

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

St. Clair Smith, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA
RAILWAY COMPANY**

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

(1) That Carrier violated agreement rules when it failed and refused to compensate E. A. Hardies, Clerk, Altoona, at time and one-half rate for the second eight hour shift worked Tuesday, November 17th, 1942, and

(2) That Carrier shall now be required to reimburse Clerk Hardies for the difference between straight time rate allowed and time and one-half rate claimed for work performed in excess of eight hours on that date.

JOINT STATEMENT OF FACTS: On Tuesday, November 17th, 1942, E. A. Hardies, Clerk, Altoona, Wisconsin, worked his regularly assigned shift on Desk No. 7 from 1:00 to 9:00 A. M.

On the same date G. S. Stoeffel, Clerk, Desk No. 8, assigned hours 4:00 P. M. to 12:00 Midnight, was absent account Tuesday being his assigned day of rest.

Desk No. 8 has been designated by the Carrier as a seven day position.

B. G. Kallis, Clerk, is regularly assigned to relieve Clerk Stoeffel on Desk No. 8 on each Tuesday, but due to illness did not fill this assignment on November 17th, 1942.

Clerk Hardies was notified by the Carrier to double for absent employe on Desk No. 8 and worked on said desk from 4:00 P. M. to 12:00 Midnight on Tuesday, November 17th, 1942.

Clerk Hardies was compensated for work performed on Desk No. 8 at pro rata rate of employe relieved. He claims time and one-half therefor.

POSITION OF EMPLOYES: Agreement between the parties dated and effective July 16th, 1928, contains the following rules:

"Overtime and Calls

Rule 42. Except as provided in Rules 37 and 44, time in excess of eight (8) 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.

does perform the work of an absent employe on another shift either by working after the close of his work period or before his work period begins, such employe will be paid for such service at pro rata rate of the employe relieved; provided, that this rule shall not apply to cases where employes are required to double on account of employe being relieved one day in seven, as provided in Rule 45."

The sole and primary question here involved is whether Hardies was performing the work of an absent employe—in the instant case Kallis, who was regularly assigned to work on Desk 8 on Tuesdays, or whether Hardies was required to double on Desk 8 account an employe being relieved one day in seven as provided in rule 45, clerks' agreement, herein quoted.

It is the position of the carrier that Hardies was, in fact, required to double on Desk 8, 4:00 P. M. to 12:00 Midnight, November 17, 1942, as the result of an emergency brought about by the illness of the regular assignee, Kallis, and sufficient notice of such illness not being furnished the railway company in time to have secured another employe to perform work on Desk 8 if there were one available. However, as of date here involved, November 17, 1942, there were no extra or unassigned employes available to have worked on Kallis' position, Tuesday, November 17, 1942, and it was necessary in order to protect the requirements of the service that Hardies be required to double on that position, as specifically provided in rule 44, clerks' agreement, herein quoted, and for which service he was compensated in line with said rules—that is, pro rata rates applicable to position, Desk 8. The only qualifications in rule 44 apply to the case of a man being used on an employe's regularly assigned relief day to relieve said employe in order to avoid payment of time and one-half as provided in rule 45, where such regularly assigned employe worked on said day. However, such facts are not here in evidence for the reason that, as indicated in the joint statement of facts, Kallis was the regularly assigned employe on Desk 8, Tuesday, November 17, 1942, and we repeat that, as indicated in agreed-to statement of facts, Kallis became ill on November 17, 1942, creating an emergency, which emergency was handled in line with rule 44.

On basis of agreed-to facts in evidence, Hardies has been allowed full compensation for service performed on Desk 8, 4:00 P. M. to 12:00 Midnight, November 17, 1942, in line with rule 44, clerks' agreement, and there are no rules in agreement between the railway company and the brotherhood sustaining claim of the employes for compensation on basis of rate and one-half for said service.

OPINION OF BOARD: The question for decision is whether the overtime rule (No. 42 supra) or the emergency doubling rule (No. 44 supra) governs in determining the rate of pay of claimant Hardies for the additional eight hours of work performed on Tuesday November 17, 1942. The Carrier applied the emergency doubling rule, and refused to allow claimant the time and a half rate provided by the overtime rule. The claim is for the difference.

The position of the Employes is twofold. It is said that the emergency doubling rule was not invoked by the operative facts because (1) the carrier was not confronted by an emergency, and (2) Hardies was used to provide Stoeffel with relief on his day of rest, and must be paid under the overtime rule even though it be thought that his use was occasioned by an emergency. The conclusions we have reached foreclose consideration of the Employes first contention.

The Employes second contention is predicated upon the provision of Rule 44. That rule reads:

"Where in cases of emergency an employe is required, or through mutual agreement with the consent of the employing officer, does perform the work of an absent employe on another shift either by working

after the close of his work period or before his work period begins, such employe will be paid for such service at pro rata rate of the employe relieved; provided, that this rule shall not apply to cases where employes are required to double on account of employe being relieved one day in seven, as provided in Rule 45." (Emphasis added.)

The response of the Carrier is that Hardies was used to relieve Kallis who was regularly assigned to relief on the position during the hours in question, rather than to relieve Stoeffel, who had no assigned work to perform on that day, and that therefore, because the use of Hardies was occasioned by an emergency, Rule 44 governs the rate of pay.

We are considering a clause which limits the application of a general or dominant provision of a rule. The general provision, in so far as it is a matter of present concern, deals with the Carrier's right to shift workers for the purpose of meeting the emergency needs of the service. The proviso states that this general rule shall not apply in a particular field viz., that of providing a day of rest on seven-day positions. It is obvious that an emergency, because of the very nature of that concept, does not relate itself to the normal every week problem of providing a day of rest on seven-day positions. Reflection will reveal that an emergency will only arise in the excepted field because of the unforeseen and unexpected absence of those upon whom dependence has been placed to provide the assignee with his day of rest. Absence of the assignee is anticipated on his day of rest. It is the unforeseen and unexpected absence of the relief clerk or clerks which will confront management with an immediate need for a shifting of its workers. It seems manifest that this was the precise circumstance the parties had in contemplation when they were writing the proviso into their contract.

When analysis is carried a step further, the reason for the proviso is revealed. A reading of Rules 42, 44, and 45 together suggests that reason. Without the proviso we are considering these sections would have been open to an interpretation which would have afforded the Carrier a choice, when an emergency of the character we have described should arise, as between on the one hand of calling the regular assignee for work on his seventh day at time and a half as it is privileged to do under Rule 45, or on the other hand of doubling some other employe under Rule 44 at a pro rata rate. When the proviso is read with this subject matter in mind, it seems reasonable to conclude that it was written into the contract, not only to forestall such an interpretation as we have suggested but for the further purpose of inducing the Carrier to follow a logical course on such an occasion and call the regular assignee for a single trick on his day of rest rather than to burden another clerk with a double tour of work.

In the light of this analysis we turn to the Carrier's contention that it was the regularly assigned relief clerk who was absent, and therefore it was this relief clerk and not the regular assignee Stoeffel who was relieved by claimant's second tour of duty. In course of its argument the Carrier points out that Stoeffel had no duties to perform at the desk on that day. That duty, it says, had been assigned to the regular relief clerk. That the reasons to which we have adverted, which must have prompted the parties to write the proviso into the rule, would be operative whether the absented relief clerk had been casually or regularly assigned to the desk is self evident. It is also clear that the regular assignee would be as much without duty during the seventh day at the desk whether relief had been provided by a regularly designated clerk or by a casual clerk. But in both instances, a regular assignee such as Stoeffel is under threat of losing his day of rest through a call under Rule 45 to work on his seventh day. To protect such a regular assignee from such calls is part and parcel of the problem of providing him with his agreed one day of rest. Indeed, this is demonstrable from the very facts of this Submission. When notice came that the assigned relief clerk was ill, the

Carrier was put to an election between calling Stoeffel for work on his seventh day or calling some other clerk to double. In exercising its discretion it called claimant to double and thereby protected Stoeffel in the enjoyment of his day of rest. To say that the broad terms of the proviso viz., "on account of employes being relieved one day in seven" do not look to this situation would be to ignore the universal principle that contracts are to be liberally construed to carry out the intention of the parties.

The conclusion is irresistible that the cited proviso manifests an intention to deny the Carrier any rights under the emergency Rule 44 in the instant circumstances.

It has been stated that the Submission discloses not only the absence of Kallis, the relief clerk, because of sudden illness, but the unavailability of Stoeffel, the assignee for call into service on that day, and the point is made that to apply the proviso in such circumstances is to outrun the manifest intention of the parties. Whether the point is well made, we need not now decide. It is not revealed by the Joint Statement of Facts that Stoeffel was not available. It is true that in stating and arguing their position, the Employes assume a state of facts which embraces the unavailability of Stoeffel, but we entertain the view that it would be unfair and unreasonable to seize upon this phraseology of argument to amend the carefully prepared Joint Statement of Facts. That statement represents that "Stoeffel * * * was absent account Tuesday being his assigned day of rest." It does not state that he was unavailable.

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.

AWARD

Claim (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of February, 1944.