Award No. 2859
Docket No. CL-2837

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

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

THE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the intent and provisions of the Clerks' Agreement at Barberton, Ohio, when from August 10 to October 24, 1942, it required C. J. Hawse, General Clerk, to vacate his regularly assigned position, hours 6:00 A. M. to 3:00 P. M. and work position of Night Yard and Ticket Clerk, hours 5:00 P. M. to 2:00 A. M. and assigned duties of General Clerk to an employe not covered by the Clerks' Agreement, and

(a) That Carrier shall now compensate employe C. J. Hawse, General Clerk, at rate of time and one-half for all time required to work position of Night Yard and Ticket Clerk outside of his regular hours of assignment, and

(b) That C. J. Hawse be compensated at regular rate of pay for his regular assignment which he was not permitted to work, the work of position of General Clerk having been performed by an employe not covered by the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: Effective July 8, 1942 the Carrier abolished the position of Bill Clerk at Barberton, Ohio, hours 3:00 P. M. to 12 Midnight, one hour for lunch and much of the work of that position was passed on to Mr. W. W. Hawse, Night Yard and Ticket Clerk whose hours were from 5:00 P. M. to 2:00 A. M., rate $5.90 per day with the result that Mr. W. W. Hawse on July 26, 1942 tendered his resignation to be effective August 10, 1942.

The position to be vacated August 10, 1942 as a result of the resignation of Clerk W. W. Hawse was advertised for bid August 4, 1942 and no applications being received, effective August 10, 1942, employe C. J. Hawse, regularly assigned General Clerk, hours 6:00 A. M. to 3:00 P. M., rate $5.90 per day, was instructed by the Agent, Mr. L. V. Yoder, to cease work on his regular position and protect the position of Night Yard and Ticket Clerk until such time as another clerk could be broken in to hold the position.

Employe C. J. Hawse protested this arbitrary order but Agent Yoder insisted he protect the night job and under protest employe C. J. Hawse worked the position of Night Yard and Ticket Clerk from August 10 to October 24, 1942, during which period the major part of the work falling to the General Clerk's position was taken over and performed by the Agent, Mr. Yoder, an employe not covered by the Clerks' Agreement, while not to exceed one and one-half hours' work of the position was passed on to and performed by other clerical employes in the Barberton office.

2nd—Rule 23 (a) cited by the Brotherhood is not applicable because work in excess of eight hours is not involved. This principle has previously been agreed to by Third Division in Awards 815, 2444 and 2511.

3rd—When it becomes necessary for the Carrier to use a regular assigned employe on another position, there is no requirement under any rule that penalty rate must be paid for such work unless the employe actually works in excess of eight hours.

4th—Rule 36 of Rules and Regulations September 1, 1936 is the only rule which has any application to a situation here involved, and there was no violation. This same rule has been continued in agreement December 1, 1943, as Rule 34.

5th—Agent at Barberton, Ohio does now and has always performed some clerical work, incident to his position as Agent just as other agents do, and there is no rule which prohibits an agent from performing any clerical work incidental to his position. He is responsible for and supervises and directs all operations at his station, including all clerical work.

6th—This is an attempt by the Brotherhood to have the Third Division by an award establish new procedure and penalty pay when employes are assigned temporarily to other positions. Rule 36 covers and any request for change is subject of negotiation and not one of interpretation. Rule is clear.

7th—Docket CL-2769 now pending with Third Division covers a similar situation at Marion, Ohio. Both cases involve temporary assignment under Rule 36.

OPINION OF BOARD: We believe that Rule 24 governs this case. The rule is clear and simple. It prohibits Carrier from suspending work of employes during regular hours for the purpose of absorbing overtime. If the temporary assignment which was made in the instant case has the effect of a suspension of hours and the absorption of overtime, it is no defense for Carrier to assert that it did not intend to absorb overtime. It is bound by the natural consequences of its own acts. See Awards 139, 2593, 2823. Whether or not it was intentionally designed by Carrier to bring about this result, it constituted a violation of Rule 24 if the assignment actually brings it about. Award 2593.

There is no question but what Carrier in the instant case did everything possible to secure a new employe for the night trick. It bulletined the position but received no applications. It trained one prospective employe who was called into the service. After finally securing another it restored Claimant to his original position. But the rule does not say that there may be no suspension of hours for the purpose of absorbing overtime except in cases of emergency. It contains no exceptions, nor are there any to be found in the Agreement. We would be usurping functions which do not belong to us were we to rewrite this rule under the guise of interpretation. If a change is desirable it should be accomplished by negotiation.

Carrier contends that the temporary assignment is authorized under Rule 36, which reads:

"Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced.

"A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignment does the work irrespective of the presence of the regular employe.

"Assisting a higher rated employe due to a temporary increase in the volume of work does not constitute a temporary assignment."

Recent awards of this Division dispose of this contention adversely to Carrier. In Award 2823 Referee Shake refers to a similar rule as a "rating provision." In Award 2775, involving Rule 46 of Maintenance of Way, which is similar to 36 here relied on by Carrier, this Division concludes that the rule does not give carrier the right to shift employes from one position to another and they may not be removed from their regular assignment at the direction of management and assigned temporarily to others entirely dissimilar in their nature. That reasoning applies with equal force here. Rules 36 and 24 must be considered together in the light of their obvious purposes. By temporarily assigning Claimant to the other position there was a clear violation of Rule 24. See also Award 2695.

Of course a different situation arises when the Agreement gives specific authority to temporarily assign employes in cases of emergency, or where supervisory officers are given permission to change the starting hours after proper notice. Such is the case in the numerous awards cited by Carrier, which we have carefully studied and find readily distinguishable. For example, in 2826, the Agreement contained a provision that the starting time for regularly assigned service shall be designated by supervisory officers. In 2511 (as pointed out by this Division in 2695) there was a specific provision in the Agreement that regular assignments would not be disturbed except in emergencies. A similar distinction in the rules and agreements exist in the other awards cited.

No case has been cited by Carrier, nor have we found any, where this or any other Division (the Agreement containing a rule similar to 24) has approved a temporary assignment where there has been no provision in the rules or Agreement authorizing it in cases of emergencies or some other exception such as authority to supervisory officers to determine the starting time.

We therefore hold that under the facts as existing here there was no justification or authority for the temporary assignment.

We do not believe however, that there is any basis for an affirmative award as to Claim (a). This Division has frowned upon infliction of a double penalty, as would result if the entire claim were allowed. Award 2695.

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 Carrier violated Agreement;

That Claim (a) should be denied and Claim (b) sustained.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of March, 1945.