Award No. 4571
Docket No. CL-4563

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA (TEXAS AND NEW ORLEANS RAILROAD COMPANY)

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

STATEMENT OF CLAIM: Run-around claim of L. L. Henderson, Yard Clerk, Hearne, Texas.

(The above description is used for identification only and is a description of the claim as submitted by the Organization to the Carrier, as shown in the Carrier's notice of December 11, 1948 to Secretary, Third Division, National Railroad Adjustment Board, serving notice of the Carrier's intention to file ex parte submission of the case with the Board.)

CARRIER'S STATEMENT OF FACTS: This case arises at Hearne, Texas, on the Dallas-Austin Divisions of this Carrier. L. L. Henderson, regularly assigned relief Clerk or swing Clerk, worked his regular assignment on August 30, 1947 which was the relief day for Yard Clerk, Position No. 16, 7:59 AM to 3:59 PM. He also worked overtime continuous with that position 3:59 PM to 5:19 PM that same date. The overtime worked was that of completing daily yard check which was supposed to be made in the morning, but due to the heavy amount of Yard Clerk work he had to do during the morning, the work was incomplete at 3:59 PM. He remained on duty until 5:19 PM finishing up that job. The position occupied by Henderson on August 30 was a position necessary to the continuous operation of the Carrier. On the same day, W. D. Self who is an unassigned Yard Clerk at Hearne worked on the position of Yard Clerk No. 2 from 3:59 PM August 30 until 2:59 AM August 31. For the services performed, Self was allowed eleven (11) hours time at time and one-half. He was allowed time and one-half because he had previously worked from 11:59 PM August 29 to 7:59 AM August 30 on the Call Boy position here designated as Caller-Clerk No. 31. Because this position is designated as a Caller-Clerk, it is filled by Group 1 Clerks. Position No. 31 and Position No. 2 are also necessary to the continuous operation of the Carrier.

On August 30, 1947, there were two unassigned Clerks at Hearne, W. D. Self with seniority date of January 2, 1943 and Vernon Moore with seniority date of June 3, 1947. Vernon Moore worked as Caller-Clerk, Position No. 29, 7:59 AM to 3:59 PM August 30, 1947. The manner in which the relief was provided on the vacancy for Position No. 2 was the usual and regular manner in which relief has been provided when employes are laying off at Hearne and elsewhere on this line for 25 years or more. In this case, the Organization came forward with a claim in behalf of Henderson claiming that since the work was paid for at time and one-half rate it should have been given to L. L. Henderson who is a regular Clerk in preference to W. D. Self who is an unassigned Clerk. The claim was presented by Division Chairman J. J. Jarvis in letter of October 8, 1947. Subsequently it was appealed to the Manager of Personnel on October 11, 1947, by General Chairman Harper. Conferences have been completed and the Carrier was advised on June 11, 1948 of Organization's intention to submit this case to the National Railroad Adjustment Board. This is a test claim

between better paying positions and lesser paying positions. In truth, seniority frequently means the difference between a job and no job at all. For all of these reasons, a railroad man is known by the seniority he keeps. To him it is a fundamentally important personal property right upon which his right to work at all is wholly dependent, and which governs the amount of money earned and how, where and when, and under whose supervision and direction he earns it. He cherishes this right second to no right established for him by collective agreements.

AWARD 1058: "Seniority is of vital importance to railroad employes, and to carriers, too, as we venture to think; and its recognition by all concerned should be encouraged, and, if necessary, required at the hands of those exercising administrative functions for carriers. See Awards 132 and 495; also, decision 4079, United States Railroad Labor Board. Let the claim be sustained."

AWARD 2341: "One of the paramount purposes of collective agreements in railroad service is the establishment and protection of seniority rights."

AWARD 2402: "It is of fundamental importance that the seniority rules of collective agreements be observed carefully and in good faith. We would add, observed scrupulously, for seniority rights constitute the most valuable asset an employe has for his protection in the assignment of work that can be made available to him and to which he is entitled."

It is clear that the Carrier, in the instant case, used a junior employe to the detriment and loss of Henderson, the complaining employe, in obvious violation of Rules 11 and 12 of the Agreement. The claim of the Carrier which, in effect, is that the right of a junior furloughed man, who has worked one tour of duty, to double is superior to that of a senior regularly assigned man should be denied. This question as to the exercise of seniority must be decided upon the basis of the contract rules governing "exercise of seniority," and not upon the basis of idealistic declarations of equity which Carrier Representatives may from time to time choose to declare.

Exhibits not reproduced.

OPINION OF BOARD: The facts are not in dispute and need not be repeated here. Suffice it to say that this case does not present merely the question of returning a furloughed clerk to work to fill a vacancy pursuant to Rule 24 because all furloughed employes were assigned to work that day and then a further vacancy presented an opportunity or requirement for overtime work at a premium rate.

The Carrier contends that by virtue of Rule 15 (vacancies of thirty days or less need not be bulletined) it has a right to fill short vacancies without regard to seniority. That contention was rejected by this Board as early as our Award No. 132. In this case, as was the case there, Rule 11 provides for the exercise of seniority "only in case of vacancies, new positions or reduction of forces." That rule contains no restriction upon the duration of the vacancies to which seniority is applicable so we may not imply that the release of the Carrier from the duty to bulletin short vacancies (Rule 15) also limits the exercise of seniority under Rule 11 therein.

The only cited Awards of this Board to the contrary are Nos. 1124, 1150 and 1177. In Award No. 3232 we considered such contrary holdings and expressed the view that the principles herein above enunciated "having been the consistent holding of the later opinions of this Board we do not feel that we should now attempt to lay down a different rule." Certainly that statement is even more applicable at this later date in view of our subsequent confirming Awards Nos. 3271, 3493 and 3538.

Since the Carrier at the hearing waived any question of the availability of Henderson due to overtime work in his regular assignment and since he is senior to Self in length of service, it must be held that the Carrier violated the Agreement in assigning Self to the vacancy.

The Organization claims pay at the premium rate. We have consistently held that the penalty rate for work lost because it was given to one not entitled to it under the agreement is the rate which the regular occupant of the position would have received if he had performed the work. Award No. 4552. The awards cited by the Organization are not inconsistent since premium pay was awarded therein upon the same principle. Awards 3371 and 3375. Examination of our awards upon the subject show that we have adopted the theory of payment of a penalty by the Carrier for its violation of the agreement instead of the theory of compensation to the Claimant for his loss if he had worked, except in cases where an agreement of the parties provides for compensation for wage loss under such circumstances. In view of our consistent decisions thereon we do not feel that we should now attempt to lay down a different rule.

Applying the rule enunciated the Claimant is entitled to eight hours at pro rata and three hours at time and one-half.

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 Employe involved in this dispute are respectively carrier and employe 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

The claim is sustained only in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of September, 1949.