Award No. 4037
Docket No. CL-4051

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

MISSOURI PACIFIC RAILROAD COMPANY
(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on Sunday, June 22, 1947, it utilized an individual, V. L. Renner, who had no established seniority rights and had not previously performed compensated service as a clerk for the Missouri Pacific Railroad to work **AUTHORIZED OVERTIME** on vacancy of Clerk C. Baker, Outside Yard Clerk, Hoisington, Kansas, 3:00 P. M. to 11:00 P. M., rate $7.79 per day, rest day, Wednesday, and failed and refused to permit the regularly assigned first shift Outside Yard Clerk Mr. G. W. Brunts, hours 7:00 A. M. to 3:00 P. M., seniority date, March 24, 1942, rest day, Monday, to work the **AUTHORIZED OVERTIME** which he as the "incumbent" of "Outside Yard Clerk" position at Hoisington in the wheel where the vacancy occurred, was entitled to work and be paid for same at the overtime rate under the provisions of Rules 6 and 25 of the Clerks' Agreement;
2. That Clerk G. W. Brunts shall be compensated in the amount of eight hours at $1.46 per hour, or $11.68, which wage loss he was forced to suffer account Carrier's action in violation of the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: On June 22, 1947 (SUNDAY), the Carrier maintained at its Hoisington, Kansas Yard a "wheel" of three regularly established and assigned positions, relieving and being relieved around the clock, the three positions classified as "Yard Clerks" which were in fact, "Outside Yard Clerks" and were those coming within the category of

"necessary to the continuous operation of the Carrier"

as provided in the second part of Sunday and Holiday Rule 26 of the current Clerks' Agreement, which three positions were embraced in a pool of six jobs. The classification, name of occupant, rate of pay and hours of assignment of these three Outside Yard Clerk positions were:

Name	Classification	Rate	Assigned Hours	Assigned Day of Rest
G. W. Brunts	Yard Clerk	$7.79	7:00 A. M.- 3.00 P. M.	Monday
C. Baker	Yard Clerk	7.79	3:00 P. M.-11:00 P. M.	Wednesday
H. S. Blanchard	Yard Clerk	7.79	11:00 P. M.- 7:00 A.M.	Thursday

It will be recalled that the Carrier was required to pay Mr. Renner, the new employe, at the punitive rate for the services he performed while working the temporary vacancy of the 3:00 P. M. to 11:00 P. M. shift on this date. He was paid at the punitive rate under the provisions of Rule 26, the Sunday and Holiday rule, not under the provisions of Rule 25, the Overtime rule. There was no overtime involved.

This organization has for many years sought shorter hours, contending that they did not desire to work long hours. The 8-hour day had its inception at the instigation of organized employes. Initially, employes were paid overtime at the same hourly rate which they received for the hours of their regular 8-hour assignment. They contended that this did not have the effect of reducing the number of hours they were required to work to 8 hours per day and asked that they be paid for overtime at the punitive rate of time and one-half, the punitive rate being a deterrent to employers and discouraging their requiring employes to work in excess of eight hours per day.

The contention advanced by the organization in this case is a far cry from the contentions they advanced in support of the 8-hour day and in support of time and one-half in excess of eight hours. Here we find them making the ridiculous claim that a man regularly assigned to a first shift position is the incumbent of the second shift position for the purpose of working the second shift position at punitive rates when the regular occupant of that position is absent. They prosecute this claim even though the individual used to work the position was a new employe and by their actions seek to restrict the right of the carrier to employ additional forces in order to permit the Carrier to comply with Rule 21, Hours of Service and Day's Work rule.

The Carrier's compliance with Rule 21 should be of primary importance to all the employes represented by this organization.

Carrier reiterates that the rules of the agreement relied upon by the Employes in support of their contentions in the instant case have no application in the matter in dispute and believes that it has conclusively established that the complaint and claim in this docket are without basis or merit and, therefore, should be denied.

Exhibits not reproduced.

OPINION OF BOARD: On Sunday, June 22, 1947, there was a pool of six positions or assignments in the Carrier's Hoisington, Kansas, Yard Office, admittedly necessary to the continuous operation of its railroad, and a relief clerk was regularly assigned to relieve each one of such positions one day a week.

The occupants of the three positions herein involved relieved each other in continuous around the clock outside Yard Clerk service, the Claimant, G. W. Brunts, senior in point of service, being regularly assigned to the first trick with Monday as his rest day. C. Baker was regularly assigned to the second trick with Wednesday as his designated rest day and H. S. Blanchard was assigned to the third trick with Thursday off.

On Sunday, June 22nd. 1947, Baker was granted permission to lay off through proper authority. Thereafter the Carrier filled his regular second trick assignment with one V. L. Renner, an individual who concededly held no seniority rights under the current Agreement on such date and paid him time and one-half, the overtime rate, for working such trick.

The claim is that the Company's action in directing Renner to fill Baker's shift was in violation of the terms of the working Agreement prohibiting the assignment of work to persons holding no seniority rights to the detriment of employes who held such rights under and by virtue of its provisions.

The rights of the parties to this controversy, except for the fact it involves work on a regularly assigned work day instead of a designated rest day, were definitely decided by this Division in three recent Awards (Nos. 3860, 3861, 3862) wherein similar facts, the same Agreement and the identical parties were involved.

In the master Award (No. 3860) in disposing of contentions almost identical to those now urged it is said and held:

> "The use of an employe whose seniority is not established is permissible only 'when such work is not performed by employes that have established seniority.' One of the purposes of seniority rules is to preserve the right to perform the work first for those who have established seniority, so that the above rule does not authorize work to be done by one without established seniority when there are those with established seniority available and willing to do the work as Claimants were in this case. See Awards 2341, 2426, 2706."

We find nothing in the contentions advanced in this case which convinces us our decisions in the three Awards mentioned were predicated upon an erroneous construction of the working Agreement there and here involved or are otherwise unsound in principle. Therefore following such Awards, to which we adhere as sound precedents, this Division holds that under the facts and circumstances of this case as disclosed by the record, the Carrier's action resulted in a violation of the seniority provisions of the current contract.

The conclusion just announced requires the allowance of the claim and makes disposition of Petitioner's contention that Rule 25 (b) was also violated unnecessary.

The fact that Carrier violated the Agreement does not mean that Petitioner's claim for time lost at the rate of time and one-half must be allowed as made. If Baker, the occupant of the position filled by Renner, had worked his regularly assigned work day on the date in question, he would have been entitled to pro rata compensation only. This Division has repeatedly held that the penalty rate for work lost because it was given to one not entitled to it under an involved agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. See Awards 3193, 3232, 3251, 3271, 3277, 3371, 3375, 3376, 3504, 3745, 3770, 3890, 3837, 3876.

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 but qualified to the extent payment shall be made at the pro rata not at the penalty rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of August, 1948.

DISSENT TO AWARD 4037, DOCKET CL-4051

The Opinion in this Award rests primarily on the conclusions reached in Award 3860, against which dissent has been rendered.

If the agreement means, as apparently here interpreted by relying on Award 3860, that this Carrier cannot hire a new employe as long as a regular assigned employe desires the extra work, no purpose is served by discussing whether or not such new employe has established any seniority. As here interpreted, even if hired, such employe could perform no service. Considering the specific language of Rules 3 (d) and 9 (a), it is inconceivable that either party contemplated such a result in the application of this agreement.

For the reasons stated, we are in complete disagreement with the conclusions reached in this Award.

/s/ A. H. Jones
/s/ C. C. Cook
/s/ R. F. Ray
/s/ R. H. Allison
/s/ C. P. Dugan