

Award No. 2695

Docket No. CL-2745

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that:

(a) Regular assigned Relief Yard Clerk, C. N. Clark, be compensated for eight hours at his regular rate on December 21, 22 and 23, 1943 account being instructed to vacate his regular assignment on each of those dates to fill position of first trick Yard Clerk, hours of assignment 7:00 A. M. to 3:00 P. M.

(b) Regular assigned Relief Yard Clerk, C. N. Clark, be compensated the difference between pro rata rate received for service performed outside of his regular assignment December 21, 22 and 23, 1943, and punitive rate which should have been paid.

EMPLOYEES' STATEMENT OF FACTS: Yard Clerk C. N. Clark of the Illinois Transfer District holds a regular assigned position of relief clerk or swing man in that district which position carries the following regular assigned hours of duty:

Sunday	—	7:00 A. M. to	3:00 P. M.
Monday	—	7:00 A. M. to	3:00 P. M.
Tuesday	—	3:00 P. M. to	11:00 P. M.
Wednes.	—	3:00 P. M. to	11:00 P. M.
Thurs.	—	10:00 P. M. to	6:00 A. M.
Friday	—	11:00 P. M. to	7:00 A. M.
Saturday	—	Day of Rest	

On December 21, 22, and 23, 1943, Yard Clerk Wilde who holds the regular 7:00 A. M. to 3:00 P. M. position, having Monday as his day of rest, was away from duty due to personal illness. On December 20, Chief Clerk Maher instructed Mr. Clark to work Mr. Wilde's regular assignment until he returned to duty. Mr. Clark advised Mr. Maher that he would prefer to work his regular assigned hours on each of these days and on December 23 specifically requested that he be permitted to come out on his regular assignment at 10:00 P. M. that night. This Mr. Maher refused to permit him to do—Mr. Wilde having reported in on that date that he would return to work on the 24th.

circumstances involved in that decision are similar to our case in that the vacancy that necessitated the assignment to other duties was brought about by sickness. The entire claim is predicated on the "assignment to other service" rule. Note that the New York Central "assignment to other service" rule is not as stringent as our Rule 57, as assignment to other service on the New York Central is entirely contingent on an emergency, whereas there are no restrictions whatever in our Rule 57. In our case, employees may be assigned to other than their regular duties for any number of reasons. As indicated previously, there are no restrictions whatever in our rule and under such conditions it is natural to assume that no employee could substantiate a claim or a grievance unless based on arbitrary or unnecessary shifting of forces not warranted by the acts of other employees or the exigencies of the service.

OPINION OF BOARD: On the dates involved in the present claim, C. N. Clark was regularly assigned to relieve six other regularly assigned yard clerks on their days off. Clark's regularly assigned days and hours were: Sunday and Monday, 7:00 A. M. to 3:00 P. M.; Tuesday and Wednesday, 3:00 P. M. to 11:00 P. M.; Thursday, 10:00 P. M. to 6:00 A. M.; Friday, 11:00 P. M. to 7:00 A. M., Saturday being his day of rest. On Tuesday, Wednesday and Thursday, December 21, 22 and 23, 1943, Yard Clerk Wilde, assigned hours 7:00 A. M. to 3:00 P. M., for six days of the week, Monday being his rest day, was away from duty because of illness. Clark was directed to work Wilde's regular assignment until Wilde returned to work and the other yard clerks were required to work their rest days and were paid time and one-half therefor. Clark was paid straight time for the time actually worked. The Organization contends that this constitutes a violation of the agreement and the imposition of the penalty payments asked for in the claim.

Clark was a regular assigned relief clerk. In filling Wilde's regular assignment, Clark was required by the Carrier to suspend work on his own assignment. We think the correct method of handling is in conformity with the views asserted by the Organization. In other words, where no extra men are available, the relief man should be left on his regular relief assignment and the regular man who is off on relief should be called out to work the position of the employee laying off. Regular assignments should not be disturbed except as a last recourse in situations such as we have here. This appears to be in accord with the holding of this Division in Award 2346.

The Carrier contends that Award 2511 controls the present situation. There are distinguishing features in that case which we do not find here. There appears to be no discussion of the rule, if one is existent on the carrier there involved, that employees will not be required to suspend work during regular hours to absorb overtime. Under the agreement in that case, regularly assigned employees were not to be required to perform service on other than their regular assigned positions except in emergencies. That situation was disposed of there by a holding that an emergency did exist. We think the distinguishing features are such that the award is not a controlling precedent here. All sections of the agreement must be considered and effect given to each. Following this rule, it is necessary that effect be given to that part of Rule 48 providing that "Employees will not be required to suspend work during regular hours to absorb overtime."

We think that Clark is entitled to be compensated for eight hours at his regular rate on December 21, 22 and 23, 1943, on account of being denied the right to work his regular assignment on those days. Award 2346.

We are of the opinion that there is no basis for an affirmative award as to claim (b). In Award 2346, this Board said: "Neither can we find that assignment without actual work is equivalent to work when the overtime rule is to be construed and applied." We think the reasoning of the foregoing award is sound that overtime cannot be allowed when the regular assignment is not worked. To hold otherwise would inflict a double penalty upon the

carrier,—straight time for the regular assignment not worked and time and one-half for the eight-hour assignment actually worked. We adhere to the holding on this issue in Award 2346 which requires a denial of Claim (b).

The Carrier alleges that it handled the situation here involved in accordance with a long established practice and for that reason no affirmative award can be granted. We must adhere to the principle that the contract supersedes an existing practice and when the practice is continued after an agreement is made, the agreement may be enforced at any time even though the parties may have estopped themselves from any retroactive benefits by their acquiescence in the continuance of the practice.

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 current agreement to the extent shown by the opinion.

AWARD

Claim (a) sustained. Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of November, 1944.