Award No. 2884
Docket No. CL-2895

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Henry J. Tilford, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that T. J. Long, Jr., Clerk at Oroville, California, was entitled to be paid for 8 hours at straight time rate and 8 hours at rate of time and one-half daily for the period, August 17, 1942 to October 11, 1942, inclusive; and that he be reimbursed for wage loss sustained account of failure of the Railroad to compensate him in the manner described.

EMPLOYES' STATEMENT OF FACTS: T. J. Long, Jr. was regularly assigned to position of Yard-Checker at Oroville, rate $6.20 per day, hours 8:00 A. M. to 4:00 P. M. He was instructed by Train Master to fill the position of Train Desk Clerk, rate $6.70 per day with hours 4:00 P. M. to Midnight, beginning August 17, 1942. Long advised Trainmaster Taylor that he did not want to work these hours; that he preferred to work his own hours of 8:00 A. M. to 4:00 P. M. Trainmaster, however, insisted that Long work the position as directed. Long did so, and his position of Yard Checker, 8:00 A. M. to 4:00 P. M. was filled by another employe.

Long was paid at straight time rate for service performed on shift 4:00 P. M. to Midnight from August 17, 1942 to October 11, 1942.

POSITION OF EMPLOYES: There is in evidence an agreement, bearing effective date of October 1, 1930 from which the following rules are cited:

> "Rule 19. Employes covered by groups one and two, Rule 1, heretofore paid on a monthly, weekly, or hourly basis shall be paid on a daily basis. The conversion to a daily basis of monthly, weekly, or hourly rates shall not operate to establish a rate of pay either more or less favorable than is now in effect.
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> "To determine the daily rate for monthly rated employes multiply the monthly rate by 12 and divide by 306. Fractions of less than one-half of one cent shall be dropped, one-half cent or over shall be counted as one cent. EXAMPLE: $7.4542, shall be $7.45; $7.455, shall be $7.46.
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> "Nothing herein shall be construed to permit the reduction of days for the employes covered by this rule below six per week, except that this number may be reduced in a week in which holidays occur by the number of such holidays, as specified in Rule 22."
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> "Rule 20. Except as provided otherwise in these rules, time in excess of eight hours, exclusive of the meal period, on any day shall be considered overtime and paid on the actual minute basis at the rate of time and one-half.

any portion of his regular hours. Therefore, he could not have been required to suspend work "during regular hours." There was an emergency at Oroville Yard, a main line district terminal through which many trains, practically all of them loaded with war materials, were passing. The Train Desk Clerks are absolutely essential to the movement of such trains as they handle the clerical work connected with the actual movement of the trains through the terminal. Insofar as Oroville is concerned, the employes have so contended in the past and their contention was sustained by your Award No. 1272.

Long was the only clerk available qualified for the work and the officers took the only course open to fill the vacancy in the emergency. As in Docket No. TE-2512, Award No. 2511 "Claimant, not having worked his regular assignment, performed no overtime service in contemplation of Rule 4"—our Rule 20 here involved.

Carrier does not agree with employes that your Awards No. 148 and No. 1133 are applicable.

It is not the purpose nor the practice of this Carrier to take an employe away from his regular assignment except to meet an emergency condition which cannot otherwise be handled and these were the circumstances in the instant dispute. The action taken did not constitute a violation of any schedule provision and Carrier urges that the claim of the employes be declined.

OPINION OF BOARD: It is apparent from the Statements of Facts and Positions of the respective parties that this controversy involves primarily the proper construction to be placed upon the third paragraph of Rule 20 and upon Rule 10, which read as follows:

Third paragraph of Rule 20:

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

Rule 10:

"Employes assigned temporarily to higher rated positions shall receive the higher rate. Employes assigned temporarily to lower rated positions shall not have their rates reduced.

"A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position, whether the regular occupant is absent or present; merely assisting a higher rated employe during a temporary increase in the volume of the work does not constitute a temporary assignment."

Stripped to its essential, the Petitioner's contention is that the mere fact that an employe clerk is assigned to another position requiring work at a different period of the day rather than permitted to fill both positions, even though each requires eight hours work and performed together, as in the confronting case, would require sixteen (16 hours continuous service, constitutes conclusive evidence that Rule 20 was violated, irrespective of the purpose of the Carrier in making the change and irrespective of the duration of the temporary assignment. The effect of this contention, if sustained, would obviously be to delete from Paragraph 3 of Rule 20 the concluding three words "to absorb overtime." Cited in support of this position are numerous precedents, the latest of which is Award 2859.

The Carrier contends that Rule 10 contemplates that employes may be temporarily assigned to other positions so long as it is not done for the purpose of avoiding the payment of overtime and the employes are paid the higher rates of compensation attached to the positions temporarily assigned, and that the true intent of Paragraph 3 of Rule 20 is to prevent the Carrier

from suspending an employe from his job during any portion of his assigned hours to off-set overtime incurred by requiring him to report for duty earlier or to work later than the hours of his regularly assigned period, or overtime to be incurred by working him on his regular relief day. It also argues that the fact that Long was completely taken out of the position from which he was transferred and that position filled by another during the entire period of Long's temporary assignment, together with the lengthy duration of the temporary assignment, distinguishes this case from some of the precedents cited by the Petitioner.

In answer to the first of these contentions it was said in our Opinion in Award 2823:

> "This, in our opinion, would unduly restrict the proper application of Rule 39 (a) (a rule in the Clerks' Agreement with The Denver and Rio Grande Western Railroad Company similar to Paragraph 3 of Rule 20) by, in effect, adding to its clear and specific language the words, 'on his own position.' It is beyond the purview of this Board to limit or expand the meaning of contractual rules that are free from ambiguity."

Furthermore, in Award 2859 the material facts were strikingly similar to those of the present case in that the position previously occupied by the temporarily transferred employe was filled during the period of his temporary employment, and in that Award we said:

> "We believe that Rule 24 (of the Clerks' Agreement with the Erie Railroad) 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.
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> "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. He 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."

The Opinion in Award 2859 also considered and denied the contention that a rule relating to temporary assignments, similar to Rule 10 of the present Agreement, conferred the right upon the Carrier, over the protest of the employe, to assign him temporarily to another position. In effect, it sustains the argument of Petitioner that Rule 10 merely deals with the preservation of rates or with compensation. It should not be overlooked, however, that such an interpretation, if adhered to, since there is no emergency exception in the present Agreement, would result in rendering it impossible for the Carrier, except with the consent of an employe, to temporarily transfer him to another position, and that under the present interpretation of Paragraph 3 of Rule 20, if the transfer was effected, the Carrier would be compelled to pay the transferred employe at overtime rates during the entire period of his temporary assignment unless the hours of the assignment to which he was transferred were identical with those of the assignment which he previously worked.

We think that, in accordance with the universal rule of interpretation that all the words of a contract must be given effect if possible, the Carrier should not be required to pay a temporarily transferred employe overtime rates where it is shown that the transfer was not made for the purpose of avoiding the payment of overtime. Otherwise the words "to absorb overtime" with which the third paragraph of Rule 20 concludes, are denied any effect. We are of the opinion however that since the effect of temporary assignments such as that in the confronting case is to avoid the payment of overtime rates to the employe who is temporarily assigned to the new position instead of being permitted to fill both it and his previous assigned position, the burden should be upon the carrier, if it would escape the payment of overtime in cases such as this, to clearly establish that the transfer was not made to avoid such payment; and in the present case we do not think the Carrier has met that burden. Its reasons for making the transfer appear in its Submission and will not be reiterated, but the Carrier has failed to show that by working Long and other employes overtime the emergency could not have been met and no reason is apparent why the extra clerk who filled Long's position during the period of the latter's temporary assignment, could not have been qualified through the reasonable expenditure of time and money, to fill the position to which Long was temporarily transferred.

However, in accordance with preceding awards of this nature, the Carrier should not be penalized beyond being required to pay Long at his regular rate of pay for his regular assignment which he was not permitted to work.

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 in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of April, 1945.