Award No. 4128
Docket No. CL-4033

THIRD DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

Francis J. Robertson, 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 that Miss Kathryne R. Gill, Clerk in Office of General Auditor was senior bidder and should properly have been assigned to position of General Clerk advertised for bids through Bulletin issued by General Auditor on July 15, 1946, and that Miss Gill be compensated for wage loss sustained through failure of the Railroad to assign her to position in question.

EMPLOYES' STATEMENT OF FACTS: Through Bulletin issued by General Auditor under date of July 15, 1946, copy of which is attached hereto as Employes' Exhibit "A", position of General Clerk was advertised for bids. Through her letter of July 15, 1946, copy of which is attached hereto as Employes' Exhibit "B", Miss Kathryne R. Gill made application for this position. An employe junior to Miss Gill was assigned to this position.

POSITION OF EMPLOYES: The following rules are cited from agreement bearing effective date of December 16, 1943:

> Rule 12: "Eight consecutive hours or less, exclusive of the meal period, shall constitute a day's work, except as provided otherwise in this agreement.
>
> This rule does not apply to hourly rated employes who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces; nor shall it apply to regular employes who lay off of their own accord before completion of the day's work."
>
> Rule 29: Employes covered by these rules shall be in line for promotion. Promotion, assignments, and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail. When an employe junior to other applicants is assigned to a bulletined position, the senior employes making application will be advised the reason for their non-assignment if they request such information in writing and file it within 15 days from date of assignment.
>
> NOTE: The word "sufficient" is intended more clearly to establish the right of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

Rule 12 quoted above, provides that eight (8) consecutive hours or less shall constitute a day's work. Rule 29 quoted above, provides that promotion

required the employe frequently, and with recurring regularity, to work beyond eight hours in any day of 24 hours. In other words, the agreement cannot be construed to require the Carrier to assign an employe to any position where said employe is prohibited by law from performing the full duties of said position.

For that reason, the claim of the employes should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On July 15, 1946, Carrier issued a bulletin advertising for applications for the position of General Clerk in the Office of the Auditor of Pay Roll Accounts. Among other things in the bulletin it was set forth that the position was subject to overtime. Miss Kathryne R. Gill, Claimant here, bid for the position and her application was denied and a male employe junior to Miss Gill in the service was appointed to the position. Miss Gill was advised by letter dated July 23, 1946 from the General Auditor, in reply to her request for advice as to the reason for her non-assignment, as follows:

> "This position is subject to overtime and was so bulletined. Section 1350 of the Labor Code of the State of California provides that 'no female shall be employed more than eight hours duriny any one day or more than 48 hours in one week'; consequently as you were verbally advised by Mr. F. A. King it was necessary to assign a male employe to the position."

At no point was the sufficiency of Miss Gill's fitness and ability to fill the position questioned. The statute upon which the Carrier relied in denying Miss Gill promotion to the bulletined position is found in Section 1350 of the Labor Code of the State of California, and reads as follows:

> "No female shall be employed in any manufacturing, mechanical, or mercantile establishment or industry, laundry, cleaning, dyeing, or cleaning and dyeing establishment, hotel, public lodging house, apartment house, hospital, beauty shop, barber shop, place of amusement, restaurant, cafeteria, telegraph or telephone establishment or office, in the operation of elevators in office buildings, or by an express or transportation company in this State, more than eight hours during any one day of 24 hours or more than 48 hours in one week. (Amended by State. 1939, Ch. 1072.)"

For the purposes of this opinion, despite the fact that some constitutional lawyers might question the authority of the State of California to regulate the hours of employment of employes of interstate carriers, we believe that we must consider the quoted provision of the Labor Code of the State of California as applicable to Miss Gill's employment. The question presented in this instance is clearly this: May the Carrier, by advertising a particular position as being subject to overtime, deprive a woman employe of her right to promotion based upon the seniority rule and rely for defense of such action on the quoted provision of the Labor Code? In some situations we do not doubt that such action may be taken by a carrier with impunity. However, a carrier should not be permitted to deprive a woman employe of as substantial a right as that of promotion because of the requirements of a statute such as this unless it can be shown that the scheduled work of the position aspired to is so inflexible that no feasible arrangement of the work can be made so as to prevent a violation of the statute.

In the instant case the Carrier had an emergency exemption from the requirements of the Labor Code to the extent that it had permission to work 248 female employes when absolutely necessary not more than ten hours on each of three days in any one week. Carrier makes the point that the State Authorities very reluctantly gave such permission and were constantly checking to be sure that the relaxation of the Labor Code was not used beyond absolute necessity. Carrier further states that when the manpower situation began to improve the Authorities insisted upon the Carrier giving up the relaxation and finally issued an ultimatum that if it did not do so voluntarily

the State of California would arbitrarily issue an order cancelling the same. Carrier asserts that in the instant dispute it could not say to the State Authorities that it was necessary to assign a female to the position of General Clerk which required the working of overtime because there were male employes available for the assignment.

We are not convinced that the arguments of the Carrier, nor the facts as appearing in the record, are sufficiently weighty to overcome the affirmative proposition that Miss Gill was entitled to this promotion on the basis of the provisions of Rule 9 and Rule 29 of the Schedule.

An examination of the record reveals that under date of February 10, 1947 Carrier's Vice President and General Manager stated:

> "Although the assignment of the position involved does not include any assigned overtime, the necessity for delivering paychecks to employes on regular paydays makes it necessary to require the incumbent of the position to work overtime."

The only other evidence appearing on the record with respect to overtime is a statement in reply to the employes supplemental brief that in January, 1948 the incumbent of the position here involved worked 4½ hours overtime on each of nine days, and during the first period of February, 1948 worked 4½ hours on each of two days. This latter statement is denied by the Employes as erroneous and they claim no overtime was worked, which can be verified by a check of the Carrier's pay rolls.

It appears to this Board that an obvious relevant, not necessarily controlling, factor in this case is the actual overtime worked by the incumbent of this position for the period either immediately preceding the bulletining of the position or immediately after its filling. Yet Carrier did not choose to introduce such evidence despite the fact that such information is easily available to it on its pay rolls. We believe that this creates a reasonable inference that such evidence would not bear out its contentions. There is no showing that the male employes could not do such overtime work as might be required nor, for that matter, that it could not have been done by a female employe under the exemption afforded to the Carrier by the State Authorities. Apparently, that exemption is still in effect. On these matters we believe the Carrier has the burden and has not sustained it, and accordingly we hold that the Carrier has violated Rules 9 and 29 of the Agreement.

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 collective Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of October, 1948.