Award No. 3504
Docket No. CL-3374

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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

(a) The rules of the Clerks' Agreement, bearing effective date October 1, 1942, were violated when Carrier assigned or permitted Mr. G. F. Everline, Head Clerk, Revising-in, to perform routine clerical work assigned to position occupied by Mr. F. E. McLain; and

(b) F. J. Debbrecht be compensated in the amount of thirty-six (36) hours at punitive rate of his regular assignment and G. Davis be compensated in the amount of thirty-five and one-half (35½) hours at punitive rate of his regular assignment to cover time spent by Mr. Everline in performing the work assigned to position occupied by F. E. McLain.

EMPLOYES' STATEMENT OF FACTS: Mr. F. E. McLain was absent from his regular schedule position during December 1943 on account of sickness and his sick leave allowance expired at noon on December 13, 1943. During his absence he was confined to the Topeka Hospital where he underwent an operation for hernia. He was unable to report for duty until the morning of December 24th which was eight days, seven and one-half hours after his sick leave allowance had expired, therefore, McLain was not paid for this eight day, seven and one-half hour period.

Article III, Section 10-a of the Agreement clearly spells out the manner in which temporary vacancies shall be filled. The Carrier, however, assigned the work during this eight day, seven and one-half hour period to Mr. G. F. Everline, Head Clerk, Revising-in, who occupies a position that is specifically excepted from the operation of the Agreement rules, and Mr. Everline performed all of the routine clerical work assigned to Mr. McLain's position.

POSITION OF EMPLOYES: It is the position of the employes that the particular work performed by the Head Clerk, Revising-in, in this case was routine clerical work and work that is a part of the position held by F. E. McLain and regularly performed by an employe covered by the provisons of the Clerks' Agreement, and that the following rules of the Agreement, bearing effective date of October 1, 1942, are in violation.

Article I, Section 1
Article II, Section 1
Article III, Sections 1 and 10-a
Article XIII, Section 15

Carrier "entirely ignored the provisions of this section in filling Mr. McLain's vacancy for these eight days, seven and one-half hours" infers that the vacancy was filled, presumably by assignment thereto of Head Clerk Everline. Although denying that the vacancy was actually so filled, it is pertinent to point out that nothing in the rule would have been violated by filling the vacancy by an assignment of Mr. Everline thereto, for first, there was no qualified off-in-force-reduction employe available for recall, and second, no qualified employe in service at the point made application for the temporary vacancy. Neither of these alternatives being applicable the vacancy could have been filled in whatever manner the Carrier elected, whether by assignment of Mr. Everline or otherwise.

This particular allegation by the General Chairman is inconsistent with the claim itself. If it is the position of the Employes that there was a qualified available off-in-force-reduction employe who should have been recalled, or if it is the position of the Employes that there was a qualified employe in service at the point who made application for the temporary vacancy and was denied the assignment, the claim necessarily should be filed on behalf of such employe, and not for punitive overtime payments to other individuals.

For some reason unknown to the Carrier, the Employes have also cited Article XIII, Section 15 of the Agreement as being in violation. This rule is simply the enacting clause of the Agreement and certainly has no bearing whatever on the instant claim. There has been no unilateral revision of the Agreement by the Carrier as inferred by the Employes.

Conclusions.

In conclusion the Carrier asserts that this claim is an attempt by the Employes to obtain an undue and unreasonable restriction of the duties of certain of the Carrier's supervisory employes in direct contravention and repudiation of the Agreement effective October 1, 1942, and that the claim is entirely without merit and should be declined for the following reasons:

1. The claim is not supported by the facts in the case. The Employes have submitted no evidence in support of the allegation that Head Clerk Everline performed 71-½ hours of routine clerical work, or any substantial fraction of that number of hours.
2. Such clerical work as Head Clerk Everline did perform was incidental to and in consequence of his position as Head Clerk, and clearly within the provisions of the agreed upon Memorandum of Interpretation of Application of Articles I and II of Agreement to Become Effective October 1, 1942.
3. Neither of the claimants, F. J. Debbrecht nor G. Davis, suffered any loss of earnings whatsoever nor is it shown that any other employe suffered loss of earnings.
4. No violation of any Agreement rule is shown to have occurred.

OPINION OF BOARD: It seems apparent from the record that the position of Clerk McLain was filled by the Head Clerk, who regularly occupied an excepted position, while McLain was on leave of absence due to sickness. Thus the Carrier removed such work for such time from the scope and operation of the Agreement.

But Carrier contends it was permitted to do so under a concurrent Mediation Agreement interpreting Articles I and II [Scope and Definition] of the current Agreement. The interpretation agreed upon stated that work of Class 1, 2 and 3 employes, when performed by officials and others not covered by the Agreement incident to or as a consequence of their official or other positions, is not subject to the provisions of said Agreement.

However, the interpretation is not applicable in this case because the Head Clerk was not performing work incident to or as a consequence of his own position when he was temporarily performing the work of Clerk McLain whose position was under the Agreement.

The same interpretation as considered and held inapplicable in an almost identical situation in Award 3191, which we reaffirm and follow.

Accordingly Claim (a) must be sustained.

Claim (b) seeks to recover the punitive rate but the proper penalty for work lost because it was given to one not entitled to it under the agreement is the rate normally earned by the position from which such work was taken.

> "In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned." See Awards 3193, 3222, 3232, 3271.

Therefore Claim (b) should be sustained for the pro rata rate of Mr. McLain's position.

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 as contended by the Petitioner.

AWARD

Claim (a) sustained; Claim (b) sustained in conformity with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of April, 1947.