

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30466
Docket No. CL-29918
94-3-91-3-298

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Transportation-Communications International
(Union
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(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization
(GL-10594) that:

- (a) Carrier violated the intent and provisions of the current Clerks' Agreement at Chicago, Illinois, May 26, 1989, when it diverted Claimant Mauter from his regular assignment of Rate Quotation Clerk Position No. 6055 to perform relief work and then failed and/or refused to properly compensate him, and
- (b) Claimant Mauter shall now be compensated for Four (4) hours' pay at the pro rata rate of Rate Quotation Clerk Position 6055, commencing on Friday, May 26, 1989, and continuing daily until violation ceases, in addition to any other compensation already received, as a result of such violation of the Agreement."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant in this case was regularly assigned as a Rate Quotation Clerk with an assigned tour of duty of 8:30 A.M. to 5:00 P.M., Monday through Friday, with a pay rate of \$110.38 per day. While working on his regular assignment on Friday, May 26, 1989, Claimant was required to assist the Customer Service Clerks perform some unspecified duties which were part of the Customer Service Clerks' assignments. There is no information in the case file record to identify when during the tour of duty such assistance was rendered. Neither is there any evidence to indicate that Claimant's normal duties were not performed on the claim date. For all service performed on the claim date, Claimant was paid 8 hours at the \$110.38 rate of pay.

The Customer Service Clerks were assigned to work in the same office and at the same time as the Rate Quotation Clerks. The Customer Service Clerks were paid \$106.97 per day. There was no difference in the Seniority District of the Rate Quotation Clerks and the Customer Service Clerks. The claim which was initially submitted by the Organization alleged that Claimant had been "diverted" from his Rate Quotation Clerk position and was "assigned" duties of the Customer Service Clerks for "four (4) hours or more." The claim alleged that because of this so-called diversion, Claimant was "entitled to the paid four pro rata hours at the higher rate of the two positions involved and is also entitled to an addition (sic) four pro rata hours at rate of his regular assignment" On appeal to the highest appeals officer, the remedy was amended to seek "eight pro rata hours at the higher rate of the two positions involved and is also entitled to an additional eight pro rata hours at the rate of his regular assignment." When the claim was listed with the Board, as evidenced by the STATEMENT OF CLAIM, supra, the remedy asked for became "four hours pay at the pro rata rate of Rate Quotation Clerk Position 6055"

The thrust of the Organization's position is that (1) Rule 32-L was never intended to permit an employee from one position to "assist" another employee "for more than four (4) hours per an eight (8) hour tour of duty"; (2) by regularly using other employees to "assist" the Customer Service Clerk pool of positions for more than four hours per day, a Customer Service position was, in fact, filled and by doing so Carrier increased the number of pool positions in violation of the Agreement; (3) the Rate Quotation Clerks and Customer Service Clerks are separate "groups of employees" and perform "two separate classes of service" and, therefore, Rule 32-L has no application; and, (4) there is no precedent for Carrier's position in this regard.

Carrier argued that there was no diversion of employees in this instance, but rather that Claimant was used during the hours of his regular assignment to assist another clerk in the performance of lower rated work within the confines of the same office in the same seniority district. Carrier contended that such action is specifically permitted by the language of the NOTE which is part of Rule 32-L.

The Agreement language which is pertinent to our consideration of this case is as follows:

"RULE 32--OVERTIME AND CALLS

Time in Excess of Eight Hours

32-A. Except as otherwise provided in Rule 32-I, time in excess of eight hours, exclusive of the meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half.

NOTE: Regular relief assignments established under Rule 26-F will be assigned in such a way as to afford incumbents thereof at least eight hours off duty between work periods; the provisions of Rule 32-A not being applicable when in following their assignments from position to position, incumbents of such relief positions work more than eight hours on any day.

* * * *

Work on Days Not Part of Any Assignment

- 32-E. Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by the senior qualified and available off-in-force-reduction employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee.

* * * *

Assignment of Overtime

- 32-G. In working overtime before or after assigned hours employees regularly assigned to class of work for which overtime is necessary shall be given preference, i.e.:
- (1) Occupant of position to have rights to overtime work on his position.
 - (2) If more than one employee is regularly assigned to class of work, the senior available employee in that class of work will have prior rights to the overtime work.
 - (3) If none of the employees are available as provided in (1) and (2) above, the senior available qualified employee at the point who has served notice in writing of his desire will then have prior rights to the overtime work.

NOTE: This principle shall also apply to working on holidays.

* * * *

- 32-I. For continuous service after regular working hours, employees will be paid time and one-half on the actual minute basis. Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three hours for two hours work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis.

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Absorbing Overtime

- 32-L. Employees will not be required to suspend work during regular hours to absorb overtime.

NOTE: Under the provisions of this rule, an employee may not be requested to suspend work and pay during his tour of duty to absorb overtime previously earned or in anticipation of overtime to be earned by him. It is not intended that an employee cross craft lines to assist another employee. It is the intention, however, that an employee may be used to assist another employee during his tour of duty in the same office or location where he works and in the same seniority district without penalty. An employee assisting another employee on a position paying a higher rate will receive the higher rate for time worked while assisting such employee, except that existing rules which provide for payment of the highest rate of entire tour of duty will continue in effect. An employee assisting another employee on a position paying same or lower rate will not have his rate reduced.

* * * *

Emergency Relief Work

32-N. (1) A regularly assigned employe will not be taken off his assignment to perform relief work except in case of emergency which creates a vacancy on a position which cannot be filled in the normal way without interruption of required service; and then only when the incumbents of both positions involved are subject to the Federal Hours of Service Law. In the application of this Rule an emergency is defined as sickness, death, short notice resignation, or other unforeseen circumstances of a like nature. However, when such an employe is used under the conditions described herein, limited to a maximum of three consecutive days, he will be compensated as follows"

In their respective presentations to the Board, both parties presented argument and evidence which was not made part of the on-property handling of this case. The Organization introduced as exhibits two internal Carrier documents which, it says, supported its arguments. The Carrier too in its Ex-Parte Submission argued for the first time that beginning with the date of the claim "the duties of the Rate Quotation Clerks were changed to assist Customer Service Clerks." It then went on to quote what it says became the assigned duties of the Claimant's position.

While the documents submitted by the Organization made interesting reading, they are not properly before the Board and have not been considered in reaching a determination of this dispute. The contention of the Carrier likewise was never advanced during the on-property handling of the dispute and no probative evidence has been advanced to support this contention. In fact, this argument flies in the face of the Carrier's on-property contention that "Claimant was used to handle Customer Service work under the provisions of Rule 32-L"

The Board has repeatedly told the parties that, as an appellate review Board, we are limited in our consideration of disputes to argument and evidence which is made a part of the on-property handling of the dispute. Nothing in the way of argument and evidence which is brought forward for the first time before the Board will be accepted or considered by the Board. This case is no exception. The arguments and evidence of both parties which were not made part of the on-property handling are summarily rejected.

The sole matter for consideration and determination in this case is whether or not the parties by their Agreement have limited the use of an employee to assist another employee in the same office and in the same Seniority District without penalty other than the payment of the higher rate of pay. In this case, the parties have agreed in Rule 32 to the procedure which will be proper to follow in several scenarios. Some control the use of employees who work on days which are not a part of any assignment. Others control work which is performed on overtime or work which is performed to absorb overtime. Still another controls the performance of emergency relief work.

When the agreed-upon language of Rule 32-L is read in its entirety, including the NOTE which is part thereof, and when that agreed-upon language is applied to the fact situation as it has been described in the on-property record of this case, it becomes obvious that no overtime was absorbed, that the work which was performed was a part of an existing assignment, that no overtime or emergency relief work was performed. The NOTE which is part of negotiated Rule 32-L clearly and without limitation permits an employee to assist another employee "during his tour of duty in the same office or location where he works and in the same seniority district without penalty."

There simply is no evidence or proof in this case record to support the payment demand which the Board is asked to allow.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.