

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

THE NEW YORK CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the New York Central Railroad, Lines West, that the Carrier violated the Clerks' Agreement.

1. When on November 13th to 18th, 1947, inclusive, and January 19th to 22nd, 1948, inclusive, all the employees in the Conductor, Audit and Adding Machine Groups were instructed to set aside their regular assignments during their regular eight (8) hour tour of duty to prepare a special statement for the years 1946 and 1947, which did not involve regular routine work, and

2. That the Carrier now be required to pay each employee involved one additional day's pay in addition to their regular monthly rate for each day these employees were required to set aside their regular assigned duties during their regular assigned hours to complete said special statement.

EMPLOYEES' STATEMENT OF FACTS: In order for the New York Central Railroad to discontinue their ferry operation at 42nd Street and Cortlandt Street, New York City, Carrier requested the Auditor of Passenger Accounts, Mr. Maurice, to prepare a special statement showing the number of passengers, cash fares and amount of revenue involved in the handling of passengers on the River Division trains from Newburgh, New York, and Stations South, to West 42nd Street and Cortlandt Street, New York, for the years 1946 and 1947.

The work involved the scrutinizing of "Conductors Cash Reports" Form APA100 and "Assistant Conductors Report of Chargeable Forms Issued and Cash Collected" N.Y.C. Form APA120 for the purpose of drawing off the number of cash fares from stations on the River Division into 42nd Street and Cortlandt Street, New York, by months for the years 1946 and 1947. These reports cover approximately 72 trains daily and involve approximately 179 Conductors and Assistant Conductors reports daily.

This statement does not involve any regular routine work assigned to the employees in the Conductors Audit Group other than a required recapitulation of the amount of cash fares handled between these points during the years 1946 and 1947—a special statement required only in cases of abandonments and not considered a part of any regular assignments of the employees handling such Conductors Cash Fare Reports.

The only position in the Conductors Audit Group, which is involved in the handling of Conductors' Cash Fare Reports is Position No. 738, which

3. AWARDS OF THIRD DIVISION, N.R.A.B., SUPPORT CARRIER'S POSITION.

In its Award 2013 the Third Division has established some principles that show the soundness of the Carrier's position in this case.

In said award the Division held:

"There is nothing in the rules to prevent Carrier from using any or all of its employees in any capacity on the taking of an annual inventory, and it would be most unreasonable to construe them in such a manner as is here claimed."

"To say that the 6 clerks named in the fourth paragraph of the claim had an absolute right to do this work on an overtime basis is entirely unjustified. Overtime pay is intended as a penalty against the carrier to protect the employees from being worked an excessive number of hours without being paid the extra rate of time and one-half. It cannot be said that the employees have the right to insist upon work being deferred or established systems of accounting upset in order that they may have the privilege of working overtime and getting overtime pay. These men * * * worked their regular hours and received their regular pay. That is all the agreement guarantees."

Those expressions fit this case exactly. Carrier saw fit to abandon certain items of work in order to use the 35 clerks for this work, and there can be no question that it had a perfect right to do so. In another part of its Opinion in Award 2013 the Board held that, "It is an attribute of management to determine when and how work is to be done, and to determine whether overtime should be necessary or extra employees temporarily needed." The soundness of this principle is apparent and we do not see how any employer could be reasonably expected to subject itself to the whims and fancies of the employees in a matter of this kind. Carrier has not in any rule of the agreement obligated itself to perform statement work or any other irregular work on an overtime basis exclusively, and the Employees are here demanding, in effect at least, a new rule which would so provide.

There is no basis for this claim and it should be denied in its entirety.

Exhibits not reproduced.

OPINION OF THE BOARD: The facts are not in dispute. The Carrier required information not regularly gathered with respect to cash fares in connection with a proposed abandonment of a ferry service. The data upon which the special statement was based were gathered by Clerks in Auditor of Passenger Accounts' office. It was not a part of their regular assigned duties. The Carrier says, "While these statements were being prepared by 27 employees comprising the passenger conductors' audit group and 8 employees from the accounts and statistics group, the regular work of these 35 employees was abandoned and was not at any time performed. All of the work was performed during regularly assigned hours by these 35 clerks."

The Organization maintains this was a violation of Rule 33: "Employees will not be required to suspend work during assigned hours for the purpose of absorbing overtime."

It is not disputed that this is precisely what was done and what it was done for. The controversy arises out of the conflicting interpretations placed upon Rule 33 by the parties in spite of the fact that this rule has been in effect on this property since 1922. The Employees maintain, "The Committee has always contended that, in the strict application of the rule and the principles involved in such application. Rule 33 prohibits the Carrier from allowing an employee time off during his regular eight hours of assignment in order to absorb the number of hours he had worked overtime without pay, as well as prohibiting the Carrier from suspending regular assigned work during an employee's regular assigned hours to perform work not regularly assigned in order to absorb any overtime which such employees would be

required to work if they were to have first fulfilled their regular assignment during their eight hour period and then perform the irregular work on an overtime basis."

The Carrier, in its submission, says:

"This provision of the agreement was the outgrowth of the fears of the Employees that without some such protective rule in their agreement the Employees might be required to lay off a whole day or a part of a day after having worked a considerable amount of overtime. For example, an employee might work 8 hours on his regular assignment on Monday and 4 additional hours as overtime, making a total of 12 hours on that day. On Tuesday he works 12 hours. On these two days he has accumulated 8 hours of overtime. The Employees wanted to be assured that they would receive pay for the 8 hours of overtime which they actually worked and not be required to lay off on Wednesday or Thursday or some other day without pay, thus receiving an equivalent amount of time off. This is exactly what Rule 33 prescribes and is the only purpose and intent of the rule.

In this case the Employees did not work overtime and therefore the rule has no application."

In support of its position, Carrier cites Award 2013. The facts are not the same. There, no regular work was suspended or abandoned; the Clerks merely claimed the right to do special work on an overtime basis. In the instant case, regularly assigned work was abandoned deliberately in order that clerical workers might, instead, perform other work during their regular hours and thereby avoid overtime they otherwise would have been entitled to earn.

The Carrier says in further justification: "We disregarded the equivalent number of hours of audit work assigned to the Clerks in order that the statement could be completed and released quickly. The employees assigned, therefore, did not work any overtime but completed the statement during their regular assigned hours."

The Clerks have not protested the Carrier's right to require them to do this special work; they only claim it was not part of their regular assignment and should have been done on an overtime basis instead of during hours assigned to their regular work.

This Board has held frequently that such action is a violation of the Agreement when this or its equivalent rule is in effect, Awards Nos. 2346, 2593, 2631, 2823, 4499.

In Award 2013, cited by Carrier and previously referred to, the Board said, "It is an attribute of Management to determine when and how work is to be done." There can be no question about that. Our conclusion here, with respect to violation, is not at variance with that accepted principle. Nor, indeed, do we question the wisdom or the necessity for reasonable flexibility in operation. We can find nothing in the Agreement that prevents the Carrier from incorporating this kind of special intermittent clerical work, by definitions or reference, in the job descriptions when positions are bulletined. We are dealing here with regularly assigned work, assigned by the Carrier, achieved on a seniority basis, that was suspended or abandoned, without any special arrangement, to enable employees to perform other work not regularly assigned.

In this case, auditing work was not merely suspended; it was abandoned—never done. The right to determine how much auditing will be done lies wholly with the discretion of the Carrier. Having made the determination, however, and organized the work and bulletined the positions accordingly, is Management at liberty to substitute other work, not contemplated when the positions were bulletined? We think not. In Award No. 4499 we said, "We have held many times that an employee cannot properly be required to suspend

work on his regularly assigned position in order to work on another position except in emergencies." The special work here was urgent but hardly of an emergency nature as there contemplated. We hold this to be a violation.

FINDINGS: The Third Division of the Adjustment Board upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively carrier and employees 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 Agreement was violated in manner indicated.

AWARD

Claims 1 and 2 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of November, 1949.