NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22945
THIRD DIVISION Docket Number CL-22617

Richard R. Rasher, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Atchison, Topeka and Santa Fe Railway company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8614) that:

(a) Carrier violated the intent and provisions of the current Clerks' Agreement by failing and/or refusing to properly compensate Mr. P. D. Gearhart at the higher rate of his regularly assigned position for service performed on his assigned rest days.

(b) Carrier shall now pay Mr. P. D. Gearhart $1.9131 for each day, May 4, 5 and 12, 1977, which represents time and one-half of the difference in pay of his regular assigned rate of $53.8905 and the rate of $52.6151 that Carrier paid for these dates.

(c) Upon expiration of 60 days from the date of original submission, Carrier shall also pay 10% per annum interest on the amounts claimed.

OPINION OF BOARD: Claimant has a seniority date of May 4, 1960, and at the time of the instant claim was regularly assigned to Control Clerk Position No. 6097 in the Station Department at Pueblo, Colorado. He was assigned hours 12:00 midnight to 8:00 a.m.; rest days Wednesday and Thursday; rate of pay $53.8905 per day.

On April 17, 1977 a new computer format was established by the Colorado and Southern Railway Company, referred to as the BN Compass System. Additional work was required to integrate the BN System into the Carrier's operations. This work was assigned to the Car Clerk Positions in the Pueblo Yard Office. The Car Clerk position was lower rated than the Claimant's position as Control Clerk, the rate of compensation being $52.6151 per day. Claimant was called under Rule 14-D(2), Filling of Short Vacancies, to work on eight hour shifts on his rest days, May 4, 5, and 12, 1977 from 12:00 midnight to 8:00 a.m. Subsequently it was agreed-that Claimant was called to work under Rule 32-G and was entitled to compensation in accordance with Rule 32-I at the overtime rate of time and one-half.

The dispute before this Board concerns the fact that the Carrier compensated Claimant at the overtime rate of the lower-rated Car Clerk position, rather than at the rate of his own Control Clerk position. The resolution of the dispute hinges upon interpretation of the parties' Preservation of Bates Rule, which reads as follows:

"RULE 43 - PRESERVATION OF FATES

Employes temporarily or permanently assigned to higher-rated positions shall receive the higher rates while occupying such positiona; employes temporarily assigned to lower-rated positions shall not have their rates reduced. A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employe. Assisting the higher-rated employe due to a temporary increase in the volume of work does not constitute a temporary assignment."

The Carrier asserts that Rule 43 does not require that Claimant be compensated at his own higher rate for three reasons: (1) no "position" existed for Claimant to fill and therefore Claimant was not assigned to a lower-rated position; (2) Claimant volunteered to perform the extra work involved, and therefore, was not "assigned" to perform this work; and, (3) the intent and purpose of Rule 43 was to protect employes when taken off their assignment during the guaranteed portion of their regular assignment.

A note following Rule 43 in the parties' agreement provides that, "Rule 43 applies only to positions covered by this Agreement. . .." The Carrier argues that no such position existed. When the BN System was being installed a fictitious position was created for accounting purposes, in order to eliminate the necessity of filling out a Form 1636, which is submitted to cover the extra time and wages in accounting records when there are more employes working then positions assigned. The Carrier contends that since this position was not a bona fide position under the Clerks' Agreement, i.e., not bulletined under Rule 11 (Bulletining and Assigning Positions), Rule 43 is inapplicable.

The Carrier's argument cuts two ways. Assuming arguendo the Carrier's assertion that Claimant did not fill a bona fide position, what then could Claimant have been doing but assisting a lower rated employe.

If no position or vacancy existed and Claimant was simply assisting a lower-rated employe then he was still within the purview of Rule 43 as he was fulfilling the duties and responsibilities contemplated and should have been compensated at the higher rate. It should be noted that the only exception mentioned in Rule 43 is when a lower-rated employe assists a higher-rated employe due to a temporary increase in the volume of work. To hold that the converse is true by implication would be creating a new Rule, a power which this Board does not possess.

The Carrier also posits that Rule 43 is not applicable when an employe voluntarily requests to protect extra work paying a lower rate. The contention here is that since Claimant volunteered he cannot be said to have been "temporarily assigned." The Carrier quotes Third Division Award No. 18652, Referee William M. Edgett:

> "Clearly if Claimant was 'temporarily assigned' to the lower rated position he would not have his rate reduced, but under the provisions of Rule 16 would continue to receive the rate for his higher rated regular position.
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> The Organization insists that he was 'temporarily assigned' within the meaning of Rule 16. Carrier insists that he was a volunteer and that under principles well established by this Board should thus not be considered to have been 'assigned'.
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> Carrier has referred to a number of cases decided by this Board which hold that an employee may not, by voluntarily assuming a duty, put Carrier in the position of conferring a benefit that is extended to one who is given an assignment by Carrier. The factual situations in those cases are not identical to this case, but the principle has been followed by many Referees.
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> In the handling of the case Carrier has made it clear that Claimant was not coerced into accepting the assignment and that he could have refused it with impunity. Thus, as far as the volunteer nature of the assignment is concerned. this case is identical to the cases referred to by Carrier.
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> Claimant must be held to have performed the work in question on strictly a volunteer basis. Therefore he cannot be said to have been 'temporarily assigned' to the lower rated position within the meaning of that term as it is used in Rule 16. Rule 16 only requires payment at the higher rate to employees so assigned end the claim must therefore be denied."
> (underscoring added by Carrier)

The award cited by the Carrier is out of harmony with more recent, better-reasoned awards. The author of Award 18652, Referee William M. Edgett, has modified the volunteer theory in Award 20820:

> "A point strongly emphasized by the employees is that the assignment flows directly from the provisions of Rule 37(c) end because of that fact it could in no way be considered to be voluntary service and it must also be considered to be service to which the employee was assigned by the Carrier. That is so, the employees say, because the Carrier is directed by the Rule to make overtime assignmenta in a specific order or sequence. When the employees' turn in that sequence appears he is then assigned by reason of the Rule. The fact that Carrier has permitted employees to turn down the overtime assignment and has also instituted a system by which they indicate in advance whether they desire to be called in their turn, does not change the contractual basis of the assignment. The employees urge, therefore, that an employee who works an overtime assignment to which he is entitled and called under the provisions of Rule 37, must necessarily be considered temporarily assigned to such a position within the meaning of Rule 51(a).
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> The Referee sitting with the Board in this case recognizes that the result reached here is contrary to that reached in Award 18652. There are differences in the two cases. However a primary reason for the different result reached here is the emphasis placed upon the application of Rule 37(c) of the parties' Agreement. Carrier, by that Rule, has agreed to assign employees to overtime work in a certain order. An employee who accepts the assignment in his turn does not volunteer and create an unanticipated obligation on Carrier's part. The groups of employees with a right to the work are established by contract. Acceptance of the offer of overtime work is not a voluntary act which places Carrier in the position of extending an unanticipated benefit to the employee. The Agreement governs both the assignment (Rule 37(c)) and the rate of pay (Rule 51(A)). The fact that employees indicate in advance those assignments they will not accept and Carrier's agreement to permit refusal of the assignment does not change its contractual nature. Rule 51(a) does not mean that Carrier must coerce the employee, or that the employee may not be permitted an option to refuse the assignment.

"Where, es here, the temporary assignment is one to which the employee has a contractual right, his acceptance of that right is by Carrier's direction and authority and is a temporary assignment within the meaning of Rule 51(a). As such, the rate of pay attached to it is specified by the Rule.

Carrier argues that Rule 36(e) by its provision for payment of at least the regular rate on rest days, indicates en intention to exclude days which are not rest days from that requirement. Under all of the circumstances present here that argument is not conclusive. It is a point which Carrier has argued artfully and which has been given much thought. As everyone recognizes the Agreement has to be read as a whole. When that is done Rule 36(e) cannot be accorded the meaning which Carrier ascribes to ft.

For the reasons stated the claim must be sustained."

In the case before us Rule 32-G provides the method for assigning overtime and it is the rule under which the Claimant obtained the work in question.

A similar result was reached by J. S. Parker in Award 5924:

'Finally it is pointed out that Linehan volunteered and agreed to work the day in question at the lower rata of Whelan's position end urged that under such circumstances Rule 48 should not be applied. We are fully cognizant of the fact there are some inconsistencies in our Awards on this point (see decisions cited and dismissed in Award 3413) and that as recently as Award 4469 some statements appear which can be interpreted as indicating that there a different result might have been reached if the involved employe had been a pure volunteer. Nevertheless, and conceding Linehan was a volunteer, there are at least three sound reasons which impel us to hold that Rule 48 has application and must be regarded as decisive. In the first place we think the short and simple answer is that the rule itself contains no . language warranting the construction that a voluntary offer or request to perform work creates an exception to its clear and unequivocal direction that employes temporarily assigned to lower rated positiona or work shall not have their rates reduced. In the next with such a rule and nothing to be -- found elsewhere in the Agreement to qualify or restrict its application we believe that negotiation is required if its

"terms are to be modified or disregarded. And, last but not least, we are convinced it cannot be said that Linehan's voluntary action made the involved provision of Rule 48 inapplicable. This Division of the Board is committed to the rule that voluntary action on the part of an individual employe subject to its terms cannot abrogate or nullify the provisions of a collective bargaining agreement. See Awards 3416, 5793, 5834 and the decisions therein cited.

* * * *

Claim sustained."

Consistent with Awards 5924 and 20820, this Board rejects the argument that Claimant's overtime selection was a voluntary request for extra work which constitutes a preclusion from the Preservation of gates Clause for lack of an "assignment."

The Carrier's final argument is that Rule 43 applies only to an employe's guaranteed portion of his regular assignment. In Award 21016, Referee Lieberman put this argument to rest as follows:

'We cannot agree with Carrier's reasoning. Rule 4-E-l is entitled Preservation of Pates and is quite clear and unequivocal. The phrase '. . ..employees assigned temporarily to lower rated positions will not have their rates reduced' does not contain any qualification that it is applicable only in the case of an employs working in a position in lieu of his own, as suggested by the Carrier. In addition, the identical issue was presented to this Board in Award 9106 which involved the same Organization and the predecessor Carrier and an identical rule; and in that Award we held that the employe who doubled over in a lower rated position should have been paid at his regular rate. In this dispute, we support the reasoning in the earlier Award and will sustain the Claim."

Based upon the foregoing this Board holds that the Organization has demonstrated that Rule 43 should govern the compensation of Claimant for the dates in question.

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 Agreement was violated.

A W A R D

Carrier shall pay Claimant $1.9131 for each day, May 4, 5, and 12, 1977, which represents time and one half of the difference in pay of his regular assigned rate of $53.8905 and the rate of $52.6151 that Carrier paid for these dates.

Organization's request for interest is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 15th day of August 1980.