Award No. 2631
Docket No. CL-2621

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY

STATEMENT OF CLAIM: (1) Claim of the System Committee of the Brotherhood that the Carrier violated its agreement with the Brotherhood when it assigned yard clerk J. D. Boyle at Springfield, Ohio, with irregular starting times under schedules of December 2, 1942, January 30 and February 12, 1943 and refused to compensate him in accordance with agreement rules, and

(2) That the Carrier shall now be required to compensate yard clerk J. D. Boyle:

a—at time and one-half rate for work performed on dates shown below under schedules above mentioned, between the dates of December 5, 1942 and August 23, 1943, and

b—at pro rata rate for each eight (8) hour tour of duty the employe was required to suspend work during the hours 3:00 P. M. and 11:00 P. M. on each date shown below under all schedules above mentioned between the dates of December 5, 1942 and August 23, 1943.

Schedule—December 2, 1942:—3:00 P. M.—11:00 P. M.
Monday—Tuesday—Wednesday—Thursday

7:00 A. M.—3:00 P. M.
Saturday—Sunday

Relief Day—Friday

Saturdays—December 5, 12, 19 and 26, 1942
January 2 and 23, 1943
Sundays —December 6, 13, 20 and 27, 1942
January 3, 10, 17 and 24, 1943

Schedule—January 30, 1943:—3:00 P. M.—11:00 P. M.
Tuesday—Wednesday—Thursday—Saturday

7:00 A. M.—3:00 P. M.
Sunday—Monday

Relief Day—Friday

Sundays —January 31
February 7
Mondays —February 1

Schedule—February 12, 1943:—3:00 P. M.—11:00 P. M.
Tuesday—Wednesday—Thursday—Friday

7:00 A. M.—3:00 P. M.
Sunday—Monday

Relief Day—Saturday

Sundays —February 14 and 21
March 14 and 21
April 4, 11, 18 and 25
May 9, 16 and 30
June 6, 13, 20 and 27
July 4, 11, 18 and 25
August 1 and 8

Mondays —February 15
March 1, 8, 15 and 22
April 5, 12, 19 and 26
May 10, 17 and 24
June 7
July 12, 19 and 26
August 2

EMPLOYES' STATEMENT OF FACTS: Yard Clerk J. D. Boyle, Springfield, Ohio, with seniority date of October 22, 1922, is not a relief clerk nor is the position occupied by him a relief position.

A position of relief yard clerk was advertised at Springfield, Ohio under date of November 7, 1942 by Bulletin No. 94 (Brotherhood Exhibit "A") and all concerned were advised by Bulletin No. 94-A (Brotherhood Exhibit "B"), dated November 13th, that no bids were received and the position had been awarded to no one. On November 14th Mr. W. G. Rice was hired from off the property and began work the same date as a Relief Yard Clerk. The Yard Station force at this time consisted of:

L. J. Ogle	—Yard Master	—Assigned—	8:00 A. M. to 4:00 P. M. Monday thru Saturday. Sunday off.
F. R. Stevens—	"	"	4:00 P. M. to 12:00 MN Monday thru Saturday. Sunday off.
L. Swable	—Yard Clerk	"	7:00 A. M. to 3:00 P. M. Monday thru Friday. Saturday off.
	—Yard Master	"	3:00 P. M. to 11:00 P. M. Sunday.
J. D. Boyle	—Yard Clerk	"	3:00 P. M. to 11:00 P. M. Monday thru Thursday. 7:00 A. M. to 3:00 P. M. Saturday and Sunday. Friday off.
F. L. Meiser	—Yard Clerk	"	11:00 P. M. to 7:00 A. M. Monday thru Wednesday. Friday thru Sunday. Thursday off.
W. G. Rice	—Relief Yard Clerk		Working extra on first and and second shifts to learn the work.

Note: Yard Clerk Meiser performs the duties of yard clerk and yard master during the hours 11:00 P. M. to 7:00 A. M. Yardmasters Ogle and Stevens are not covered by the agreement rules.

Now, having assigned Claimant to relieve the 7-day position it was proper to furnish him other work in order that he would have full employment (Rule 57 (c)) and it was proper under the contract to assign this relief clerk different starting times daily (Memorandum of Understanding No. 4).

The Employes contend that every employe, including employes performing relief work, must, under Rule 20 of the contract, start work at the same time each work day. The Carrier contends that there is nothing in the contract requiring employes or positions to have the same time for starting work each day. The pertinent part of Rule 20 reads as follows:

> "Regular assignments shall have a fixed starting time and a designated point for the beginning and ending of tour of duty."

Rule 20 does not provide that assignments shall have the same starting time **each day.** It is significant that the words "each day" or the word "daily" or some such words with the same meaning were omitted. The Carrier points out that the words "tour of duty" are singular and not plural and, therefore, the rule means that each tour of duty shall have a fixed starting time and a designated point for beginning and ending. There is nothing in the rule to prevent there being a different starting time each day of a regular assignment, but the starting time for each tour of duty must be fixed.

Be that as it may, this case involves the starting time of a relief position which is entirely different from a regular assignment. It is impracticable and in most cases impossible to have the same starting time daily for relief workers and this is the condition that has always existed. It never has been the practice to assign relief employes the same starting time daily. On the contrary, it has always been the practice to assign relief employes to work the assigned hours of the position relieved. The very fact that relief positions were established under the contract but were not excepted from Rule 20 is proof that Rule 20 does not require and was not intended to require the same starting time daily.

Unfortunately the conditions that made this claim possible were brought about by the shortage of competent and experienced employes to fill important positions badly needed to handle the greatest burden of transportation ever undertaken by the railroads at a time when employes were transferred to the armed services and new employes were not available. The Carrier feels that it did the very best that could be done under the circumstances and that the contract was complied with in every respect even though some employes had to work long hours and on their relief days, for which they were paid the punitive rates, and happy and proud to record that the employes involved applied themselves without reservation in a manner to perform the huge task regardless of the shortage of help.

The claim should be denied.

OPINION OF BOARD: The facts in this case are somewhat complicated but if throughout the course of this Opinion it will be kept in mind the parties concede the employes directly involved worked a total of six Saturdays, 17 Mondays and 31 Sundays, no one of which was his own rest day, we believe much confusion will be avoided. Other facts, many of which are not controlling, but which we deem necessary in order to have a clear understanding of the controversy, will be hereinafter stated as briefly as the circumstances disclosed by the record will permit. Any facts omitted may be supplied by reference to the record.

J. D. Boyle who is employed by the respondent is a yard clerk with seniority date of October 22, 1922. During the entire period covered by the claim the respondent maintained a yard office at Springfield, Ohio, where yard clerks were regularly assigned to provide 24-hour service, seven days per week, the starting time for each tour of duty being 7:00 A. M., 3:00 P. M. and 11:00 P. M.

Effective November 25, 1942, the claimant was assigned as Yard Clerk on the 3:00 P. M. to 11:00 P. M. shift, on Mondays, Tuesdays, Wednesdays, Thursdays and Saturdays, his rest day being Friday. On Sundays he was required to work the 7:00 A. M. to 3:00 P. M. shift, regularly occupied by Yard Clerk L. Swable. On Sundays, while Boyle worked the 7:00 A. M. to 3:00 P. M. shift, Swable was required to work the position of Yardmaster, one not within the scope and operation of the Clerks' Agreement. Effective December 2, 1942 claimant was also required to work the 7:00 A. M. to 3:00 P. M. shift on Saturdays, so that thereafter he worked on the 3:00 P. M. to 11:00 P. M. shift on Mondays, Tuesdays, Wednesdays and Thursdays, his rest day still being Friday, and on Saturdays and Sundays he was required to work the 7:00 A. M. to 3:00 P. M. shift. On Saturday, while Boyle worked the 7:00 A. M. to 3:00 P. M. shift, his position on the 3:00 P. M. to 11:00 P. M. shift was blanked.

Effective January 28, 1943, Boyle was instructed to resume working the 3:00 P. M. to 11:00 P. M. shift on Saturdays, with the result that thereafter he worked his position the same days he had effective November 25, 1942, as well as Swable's on Sundays, while Swable worked the yardmaster position.

Effective February 12, 1943, claimant was directed to work on the 3:00 P. M. to 11:00 P. M. shift on Tuesdays, Wednesdays, Thursdays and Fridays, with Saturday as his day of rest. He was also required to work the 7:00 A. M. to 3:00 P. M. shift on Sundays and Mondays, which was the regular position of Clerk Swable. On Sundays and Mondays, while Boyle was working the 7:00 A. M. to 3:00 P. M. shift, his position on the 3:00 P. M. to 11:00 P. M. shift was worked by a newly hired clerk by the name of Rice. Rice filled Boyle's assignment on the 3:00 P. M. to 11:00 P. M. shift on Saturdays, Boyle's rest day. Effective August 23, 1943 claimant was assigned to the 3:00 P. M. to 11:00 P. M. shift for the six days of the week, viz., Sunday through Friday, with Saturday as his rest day, thus terminating his claim on that date.

Still other facts may be fairly deduced from the record by inference and circumstances but we shall not refer to them until contentions advanced by the parties in support of their respective positions have been stated.

On behalf of the petitioner it is claimed that prior to and during the period of time covered by the claim Boyle was a regularly assigned yard clerk at Springfield, not a relief position, with a regular or fixed starting time of 3:00 P. M. which at no time was properly discontinued or abolished by the carrier and that its action in requiring him to work Swable's position at a starting time other than his own was a violation of Rule 20 of the current Clerks' Agreement which reads:

CHANGING ASSIGNED STARTING TIME

> "Regular assignments shall have a fixed starting time and a designated point for the beginning and ending of tour of duty and the regular starting time shall not be changed without at least thirty-six (36) hours' advance notice to the employes affected. When the established starting time of a regular position is changed one hour or more for more than six (6) consecutive days, or a change made in the day of rest, or changed a total of more than two (2) hours during a period of one year, the employes affected may, within ten (10) days thereafter, upon forty-eight (48) hours' advance notice to proper official, exercise seniority rights to any position held by a junior employe. Other employes affected may exercise their seniority in the same manner."

For this alleged violation compensation is claimed at the rate of time and one-half for Boyle for all time worked by him outside his regular assignment.

The petitioner also claims that the course of action indulged in by the carrier with respect to changes made in Boyle's hours and work was for the

express purpose of avoiding the necessity of payment for overtime on the yard positions in question and that in requiring him to suspend work on his own assignment to accomplish such purposes the carrier violated Rule 47 of the Agreement which provides:

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

Compensation for the alleged violation of this rule is claimed on the basis of the pro rata rate for each eight (8) hour tour of duty Boyle was required to suspend work on his own regular assignment in order to comply with the requirements of the Carrier.

Other rules relied on as having a bearing on petitioner's claim are 58 and 45 but the violation of their terms is not urged as a basis for recovery of compensation.

Rule 58 (Adjustment of Rates) reads:

"Established positions will not be discontinued and new ones created under different titles covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

Rule 45 (Notified or Called) provides:

"Except as provided in Rule 46, employes notified or called to perform work not continuous with, before or after, the regular work period shall be paid at overtime rates on the minute basis with a minimum of two hours for each tour of duty."

In passing it should be noted petitioner's claim dates from December 2, 1942, whereas alleged violations commenced on November 25, 1942. It explains this fact is due to Memorandum No. 7 of the Agreement which provides claims may not be allowed for a period of more than thirty (30) days immediately preceding the date the claim was filed with the carrier—in this case January 1, 1943—and is in no sense to be considered as a waiver or admission that carrier was not violating the agreement on all days subsequent to November 25, 1942.

The respondent first relies on the proposition that Boyle's position as assigned by it was not that of a regularly assigned yard clerk but was a regularly assigned relief position and therefore contends that since such positions are not required under the Agreement to have the same starting time each day there was no violation of Rule 20 heretofore quoted.

In support of its argument such employe was properly assigned to a relief position it relies on Rule 57 which reads:

"(a) Relief positions may be established for the purpose of relieving employes on positions necessary to continuous operation.

"(b) Relief employes shall be paid the rate of positions worked.

"(c) Relief employes shall be given six-day-per-week assignments whenever practicable."

Assuming the correctness of its position the carrier next contends that the following rules, which we quote, are applicable and justify its action with respect to compensation paid to Boyle by it as one holding a regular relief assignment:

"Rule 50—SUNDAY AND HOLIDAY WORK

"Work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided

when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday) —shall be paid at the rate of time and one-half, except that employes necessary to the continuous operation of the carrier and who are regularly assigned to such service, will be assigned one (1) regular day off duty in seven, Sunday if possible, and if required to work on such regular assigned seventh day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate."

"MEMORANDUM OF UNDERSTANDING NO. 3

"Positions necessary to continuous operation are such positions as are regularly relieved on the seventh day or filled by regular occupant on the seventh day and compensated therefor at punitive rate."

We have not overlooked petitioner's contention as to the proper application of the two contractual provisions last quoted. For reasons to be presently disclosed we do not detail them at the moment but will make reference thereto later.

With the issue stated it must be apparent to the close observer there is one all-decisive question which must first be determined before attempting to make application of other propositions urged and relied upon by the parties and that is whether Boyle's position on the dates in question was that of a regularly assigned yard clerk as contended by petitioner or was that of a regularly assigned relief clerk as claimed by respondent.

At the outset, in our search for the answer to the question just recited, it should be stated that we are not limited, nor should we confine our deliberations to a narrow construction of the bare facts as they may appear from the record in any proceeding. To the contrary circumstantial evidence and inferences fairly to be deduced from the testimony of witnesses and documents introduced are just as important as any other evidence and should be given careful consideration and attention. It is with the principle just stated in mind we approach consideration of the status of Boyle's assignment.

Without attempting to detail them, but assuring those who care to search as we have that they can be found, we do not hesitate to say our careful examination reveals a record brim full of facts and circumstances irreconcilable with the carrier's position Boyle was ever regularly assigned as a relief clerk. It convinces us beyond peradventure of any doubt that he not only had a regular assignment as yard clerk prior to November 25, 1942, but that he retained that assignment throughout the entire period covered by the claim. While it is true the carrier might pursuant to Rule 57 establish a relief position it did not accomplish that result by the simple process of giving the holder of a regular assignment notice it was assigning him to work relief on another tour of duty. Moreover such action by the carrier, even when followed by Boyle's subsequent compliance with its requirements, could not and did not deprive him of his original status. It necessarily follows under well considered decisions of this Board the effect of which are conceded but not approved of by the carrier (See Awards 967, 1307 and 2053) that the course of action followed by it in requiring Boyle to work different starting times on his regular assignment resulted in a violation of Rule 20 of the current Agreement. For additional awards where the principles resulting in the conclusion announced are recognized and applied, see Awards 22, 1690, 1641, 1591 and United States Railroad Labor Board Decisions 3635, 3682 and 4178.

The same careful examination of the record, but for the purpose of ascertaining the true effect of the arrangement consummated by the carrier, convinces us its design was to avoid payment of overtime. It resulted in Boyle

having to lay off on days included in his regular assignment in order that he might perform the duties of Swable's assignment. If Boyle had been called upon to work Swable's tour of duty for reasons deemed necessary and then had worked his own he undoubtedly would have been entitled to overtime. Of course the carrier could have established another regular relief position or filled the one then in existence and perfected an arrangement not necessary to the actual result of the plan it put into action. But it did not see fit to do so. However we are not interested in what might or might not have been done to avoid the condition: Our problem is to determine the effect of the one in existence. We believe it is clear the result attained, whatever the purpose motivating it, was the avoidance of overtime and that Boyle was required to suspend work on his own tour of duty in order to accomplish it. Therefore the course of conduct pursued by the carrier resulted in a violation of Rule 47 of the Agreement. For decisions of this Board recognizing the principles behind our construction and approving their application, see Awards 2537, 2346 and 2593.

Much time has been consumed by the carrier both in its brief and argument in discussions of the force and effect of Rule 50, commonly referred to as the Sunday and Holiday Rule. We recognize the force and effect of the doctrine enunciated in Awards 594, 596, 750, 1635, 2591, 2592 and 2593 all of which were cited. So far as here involved our difficulty arises in reaching the conclusion its terms are applicable or determinative. The claim as filed was not based on its violation. The brief and reply brief of petitioner did not urge application of its provisions and it is frankly stated it does not claim Boyle should be paid anything by virtue of its terms. Under such circumstances and in view of the fact this award, as will be presently disclosed, is not based on any provisions to be found in the rule, how can it be said there is any necessity of elaborating on its force and effect? The carrier so far as it relates to this proceeding is neither helped nor harmed by our failure to do so and therefore not prejudiced by our decision the rule is not applicable to a determination of the rights of the parties.

We direct our attention now to compensation to be allowed for violation of Rules 20 and 47. With the Sunday Rule eliminated our decision should be reached without regard to the character of the assignment on which Boyle performed the work in question. Differently stated it is our belief that restricted to the factual situation presented to us in the instant case our decision should be based on his right to compensation as one who holding a regular assignment of his own, is notified or called to perform work on a position held by another. In passing it should be stated this conclusion also does away with necessity for consideration of Memorandum of Understanding No. 3 of the Agreement. So viewed it must be conceded by reference to the schedules of record that while Boyle was required to suspend his work no day worked by him at the direction of the carrier was on his regularly assigned rest day. He only worked on days which he would have otherwise worked had he been permitted to carry out the duties of his own assignment. Therefore, he was not entitled to time at rate and one-half because required to work on his rest day, nor was he entitled to compensation at that rate on account of a violation of Rule 45 because further reference to the schedules discloses he was in each instance called to work and worked a time period immediately preceding the regular work period of his own assignment. Boiled down, so far as it pertains to compensation our decision must be based on Rule 44 providing remuneration for overtime. But Boyle did not work his own shift on the days he worked the other position. At no time did he work more than eight (8) hours on any one of the days involved. The practical result of claimant's position if sustained in its entirety would be to allow recovery of a penalty for each violation of the rule committed in effectuating a single course of action. That result would entail a pyramiding of penalties which might, if we visualize extreme illustrations, be so harsh as to be unconscionable. Such action, when a single course of conduct is involved, would in our opinion be unfair and unequitable and violate the spirit and intent of the purposes prompting

enactment of the Railway Labor Act. Under the factual situation presented to us in this case we believe a fair, just and equitable result would be to impose the penalty for violation of Rule 47 and refuse imposition of any penalty under Rule 20, although violated. This conclusion does not of course imply that if the evidence had not justified a finding Rule 47 had been violated, there would under such circumstances and the factual situation presented, be no justification for allowance of a penalty for violation of Rule 20 standing alone. Compensation as indicated in the Opinion is to be limited to 54 days only, the parties having agreed that Monday, February 1, 1943, should be eliminated from consideration.

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 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 carrier violated the agreement.

AWARD

Claim sustained as to Item (1), denied as to Item (2-a) and sustained as to Item (2-b) for 54 of the 55 days described in the claim.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of July, 1944.