

Award No. 14898
Docket No. CL-14266

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5397) that:

CASE No. 1

Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Clerks' Rules Agreement at Savanna, Illinois, when it permitted Employee J. Everhart to return to his regularly assigned position on the rest days of the temporary vacancy to which he was assigned.

2. Carrier shall be required to pay Employee J. Everhart for an additional four (4) hours at the pro rata rate of Yard Clerk Position No. 2684 for Sunday, June 17, 1962, and an additional four (4) hours at the pro rata rate of Yard Clerk Position No. 2685 for Monday, June 18, 1962.

CASE No. 2

1. Carrier violated the Clerks' Agreement at Savanna, Illinois, when it permitted employees to return to their regularly assigned positions or move to other temporary vacancies on the rest days of positions to which they were temporarily assigned.

2. Carrier shall be required to compensate Employee R. Keehner for an additional four (4) hours at the pro rata rate of Messenger Position No. 2698 for Friday, June 1, 1962.

3. Carrier shall be required to compensate furloughed Employee R. Swift for eight (8) hours at the penalty rate of Yard Clerk Position No. 2695 for Wednesday, May 30, 1962. (Memorial Day.)

CASE No. 3

1. Carrier violated the Clerks' Agreement at Savanna, Illinois when it permitted Employee M. Podolski to return to his regular posi-

tion on the rest days of the temporary vacancy to which he was assigned.

2. Carrier shall be required to compensate Employee M. Podolski for an additional four (4) hours at the pro rata rate of Relief Position No. 18 for July 11, 1962.

CASE No. 4

1. Carrier violated the Clerks' Agreement at Savanna, Illinois when it permitted Employee K. Farrar to return to his regularly assigned position on the rest days of the position to which, in accordance with his request, he was temporarily assigned.

2. Carrier shall be required to compensate Employee K. Farrar an additional four (4) hours at the pro rata yard clerk rate for Saturday, June 30, and Sunday, July 1, 1962.

CASE No. 5

1. Carrier violated the Clerks' Agreement at Savanna, Illinois when it permitted Employee M. Podolski to return to his regularly assigned position on the rest days of the position to which he was temporarily assigned.

2. Carrier shall be required to compensate Employee M. Podolski for an additional four (4) hours at the pro rata rate of Yard Clerk Position No. 2695 for Tuesday, June 5, and Wednesday, June 6, 1962.

3. Carrier shall be required to compensate furloughed Employee R. Swift for eight (8) hours at the straight time rate of Yard Clerk Position No. 2695 for Tuesday, June 5, 1962, and furloughed Employee L. P. Ferris for eight (8) hours at the straight time rate of Yard Clerk Position No. 2695 for Wednesday, June 6, 1962.

CASE No. 6

1. Carrier violated the Clerks' Agreement at Savanna, Illinois when it permitted Employee R. Nehrkorn to return to his regularly assigned position on the rest day of the position which he requested and to which he had been assigned temporarily.

2. Carrier shall be required to compensate Employee R. Nehrkorn for an additional four (4) hours at the pro rata rate of Yard Clerk Position No. 2696 for Sunday, July 1, 1962.

3. Carrier shall be required to compensate Employee K. Eirhart for eight (8) hours at the pro rata rate of Yard Clerk Position No. 2696 for Sunday, July 1, 1962.

CASE No. 7

1. Carrier violated the Clerks' Agreement at Savanna, Illinois when it permitted furloughed Employee M. Cravatta to return to the furloughed list on the rest days of the temporary vacancy for which he was recalled and assigned to.

2. Carrier shall be required to compensate Employee M. Cravatta for an additional four (4) hours at the pro rata rate of Yard Clerk Position No. 2692 for Tuesday, July 3, 1962.

3. Carrier shall be required to compensate furloughed Employee L. P. Ferris for eight (8) hours at the pro rata rate of Yard Clerk Position No. 2692 for Tuesday, July 3, 1962.

EMPLOYEES' STATEMENT OF FACTS:

CASE No. 1

Employee K. Arneson is the regularly assigned occupant of Messenger Position No. 2698. Position No. 2698 is assigned from 11:45 P. M. to 7:45 A. M. Wednesday through Sunday with Monday and Tuesday rest days.

Employee F. S. Cimino is the regularly assigned occupant of Yard Clerk Position No. 2694. Position No. 2694 is assigned from 7:45 A. M. to 3:45 P. M., Tuesday through Saturday with Sunday and Monday rest days.

Employee J. Everhart is the regularly assigned occupant of Relief Position No. 4. Relief Position No. 4 is assigned Saturday through Wednesday with Thursday and Friday rest days. Relief Position No. 4 relieves Yard Clerk Position No. 2684 from 7:45 A. M. to 3:45 P. M. on Saturday and Sunday; Yard Clerk Position No. 2685 from 7:45 A. M. to 3:45 P. M. on Monday and Position No. 2700 from 7:45 A. M. to 3:45 P. M. on Tuesday and Wednesday.

Employee K. Arneson, regularly assigned to Position No. 2698, was assigned 10 days' vacation beginning Wednesday, June 6, 1962. His vacation period was not included within a regular vacation relief assignment.

Employee F. S. Cimino, the regular occupant of Yard Clerk Position No. 2694, requested the temporary vacation vacancy on Position No. 2698 and was assigned thereto on June 6, 1962.

Employee J. Everhart, regular occupant of Relief Position No. 4, requested the temporary vacancy on Employee Cimino's Yard Clerk Position No. 2694 and was assigned to that position on Wednesday, June 6.

Employee F. S. Cimino worked Position No. 2698 June 6th through June 17th. He observed the Monday and Tuesday, June 11 and 12, and the Monday and Tuesday, June 18 and 19, rest days of Position No. 2698 and returned to his regular Position No. 2694 on Wednesday, June 29.

Employee J. Everhart worked Position No. 2694 June 6 through 16. He observed the Sunday and Monday, June 10 and 11, rest days of Position No. 2694 but did not observe the Sunday and Monday, June 17 and 18, rest days thereof. He was permitted to return to his regularly assigned relief position on those rest days, displacing Employee M. Podolski who had requested and been assigned to fill the temporary vacancy on Relief Position No. 4, thereby working 7 consecutive days. Employee Podolski returned to his regularly assigned relief position, No. 18, displacing furloughed employee R. Swift who had been assigned from the furloughed list to fill the vacancy on Relief Position No. 18.

Employee J. Everhart was compensated at the straight time rate of pay for June 17 and 18.

There is attached hereto as Carrier's Exhibit G copy of letter written by Mr. Amour to Mr. Gilligan under date of November 30, 1962.

(Exhibits not reproduced.)

OPINION OF BOARD: The basic issue in each of the seven claims is whether an employe who fills a temporary vacancy, and has worked five consecutive days of that position's work week, may, at his request, return to his regularly assigned position or move to another temporary vacancy and work the days which were the rest days of the first temporary vacancy at the straight time rate.

Carrier relies heavily on Award 11446. That Award says:

"The question before this Board is whether Coleman was obliged to observe the two rest days of Position No. 12 which were Sunday and Monday, June 29 and 30. Employes contend that the temporary vacancy of Position No. 12 included the two rest days and that Coleman was obliged to observe them. Carrier contends that Coleman had the right to return to his Position No. 3 on those days."

* * * * *

"Claimant had no tenure to that position. While it may have been selfish for Coleman to request work on his position after completing the second of five work days on Position No. 12, we find nothing in the Rule prohibiting him from requesting the right to work those two days. Rule 9(h) permits him to give up his temporary assignment at any time . . ."

"Accepting Petitioner's argument that Coleman's assignment to Position No. 12 included rest days of that position, and since June 29 and 30 were rest days of that position, Coleman was within his rights to give up the vacancy which included those days."

But no claim for overtime was involved in Award 11446. The Board specifically excluded that issue and said:

"We are not here concerned with overtime pay. No claim is before us on behalf of Coleman, and we are not permitted to consider whether or not Coleman was properly paid for work on June 29 and 30. We are only concerned with the claim of J. F. Damerval, a furloughed employe, who was recalled to temporarily fill the vacancy on Position No. 3."

Petitioner now contends that the "Carrier violated the Agreement in each of the cases presented herein when it permitted the employes to return to their regularly assigned positions, move to another temporary vacancy or return to the furloughed list, as the case may be, on the rest days of the position to which they were temporarily assigned and had filled on all five days of its work week." Specifically, Petitioner says that Carrier violated Rules 26, 27, 32 and 33 of said Agreement.

Rule 26 establishes eight (8) consecutive hours, exclusive of the meal period, as a day's work. It is not applicable to the instant claims. Rule 27 is also not directly applicable. It only establishes the forty (40) hour work week,

consisting of five (5) days of eight (8) hours each, with two (2) consecutive days off in seven (7). Rule 32 (b) provides for overtime pay after eight (8) hours in any day and paragraph (c) provides for overtime pay after forty (40) hours in any work week "except where such work is performed by an employee due to moving from one assignment to another or to or from an extra or furloughed list . . ." (Emphasis ours.) Similarly, paragraph (d) of Rule 32 provides for overtime pay for work on the sixth and seventh days of the work week "except where such work is performed by an employee due to moving from one assignment to another or to or from an extra or furloughed list . . ." (Emphasis ours.) Rule 33 states how an employee shall be paid when he works on his assigned rest days. This Rule is not applicable to the claims under consideration.

An employee who voluntarily requests and accepts a position to which his seniority entitles him is excepted from the overtime provisions of Rule 32 (c) and (d). Such employee, assigned to a temporary vacancy, has the right under Rule 9 (h) to transfer back to his regular position and under Rule 9 (g) to transfer to another temporary position. Carrier is obligated to make such a requested assignment within the terms and provisions of that Rule. There is a clear distinction between an assignment made by the Carrier and one which an employee requests under the seniority provisions of the Agreement. In Award 13234 we said:

"The distinction between 'recognition of an employee's seniority rights by a Carrier' in directing a working force and 'the exercise of seniority rights by an employee' is whether or not an employee accepts an assignment by Carrier on his own volition or by his own choice or whether he does not."

This principle is pertinent to the application of the overtime provisions in Rule 32. It applies to those Claimants who voluntarily, at their own volition or by their own choice, accepted positions to which their seniority entitled them and thus worked on the days which, except for their voluntary choice, had been their rest days on the positions which they held prior to such voluntary transfer. They are not entitled to overtime pay for work on those days.

The employees whom such Claimants displaced likewise have no claim for overtime pay because Rule 9 (h) specifically provides that all employees who are displaced by an employee returning to his former position or displaced under Rule 9 (g) by a senior employee exercise their seniority rights in accordance with the contract terms.

All of the Claimants in each of the seven cases, and on the dates contained in the claims, moved either "from one assignment to another or to or from an extra or furloughed list" as provided for in Rule 32. They are excepted from the overtime provisions contained in that Rule.

Since the claims are denied on the merits, there is no need to resolve the procedural issues raised by the Carrier.

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 Carrier did not violate the Agreement.

AWARD

All claims as set out in Cases 1 to 7 inclusive are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1966.