Award No. 5195
Docket No. CL-5160

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Carrier has violated the Agreement between the parties since September 1, 1949, on each occasion that it has assigned by Bulletin or otherwise employes of the Mechanical Department to perform work on positions in the Freight Department and the Yard Department, and;

(b) The Carrier shall pay to Robert Sherr, holding seniority as Coach Yard Clerk, Yard Department, (or in event of his unavailability to the next senior available Yard Dept. Clerk) one day's pay at time and one-half the rate of the position of Coach Yard Clerk for Thursday, September 8, 1949, and each subsequent Thursday as long as the violation charged in paragraph (a) above continues.

(c) The Carrier shall pay to Dewey Gentry, senior Freight Department employe holding Class Two seniority (or in event of his unavailability to next senior available Freight Department employe holding Class Two seniority) one day's pay at the rate of his regular assigned position for Saturday, September 3, 1949, and each subsequent Saturday as long as the violation charged in paragraph (a) above continues.

(d) The Carrier violated the Agreement on Thursday, September 1, 1949, when it failed to call Robert Sherr to work the position of Frank Burkett, which day and date was a regular assigned rest day attached to his position.

(e) The Carrier shall pay Robert Sherr one day's pay at the rate of Coach Yard Clerk for Thursday, September 1, 1949.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, bearing effective date of October 1, 1942, governing the hours of service and working conditions of the employes of the Carrier represented by the Brotherhood. Said Agreement and amendments thereto, effective October 1, 1946, and September 1, 1949, have been filed with this Board, and the Employes request that the said Agreements in their entirety be treated as being in evidence in this dispute. The following Rules or part of Rules thereof are cited as having particular bearing on this dispute:

Clerks' Supplemental Agreement as quoted in the Carrier's Statement of Facts. This rule was not in dispute on this property, however, the committee's decision lays down a set of facts that sustains the Carrier's Position as follows:

> "1. Section 3 (i) did not create the right to utilize extra or unassigned employes unless a carrier has that right under existing agreements or practices. However, where that right exists, the intent of Section 3 (i) is that where work is required by the carrier to be performed on a day which is not a part of any assignment, either an available extra or unassigned employe who would otherwise not have 40 hours of work that week or the regular employe may be used; unless such work is performed by an available extra or unassigned employe who would otherwise not have 40 hours of work that week, the regular employe shall be used. Where work is required to be performed on a holiday which is not a part of any assignment the regular employe shall be used. Rules in existing agreements shall be modified to conform with the intent above expressed. Wherever the words 'the regular employe' are used in this paragraph, they shall mean the regular employe entitled to the work under the existing agreement."

The agreement between the Brotherhood of Railway Clerks and the Carrier does not contain a rule that requires overtime to be worked on a seniority basis. Overtime is worked at the point where overtime accrues. Since Rule 37 (f) became a part of the agreement it is mandatory that the employe owning the position shall be worked when no unassigned employes are available who have not had 40 hours of work in that week.

(Exhibits not reproduced).

OPINION OF BOARD: The System Committee of the Brotherhood contends that since Sept. 1, 1949, Carrier has been violating the rules of the parties' Agreement by assigning Mechanical Department employes to perform work on positions in Freight and Yard Departments.

Rules 1, 2, 4, 6 and 18 of the parties' Agreement, effective Oct. 1, 1942, as amended by the Memorandum Agreement effective Oct. 1, 1946, establish departmental seniority with separate classes in some of the departments. These rules restrict the exercise of seniority accordingly and do not permit the Carrier to assign work to employes across departmental seniority lines.

The record discloses that on Thursday, Sept. 8, 1949, Carrier assigned a Mechanical Department employe holding seniority in that Department to perform the duties of a Yard Department Clerk, it being a regular relief day of the latter position. This continued on subsequent Thursdays but for how long the record does not disclose.

The record also shows that on Saturday, Sept. 3, 1949, Carrier assigned a Mechanical Department employe holding seniority in that Department to perform the duties of a messenger in the Freight Department, it being a regular relief day of the latter position. This continued on subsequent Saturdays but for how long the record does not disclose.

Carrier seeks to justify its action by Rule 28.5(e) of the parties' Agreement, effective Sept. 1, 1949, which put into effect the 40-Hour Week Agreement.

This Rule is as follows:

> "All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days

and such types of other work on other days as may be assigned under individual agreements. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week.

Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employe or employes whom they are relieving."

As already stated, the agreement of these parties does not permit of work being assigned between employes across departmental seniority lines. Rule 28.5(e) clearly indicates that this limitation applies to relief assignments necessary as a result of putting into effect the five-day week.

In view of the foregoing it becomes apparent that assigning Mechanical Department employes to perform the services of relief work on positions in either the Freight or Yard Department is in violation of the rules of the parties' effective Agreement.

The Carrier contends that, even if Rule 28.5(e) is so interpreted, the individuals for whom claim is here made were not entitled to be called under Rule 37(f) and, therefore, not the proper individuals to make the claims. The essence of the claims made by the Organization is for a violation of the rules of the parties' Agreement. The claims for the penalty on behalf of the individuals named are merely incident thereto. That the claims might have been made in behalf of others having, as between themselves and the named individuals, a better right to make them is of no concern to the Carrier. That fact does not relieve it of the violation and the penalty arising therefrom. No other individuals are making claims and if they should, since they are represented by the same organization, Carrier would not be required to pay more than once. See Awards 2282 and 4359 of this Division.

In view of the foregoing we find that Claim (a), (b) and (c) should be sustained but Claim (b) should be limited to pro rata in place of time and one-half. "The penalty for work lost is the rate which an employe, if the work had been regularly assigned, would have received if he had performed it." Award 5117 of this Division. Both claims are properly limited by their terms, that is, as long as the violation charged continues.

As to Claims (d) and (e), Carrier cites Rule 37(f) of the Agreement effective Sept. 1, 1949, as authority for using the regular incumbent of the position to perform the work on Sept. 1, 1949, a relief day.

Rule 37(f) is as follows:

"Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

The record does not disclose that an extra or unassigned employe was available during the week which included Sept. 1, 1949, who had less than forty hours of work. In such case the Rule authorizes the Carrier to use the regular occupant of the position. This it did. See Awards 2426 and 3271 of this Division. Claims (d) and (e) are without merit and therefore denied.

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 has violated the Agreement as it relates to Claims (a), (b) and (c) but not as it relates to (d) and (e).

AWARD

Claims (a), (b) and (c) sustained but Claim (b) on a pro rata basis. Claims (d) and (e) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of January, 1951.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 5195

Docket No. CL-5160

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Kansas City Terminal Railway Company.

Upon application of the Carrier involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Sec. 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

In doing so it should be understood that an interpretation of an award is not a rehearing or a new trial of the case on its merits. Its purpose is to explain or clarify the award as made, not to make a new one. Consequently questions raised and disposed of will not be considered again. Neither will we consider questions raised for the first time.

As to claim (b), which was sustained on a pro rata basis, the carrier raises a question as to its form for the purpose of fixing the date to which payments thereunder must be made. It now claims the claim made on the property was in behalf of Robert Sherr only. The claim here presented, and which we sustained, was for Robert Sherr, or in event of his unavailability, for the next senior available Yard Department Clerk for Thursday, September 8, 1949, and each subsequent Thursday as long as the violation charged continued. The claim was therefore allowed until the violation on which it was based ceased. This now appears to have been September 1, 1950. See statement of the Brotherhood. This objection was not previously raised and is therefore not here for our consideration. The claim should be paid until the violation on which it is based has been or is discontinued. It should be paid to those in whose behalf the claim was made; namely, Robert Sherr, or in the event of his unavailability to the next senior available Yard Department Clerk.

As to claim (c), which was sustained as made, Carrier raises two questions:

First, that the rate of pay for which the claim was made was that of Check Clerk which is higher than that of messenger, the position involved, and second, that under the circumstances here involved, in view of Rule 37 (f) of the parties' Agreement effective September 1, 1949, Carrier was required to use the employe to whom the work was regularly assigned to perform it and therefore the claim was not made in behalf of the right party.

As to the first of these no such contention appears to have been previously made and cannot now be properly made. It is therefore not here for our consideration.

As to the second contention, it is fully answered by the Award. Therein we stated: "The Carrier contends that, even if Rule 28.5 (e) is so interpreted, the individuals for whom claim is here made were not entitled to be called under Rule 37 (f) and, therefore, not the proper individuals to make the claims. The essence of the claims made by the Organization is for a violation of the rules of the parties' Agreement. The claims for the penalty on behalf of the individuals named are merely incident thereto. That the claims might have been made in behalf of others having, as between themselves and the named individuals, a better right to make them is of no concern to the Carrier. That fact does not relieve it of the violation and the penalty arising therefrom. No other individuals are making claims and if they should, since they are represented by the same organization, Carrier would not be required to pay more than once."

The contentions raised by Carrier's application really do not seek an interpretation of the Award but seek to have old issues reconsidered and new issues determined. As already stated, that is not the purpose of an interpretation. The Award, as made, fully and clearly determines all questions which Carrier here seeks to have determined. All Carrier needs to do to carry it out is to determine on what days and for how long the violations continued, if they have ceased, and pay the parties entitled thereto the amounts as fixed by the Award.

Referee Adolph E. Wenke, who sat with the Division as a member when Award 5195 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of August, 1951.