Award No. 2346
Docket No. CL-2395

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Henri A. Burque, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Clerk T. E. Cook, Kansas City Terminal Division, be compensated for eight hours at his regular rate $6.64 per day, on November 7, 1942, account of being instructed to vacate his regular assignment of Machine Bill and Yard Clerk, 4:00 P. M. to 12 o'clock midnight, to fill position of Train Clerk, hours of assignment 11:00 P. M. to 7:00 A. M.

(b) Clerk T. E. Cook be compensated in the amount of seven (7) hours at punitive rate of his regular assignment of Machine Bill and Yard Clerk, less amount received, account of being required to work position of Train Clerk starting at 11:00 P. M., November 7, and completing assignment at 7:00 A. M., November 8. Claim for seven (7) hours at punitive rate covers period 12:00 o'clock midnight to 7:00 A. M., account regular hours of Clerk Cook's assignment were 4:00 P. M. to 12:00 o'clock midnight, as covered by section (a) of this claim.

(c) Clerk T. E. Cook be compensated for seven (7) hours at punitive rate of Train Clerk assignment, rate $6.84 per day, plus one (1) hour at pro rata rate of his regular assignment, $6.64 per day, less amount of $6.64 which he was paid for working his regular assignment on November 22, 1942, hours 4:00 P. M. to 12:00 o'clock midnight after completing daily hours of assignment of Train Clerk at 7:00 A. M., on November 22, which resulted in his being required to work a total of fifteen (15) hours within the twenty-four hour period.

EMPLOYES' STATEMENT OF FACTS: On November 7, 1942, Clerk T. E. Cook, regularly assigned to position of Machine Bill and Yard Clerk 4:00 P. M. to 12 o'clock midnight, was instructed by Chief Clerk to Terminal Superintendent R. W. Berrey, to vacate his regular job and report for work on position of Train Clerk, assigned hours 11:00 P. M. to 7:00 A. M. Regular occupant of Train Clerk position, T. R. Dolan, was transferred to fill temporary vacancy of Roundhouse Foreman's Clerk, account vacation. Clerk Cook objected to being taken off his regular job but nevertheless, was instructed to protect the assignment and reported for work on Train Clerk position at 11:00 P. M., November 7, 1942. We quote below letter of Clerk T. E. Cook to Local Chairman Dolan, which is dated November 25, 1942.

hour period, when necessary for them to work in excess of eight (8) hours in any twenty-four (24) hour period, in order to resume duty on their regular assignment without loss of time.

Mr. T. E. Cook was properly compensated under the rules of the Schedule for Clerks for the service performed on the position of Train Clerk on the dates in question, i. e., $6.84 per day; and was properly compensated under the rules for the service performed on his regular position on November 22, 1942, i. e., $6.64 per day.

The alleged claim set up in the Committee's ex parte statement of claim is not supported by the rules of the Schedule for Clerks and the established practice thereunder, therefore, the contention of the Committee should be dismissed and the claim denied.

OPINION OF BOARD: Taking up the claims in their order, we proceed as follows:

Claim (a) that Clerk Cook should be compensated for eight hours at his regular rate of $6.64 per day on November 7, 1942, on account of being instructed to vacate his regular assignment, from 4:00 P. M. to 12 o'clock midnight, to fill another position temporarily vacant, with assigned hours from 11.00 P. M. to 7:00 A. M.

The petitioner bases his case on a claimed violation of Rules 4 (d) and 7 (a) and (b).

Rule 4 (d) reads:

> "Employes will not be required to suspend work during regular hours to absorb overtime;"

Rule 7 (a) reads:

> "Clerks will not be—required to change positions except temporarily and for good and sufficient cause."

The facts of the case are not in dispute, and are as follows:

On November 7th there was a temporary vacancy in the position of Train Clerk in the Kansas City Terminal Division and Clerk Cook, who was a regular Machine Bill and Yard Clerk, was directed to lay off his regular assignment and to report in time to fill the vacated position at 11:00 P. M., to work until 7:00 A. M. the next morning. This vacated position paid more (to wit, $6.84) than the regular position of the claimant, which was $6.64, so the change was a promotion and no criticism is made in that respect. Nor can any claim be made that Rule 7 (b), which refers to compensation only, was violated. The claimant did not want the change, protested against it, but was required and had to make it.

It may be conceded that Rule 4 (d) was violated, for had claimant been allowed to work his regular assigned hours, and then filled temporarily vacated position, overtime would have resulted. In the absence of proper showing on the part of the Carrier that avoidance of overtime was not the motivating cause, it may be assumed that it was. As to Rule 7 (a), it was not violated unless it is found that there was no "good and sufficient cause" for the change of positions. The vacancy was brought about by Clerk Dolan, whose regular assignment was that of Train Clerk, being off duty on the 7th, 8th and 9th; why, no one apparently knows. He reported for work on the 10th, and through an agreement brought about at his own request with the supervising officers, he was allowed to fill the position of Roundhouse Foreman Clerk from the 10th to the 21st, inclusive, at a reduced rate of $6.64, his regular pay for his regular assignment being $6.84. This was to suit his own convenience by working a day instead of a night shift.

The Carrier apparently does not show that there was a good and sufficient cause for the change of positions. The record is silent on the point and it being incumbent upon the Carrier to show cause, the conclusion is inevitable that, there being none advanced, no good and sufficient cause for the change of positions existed. So far, therefore, violation is established.

But the Carrier's defense is that the rule governing the case, instead of being Rules 4 (d) and 7 (a), is 11 (b), fourth clause, which reads as follows:

> "Positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining, provided the senior competent employe in the office involved shall be assigned to the vacancy."

The Carrier contends that the assignment was made under this rule and that there was no violation of it for the reason that Cook was a "Senior competent employe."

The petitioner's answer to this contention is that even if this rule prevails, there was a violation because there was in the office a competent employe senior to Cook by almost four years (who had in fact held the position of Train Clerk,) who was doing the same kind of work as Cook, and in the same office, on the preceding day shift, 8:00 A. M. to 4:00 P. M. (facts not denied by the Carrier,) and who should have been assigned to fill the vacancy.

We are of opinion that we need not pass on this issue, there being no claim by this other senior employe that he should have been the one assigned to fill the vacancy.

Complainant Cook is entitled to his day's pay for his regular assigned work 4:00 P. M. to 12 o'clock midnight, which he desired to fill but was not allowed to, less 85½¢ which he received for the hour 11:00 P. M. to 12 midnight at the advanced rate of $6.84.

We need not concern ourselves whether this in effect is a penalty or not. It is compensation for a violation of a rule, and what is said in Awards 685, 1646 and 2282 on the subject, although not involving the same rule, is applicable to the situation here. Citation and quotation of the language used in those awards would serve no useful purpose; it is adopted here. Reference to the awards suffices.

It was further argued on behalf of the Carrier that the petitioner, in a prior case, agreed with the interpretation that the Carrier puts on the present situation as to the application of Rule 11 (b), fourth clause. The docket number of the case referred to is CL-1220, Award 1216. It refers to an interpretation of Rule 11 (b), fourth clause, but on a very different statement of facts. The issue in that case was whether, under the rule, the Carrier was required to fill a position becoming vacant temporarily, and the Award held that there was no mandatory requirement in the rule.

It is well settled that interpretation of rules, presented by either party to a controversy, is not binding except in the particular case where the construction is agreed upon by the parties involved, and to the extent only that it may create a waiver or estoppel. Authority for this proposition is found in Awards 735 and 1518, also 561 cited in 1518. The decision in these awards is to the effect that acquiescence in practice does not change the meaning of a rule, but may create a waiver or estoppel as to claimed past violations but not as to future ones after violation is asserted. The principle laid down in the above awards is the same in a case where attempt is being made to excuse action because of previous interpretation agreed upon by either

party to the controversy, but must relate to the same subject matter and the same issue. This is not the case, the subject matter and the issues are different, though the parties are the same.

We need not consider petitioner's other claims that the real issue behind the Carrier's assignment of Clerk Cook was to avoid payment of overtime, and the different methods the Carrier could have adopted to fill the vacancy. The conclusion reached obviates all of this.

Claim (b) presents difficulties. The attempt here is to require time and one-half for seven hours, to wit, from 12 o'clock midnight to 7:00 A. M. on the morning of November 8th, as overtime. Claimant Cook, as we have seen, did not work his regular assignment on November 7th. Even though it is found that he should have been allowed to work his regular assignment and because of the violation of the rules above referred to he is entitled to pay, it does not mean that it must be said the situation resolves itself into one equivalent to work actually performed in fact and become a basis for overtime pay. The rule says "work" not assignment. Neither can we find that assignment without actual work is equivalent to work when the overtime rule is to be construed and applied. No precedent is brought to our attention for the adoption of such a ruling as contended for by the petitioner, nor have we been able to discover any. The situation is novel, unique and the claim exceedingly technical. We are not inclined to make a ruling in favor of such a claim, thus establishing a precedent which, in our way of looking at it, would create a harsh and inequitable rule.

Petitioner claims that he is entitled to his day's pay for his regular assignment on November 7th because of a violation of a rule, and that in effect is a demand for the payment of a penalty. If we followed that up by an allowance of overtime for seven hours, it would be equivalent to a double penalty. That certainly would not be fair, just and equitable. Claim (b) therefore, is denied.

Claim (c) for overtime November 22nd for work performed from the hours of 4:00 P. M. to 11:00 P. M. has merit. It is agreed that claimant worked from 11:00 P. M., November 21st to 7:00 A. M., November 22nd, and that he was required to resume his regular assignment at 4:00 P. M. on the same day, even though he protested and wished to be excused, so as to get some rest. The rule that 8 hours in 24 constitute a day's work, and that all work in excess of eight hours is to be paid on an overtime basis of time and one-half regular pay for the work performed, is too well known to require citation and further consideration. The construction adopted for what constitutes a 24-hour day, and as to how and from when it is to be computed, is also so well established now (Awards 687, 2030 and 2053) that it is no longer open to discussion or difference of opinion.

Claimant Cook actually worked fifteen hours in a 24-hour period, to wit, from 11:00 P. M., November 21st, to 7:00 A. M., November 22nd, and from 4:00 P. M. to 12 o'clock midnight, November 22nd. He is therefore entitled to time and one-half for the last seven hours at the regular rate, which is $6.84, less what he received.

We have already seen there was no good and sufficient cause to require claimant to fill the vacated position. We can go further and say that the question of good and sufficient cause does not enter into the proposition of overtime work. The rule says that if work is performed for more than eight hours within a 24-hour period, time and one-half is the basis for the payment of overtime. The reason that may bring about the work which is performed is immaterial and entirely out of the case. The work being performed, the rule applies and the work must be paid for.

Claim (c) is allowed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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 violated the agreement in part, as appears in the Opinion.

AWARD

Claim (a) sustained in part, see Opinion.

Claim (b) denied.

Claim (c) sustained in full.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of October, 1943.