Award No. 4103
Docket No. CL-3991

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. (a) When on April 1, 1947, occasioned due to the Carrier's utilizing occupant of first shift General (Passing Report) Clerk, Ira Y. Elliott, 7:00 A. M. to 3:00 P. M., rate $8.64 per day as a "Passenger Trainmaster";

   (b) Occupant of second shift General (Passing Report) Clerk position, C. E. Cliff, hours 3:00 P. M. to 11:00 P. M., rate $8.64 per day, exercising his seniority rights to Mr. Elliott's vacancy per provisions of Rule 9 of the Clerk's Agreement;

   (c) Carrier required and directed Relief Clerk, E. M. Evans who was due to relieve Inbound Routing Clerk, Wesley Wyatt, hours 3:00 P. M. to 11:00 P. M., on Wyatt's rest day, to work the 3:00 P. M. to 11:00 P. M. vacancy on Mr. Cliff's General (Passing Report) Clerk job; and

   (d) Because there was no qualified extra or furloughed clerk available required Clerk Wesley Wyatt to work on his assigned day of rest—(authorized overtime) thus discriminating against third shift General (Passing Report) Clerk, C. E. Watts who was the incumbent of the General (Passing Report) Clerk work, 11:00 P. M. to 7:00 A. M., and who was available, ready and willing to work and who was entitled to perform and be paid for the authorized overtime directly occasioned by the Carrier's action in removing Relief Clerk Evans from the Relief Clerk Position;

2. That Clerk C. E. Watts shall be compensated for eight hours at the time and one-half time, amount $12.96, account Carrier's action in violation of the Agreement, which action was a prohibited discrimination against this claimant.

had nothing whatever to do with the work of that position work overtime and increase his earnings.

The word "authorized", in the second sentence of paragraph (b) of Rule 25, cannot be fully understood without reading and analyzing the first sentence of the same rule. The first sentence merely states that overtime will not be worked without authority of superior officers, except in case of emergency when advance authority is not obtainable. Authorized overtime then becomes overtime that is authorized by a superior officer.

Carrier submits that it did not discriminate against Mr. Watts. Mr. Watts held an assignment working from 11:00 P. M. to 7:00 A. M. and completed all of his work during those hours, and there was no overtime attached to his position. Had there been an undue amount of work on his job that he could not complete between the hours of 11:00 P. M. and 7:00 A. M., and Carrier required the work to be completed, then Mr. Watts would have become an incumbent, and then he would have been required to work overtime. The Carrier did not discriminate against Mr. Watts when it shifted the employe, Mr. E. M. Evans, from his regularly assigned position to another position for a full eight hours, which was a temporary position under the provisions of Rule 9, paragraph (a).

Carrier further contends that Mr. C. E. Watts was no more an incumbent of the 3:00 P. M. to 11:00 P. M. job, regularly assigned to Mr. C. E. Cliff, than Mr Cliff was while occupying a temporary vacancy, hours 7:00 A. M. to 3:00 P. M., and if the claim of Mr. Watts is sustained, then we believe that it can be said that there has been discrimination against Mr. Cliff, and to avoid discrimination under such a situation the Carrier would be required to work both Mr. Cliff and Mr. Watts eight hours, 3:00 P. M. to 11:00 P. M., and pay each of them at the punitive rate.

Exhibits not reproduced.

OPINION OF BOARD: On April 21, 1947, the Carrier maintained at its Kansas City Topping Avenue Yard Office a pool of six regularly assigned 7 day positions, necessary to the continuous operation of its business. Within this pool were two wheels, relieving and being relieved around the clock. The three positions within one wheel were occupied by General Clerks Elliott, Cliff and Watts, with regularly assigned hours 7 A. M. to 3 P. M., 3 P. M. to 11 P. M. and 11 P. M. to 7 A. M. respectively, while the three positions in the other were filled by inbound Routing Clerks Wilson, Wyatt and Valenti, each in the order hereinafter mentioned, namely, 7 A. M. to 3 P. M., 3 P. M. to 11 P. M. and 11 P. M. to 7 A. M.

Each of the foregoing positions had a regularly assigned rest day which were filled by one Evans under a regular assignment as a relief or swing clerk. In fulfilling the requirements and duties of his assigned position he worked six different positions each week, relieving the Clerks named on their respective days of rest.

There is no controversy between the parties with respect to the incidents giving rise to the instant dispute. The record facts can be summarized as follows:

(1) On April 1, 1947, Elliott was taken off his regular assignment and was used by the Carrier in the official position of Assistant Trainmaster at the Kansas City Union Station.

(2) Under existing provisions of the working Agreement Cliff was permitted to fill the temporary vacancy created in Elliott's position by reason of the latter's absence.

(3) Upon the date in question Evans' assignment was to work the rest day of Wyatt's position from 3 P. M. to 11 P. M. Instead of permitting Evans to work such regular assignment the Carrier directed him to take over and he did fill and occupy Cliff's regular position.

(4) Wyatt, who was due to be absent on his weekly rest day, was permitted and required by the Carrier to work the designated rest day of his regular position and was paid the overtime rate for such service.

(5) Claimant Watts worked his regular third shift assignment on the around the clock position he was occupying on April 1, but he was neither called nor permitted to work Cliff's second shift on the same position. His claim is he was available and should have been permitted to work the second shift of such position, that as a result of his not being called and permitted to work it the current Agreement was violated, and that as a consequence he should be paid for such shift the same as if he had worked it.

(6) The Carrier's Kansas City Terminal Division Station and Yard Seniority Roster discloses that Watts was senior to Wyatt in the Carrier's Service.

In addition to those already stated it can be said the record establishes the following facts, not heretofore related because of possible controversy between the parties respecting them, viz:

(1) There were no qualified furloughed or extra Clerks unassigned and available to perform work on any of the positions made temporarily vacant as a result of the incidents and action heretofore related.

(2) Watts did not specifically elect to occupy the temporary vacancy in Cliff's position but there was no evidence to indicate he knew anything about its existance or that the Carrier afforded him an opportunity to elect to do so. His claim that he was not called, that no attempt was made to call him and that he was available is not denied. Hence such matters must be regarded as admitted.

(3) The Carrier neither asserts nor proves (a) the existence of an emergency permitting the filling of Cliff's position by Evans, irrespective of the seniority rules, or (b) that the assigning of such temporary position to Watts would have unduly disrupted the work in the department in which he was employed or worked a hardship upon it.

(4) The duties of the Inbound Routing Clerks were separate and distinct from those of the General Clerks and the three positions within the Inbound Routing Clerks Wheel were not the same as the three within the General Clerks Wheel.

The Carrier's defense to the instant claim is that the record reveals a situation involving the filling of a one day vacancy in the three involved positions and that action taken by it with respect thereto was not in violation of the Current Agreement.

At the very outset, before giving consideration to what disposition must be made of the claim, we are obliged to state it is our view the Carrier's overall contention respecting the working Agreement is not tenable for the reason its action violated such cotract in shifting Evans from his regular assignment to Wyatt's rest day and in requiring him to fill the temporary vacancy in Cliff's position. Heretofore we have pointed out that when the latter position became vacant no extra or furloughed Clerks were available and that so far as the record shows the Carrier was not confronted by any emergency. In that situation it should have left Evans on his regular assignment and called on available Clerks who were off work to protect the position. We so held in Award 2695 where, under similar conditions circumstances, we said:

> "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 employe 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."

To hold otherwise would, in our opinion, permit the Carrier to evade and nullify the provisions of Rule 6 (a) preserving the right to perform work, including overtime, to employes who have established seniority.

The conclusion heretofore announced compels an additional one that in filling Cliff's position the Carrier was obliged to take notice of established seniority rights and assign it to the employe who was senior in point of service if he was available and not otherwise disqualified for service. That this is true is established by our repeated decisions. See Awards 2341, 2490, 3493 and 3860. Indeed, in our opinion, it is required by the language of Rule 9 (a) providing for the filling of vacancies.

Under the record Watts was available for service and his assignment would not have disrupted work in his department or worked a hardship on the Carrier. It is not contended or even suggested that Evans was his senior in point service. It necessarily follows Watts was entitled to the temporary work in Cliff's position and that the Carrier's action as herein related not only deprived him of it but circumvented the intent and purpose of the Agreement.

We are not impressed with the Carrier's suggestion Watts did not specifically ask for the work in question. We know of no requirement imposing the duty of requesting extra work on an employe when he is not shown to have had knowledge of its existence and we certainly do not believe there is any language to be found in Rule 9 (a) which is intended to impose such a duty upon him.

Neither is it necessary to labor an additional contention that the two other employes in Watt's wheel were senior to him in point of service. The essence of the instant claim is to impose a penalty for a violation of the contract. Under such circumstances this Division has consistently held a claim can be made in the name of any employe the Brotherhood elects and that regardless of rights of the employes as between themselves the cause can be maintained, but the Carrier can only be required to pay once on the same factual set up. See Awards 1646, 2282, 3375, 3376 and 4022.

What has been heretofore held requires allowance of the claim. We are not disposed, however, to ignore the Brotherhood's contention the Carrier's action was also in violation of Rule 25 (b) of the Agreement. That rule reads:

"(b) No overtime will be worked without authority of superior officer except in case of emergency when advance authority is not obtainable.

To avoid discrimination as between employes to be used on authorized overtime work, the incumbents of positions which require overtime hours will be used if possible."

Heretofore we have stated the vacancy was in Cliff's position and held that subterfuge and shifting did not relieve the Carrier of its obligation to fill it under the seniority rule. We have also indicated that there were no extra or furloughed Clerks available for that purpose. Thus it clearly appears performance of overtime was required on his position. The fact the Carrier did not authorize such overtime as is contemplated by its terms and assign it to the proper employe does not mean the rule is not operative or avoid discrimination between employes. The test as we understand it does not depend on the assignment or authorization of overtime by a superior officer of the Carrier but on whether, under the facts and circumstances of a given case, overtime work on the position in question is authorized by the working Agreement. If it is the rule is applicable. That we think was indicated if in fact it was not definitely established by Award 2795. Here, as we have stated, under the existing conditions, Cliff's position required overtime.

Therefore the rule applied. The only question remaining is whether Watts was an "incumbent" of the position within the meaning of its terms. We think he was. In our opinion the phrase "incumbents of positions" definitely indicates and requires a conculsion the rule comprehends that the occupant of one of the tricks of an around the clock position is to be regarded as an incumbent of such around the clock position. Therefore, we hold the Carrier's action on the property was in violation of the rule last quoted.

Even hough Watts was entitled to the overtime in question it does not follow he is entitled to pay at the overtime rate. If Cliff had worked his position he would have been entitled to straight time only. Under our Awards the penalty rate for work lost because it was given to some one not entitled to it is the rate the regular occupant of the position would have received had he worked his position (Awards 3814 and 4037, and Awards there cited).

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 1 and 2 sustained as indicated in the opinion but compensation is limited to straight time.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.