the provisions of the "Unassigned Day Rule" were exhausted. Carrier thereupon exercised a prerogative which it retained when the contract was negotiated—it assigned an employe, who was otherwise scheduled to work that day—to perform the work at the straight time rate and in doing so, it refrained from using the Claimant, off observing his rest day, as was the actual and expressed intent of the negotiating parties to the Forty Hour Week Agreement.

The Dissentor makes the further erroneous conclusion that the Absorbing Overtime Rule—Rule 32-5—somehow prohibited the Carrier's action here; thus, the principle enunciated in Award 5331 would not be applicable. We would suggest that not only did the Organization conclude Rule 32-5 was not applicable as evidenced by their failure to argue the point, but their conclusion in this regard is a clear repudiation of the Dissentor's opinion that the Rule was, in fact, violated.

For the reasons stated above, the award is affirmed.

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