Award No. 4469

Docket No. CL-4400

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the Clerks' Agreement:

(1) When on May 5 and 12, the Carrier called Mr. P. A. Dwyer on his assigned day of rest to fill positions held by Mr. L. L. Willman and Mr. J. C. Young, during their absence respectively, and on May 13, 1948 called Mr. Harry Schulman on his assigned day of rest to fill the position of Mr. L. L. Willman, during his absence, and paid them at the punitive rate of the position worked, which was a lower rate than the positions held by Messrs. Dwyer and Schulman.

(2) That Mr. Dwyer and Mr. Schulman be paid the difference between the punitive rate of their regular assigned positions and the lower rated positions they were called to fill on the dates above mentioned and any subsequent dates on which called and compensated under the same circumstances.

EMPLOYES' STATEMENT OF FACTS: Under dates of May 5 and 12, 1948 Mr. Dwyer was called to fill the positions of lower rated employes on his assigned day of rest, and on May 13, 1948 Mr. Schulman was called under the same circumstances. As the past practice of the Carrier was to compensate the employes at either the rate of their own position, or the rate of the position worked, whichever was higher, they presumed this was still in effect, as they had not received any advice to the contrary, and as recent as April 1948, Mr. Dwyer was called on his day of rest to fill the position of Mr. Vahey on his assigned day of rest and paid at the rate of his regular position, which was the higher rate. On May 13, 1948 Mr. Frank Donnelly, Chief Clerk to the General Passenger and Ticket Agent, notified Messrs. Dwyer and Schulman orally that they would be paid at the lower rate.

When these employes received this notification, they immediately advised the undersigned, and letter was written to Mr. Wicks, Director of Personnel, before the claims were filed for the difference in time to possibly avoid the dispute and claims. My letter dated May 18, 1948 is attached as Employes' Exhibit "A" and his reply dated May 20, 1948 is attached as Employes' Exhibit "B," in which Mr. Wicks failed to answer question as to what prompted the action of the Carrier, after having complied with the rules up to that time.

Claims were filed by the individuals with the General Passenger and Ticket Agent for the dates of May 5, 12 and 13, 1948 on May 25, 1948, when

Summarizing, our position is this: No employe, regular or extra, has the right to expect compensation at other than the rate of the position he works (except to the extent provided in Rule 48, the application of which will be discussed later), be it a regular one acquired by bulletin, an extra one filled by a furloughed employe, or an extra one tendered to and accepted by a regular employe on the rest day of his regularly assigned position. As outlined in the Statement of Facts, the rate of each such position, regular or extra, is established by agreement and there is no basis under the contract for a claim for a wage in excess of the established rate. A regular employe off duty on his day of rest is tendered the work of an absent employe and accepts it. He knows whose position he is working and what it pays. If he doesn't want to work it, we do not require him to. The whole arrangement is voluntary on the part of the employe, except to the extent that we would expect the junior of the men to work if all others refused it.

As to the exception in Rule 48: This rule means, and always heretofore has been construed to mean, that a man who acquires a regular position in the course of his seniority rights can expect to earn the rate of that position if during the hours of his assignment he is asked to fill some other position for some reason. In other words, a man acquiring a position in the exercise of his seniority rights is entitled to the pay of that position during the hours of his assignment, no matter what you ask him to do. The rule has no application whatsoever to extra work and neither it nor any other rule in the agreement was ever designed to change the mutually established rate of pay of any position fully covered by all the rules of the contract.

The claimants worked the full complement of their assignment and received the established rate of pay for that work. The work performed by them on their relief day was no part of that which was guaranteed them nor to which they had any rightful claim. It did not grow out of, nor was it incidental to, their regular work. The established rate of pay of their regular position can only apply to work attaching to that position or in cases where they are taken from their regular positions during their assigned hours for some reason. Employes on their relief day have no assignment and if they elect to work on that day they have the status of a furloughed or extra person, assuming the rate of pay of the position worked. The rate of pay established for their regular position covers only the work included in the assignment thereof and cannot apply to work entirely foreign to their assignment.

As we have stated to General Chairman Schmidt in the letters quoted, Rule 40 has no application whatsoever and Rule 48 has no application except to the extent of the similarity of the principle involved. In addition, we think Rules 17 and 42 have a bearing and should be considered in arriving at a decision as to the merits of the claim. It should be borne in mind that Rule 17 relates to extra work which a regular employe normally has no right to expect and that it is overtime of a nature not contemplated for regular employes under Rule 42. Rule 13 also has a limited application in principle, in that it specifically provides that if you change the rate of any position for any reason you have created a new one subject to bid under the seniority rules of the agreement.

Both of the employes in question were paid the agreed rates of the positions they worked and there is no basis under the contract for any compensation in excess of such agreed rates.

(Exhibits not reproduced.)

OPINION OF BOARD: On days mentioned in the claim, Carrier called Claimants (regularly assigned employes) on their days of rest to fill lower rated positions. Carrier paid them on a punitive basis, at the rate of the lower rated position. Employes claim the punitive rate should have been figured on the rate of the positions regularly filled by these Claimants and make claim for the difference, citing Rule 40 (Call Rule) and Rule 48 (Preservation of Rate) both of which rules are set forth in the Employes' submission and therefore will not be quoted here.

Carrier has taken the position that the Call Rule is not at all applicable and that Rule 48 is not applicable in this instance because it is designed to cover situations where an employe, for some reason, is required on regularly assigned work days to work on some position other than his own. In Awards 2687 and 3413 the Carriers involved raised the same contention with respect to the applicability of a rule similar to Rule 48 in the instant Agreement and such contention was not sustained. We subscribe to the reasoning of those Awards insofar as the application of the Preservation of Rate Rule is concerned and hold, therefore, that a sustaining Award is in order.

We recognize that in instances where employes **volunteer** to fill positions outside their regular assignments, as was the situation confronting the Board when it adopted Awards 2670 and 2672, a different result might be achieved, but here we do not believe that there was any such volunteering by the Claimants such as was contemplated in the latter two Awards. As a matter of fact, Carrier in its own statement of facts says that the Claimants **were called to fill** the vacancies, and further, although stating that the Claimants could have refused to work with impunity and that the whole arrangement is voluntary on the part of the employes, it would expect the junior of the men to work if all others refused. We believe that this quite preponderately indicates that the Claimants were not in the position of pure volunteers.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of July, 1949.