Award No. 5200
Docket No. CL-5194

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

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that Management, The Baltimore and Ohio Railroad Company, violated certain rules of Agreement between the Carrier and its employes represented by the Brotherhood effective July 1, 1921 (last revised March 1, 1947):

1. When for period March 27, 1947, to April 16, 1947, they assigned to other than a clerical worker, subject to the Scope Rule Number 1 of the aforesaid Agreement, to perform the duties attached to position of third trick Crew Dispatcher-Yard Clerk, East Dayton, thus denying to clerical workers R. F. Burke, Crew Dispatcher-Yard Clerk, and C. F. Hardin, Crew Dispatcher-Yard Clerk, employment opportunities and wage losses incident thereto amounting to four (4) hours' pay at the overtime rate daily from March 27 to April 16, 1947.

2. That R. F. Burke, Crew Dispatcher-Yard Clerk, and C. F. Hardin, Crew Dispatcher-Yard Clerk, be compensated for wage losses sustained, namely, four (4) hours' pay at overtime rate for period March 27 to April 16, 1947.

JOINT STATEMENT OF FACTS: Immediately preceding March 27, 1947, there was employed in the Carrier's East Dayton Yard Office:

Name	Position	Hours of Service Assignment
C. F. Hardin	Crew Dispatcher-Yard Clerk	First shift 7 A. M.- 3 P. M.
R. F. Burke	"	Second " 3 P. M.-11 P. M.
R. E. Williams	"	Third " 11 P. M.- 7 A. M.

On March 6, 1947, Management advertised position of Interchange Clerk, Dayton Station.

March 24, 1947, the vacancy advertised by Bulletin 19 was awarded to Mr. Williams.

On March 27, 1947, Mr. Williams assumed the duties of the position awarded to him by Bulletin 19-A in the Dayton Station thus creating a vacancy in his former position of Crew Dispatcher-Yard Clerk, East Dayton,

Agreement. The Organization claims the time and one-half rate of the position. The Carrier claims, in case a violation is found, that the pro rata rate controls. The Organization bases its claim on the fact that if Claimants had performed the work, it would have been paid for at the overtime rate of time and one-half. It seems to us that the Agreement contemplates a different penalty rate for work lost and work performed falling within a penalty provision of the Agreement. It seems clear that the penalty rate for work lost because it was improperly given to one not entitled to it under this Agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work. That is the rate the regularly assigned employe would receive if he were deprived of it. We fail to find any contract provision, or any reason in addition thereto, that would give any other employe a greater penalty rate than the employe to whom the work was assigned in the event he was deprived of it. In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned. The overtime rule itself is consonant with this theory when it provides that 'time in excess of eight (8) hours exclusive of the meal period on any day will be considered overtime'. The overtime rule clearly means that work performed in excess of eight hours will be considered overtime. Consequently, time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides. This conclusion is supported by this Division Awards 2346, 2695, 2823 and 3049."

Based then on the Division's Findings, it is evident that the wage claims as now presented by the two claimants found herein for penalty compensation based on the overtime rate of pay must necessarily be held to be totally without merit.

On the basis of the Carrier's statement above, and on the basis of all that is contained herein, the Carrier respectfully requests the Division to hold this protest, the wage claims emerging therefrom, as being totally without merit and to deny them accordingly.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Board of Adjustment of the Brotherhood contends the Carrier violated the rules of their Agreement when, during the period from March 27, 1947 to April 16, 1947, it assigned to W. B. Honnaker, an employe not under their Agreement, the duties attached to the position of Third Trick Crew Dispatcher-Yard Clerk, East Dayton Office, a position under the Clerks' Agreement. It asks that R. F. Burke and C. F. Hardin, both Crew Dispatcher-Yard Clerks, be compensated because thereof for four hours at overtime for each day the work was assigned to and performed by Honnaker during that period.

Honnaker had established seniority under the Clerks' Agreement as of June 24, 1946. On February 27, 1947, he was holding a position as Crew Dispatcher-Yard Clerk, East Dayton Office, a position under the Clerks' Agreement. On that date he was displaced on that position by a senior employe. Honnaker did not thereupon choose to displace any employe under the Clerks' Agreement who had seniority junior to his, as he might have done, but accepted employment with the Carrier as brakeman, a position under the Trainmen's Agreement with the Carrier, with seniority as of February 27, 1947. He continued to work as a brakeman. However, on March 27, 1947, Carrier assigned him to fill a vacancy on a position of Crew Dispatcher-Yard Clerk. He performed the duties of that position until April 16, 1947. Then he returned to his duties as a brakeman.

Some statements are made in the record that Honnaker was temporarily injured and incapacitated to perform the duties of a brakeman about the

time of his being assigned to this work. That fact is immaterial and not here controlling.

This Board has often held, and it is fundamental in order to maintain the scope of any collective agreement, that work belonging to those under an agreement cannot be given to those not covered thereby. This is true even if, in order to perform the work, it is necessary for the employes under the agreement to work overtime.

Traditionally an employe is not allowed to carry seniority on the roster of two different crafts at the same time unless so provided by agreement between the affected craft or crafts and the Carrier. See Award 5099 of this Division. However, Carrier contends the situation here presented is controlled by the parties' Letter Agreement of November 2, 1943.

As to this contention the Brotherhood contends it is not properly here for our consideration because not raised on the property. It cites the following principle from Award 3950 of this Division as controlling: "Ordinarily one who mends his hold after an appeal has been taken to this Board will be permitted no advantage to be gained thereby." We do not think this contention of the Brotherhood can be sustained because one of the grounds on which Carrier refused payment of the claim on the property was that Honnaker still held seniority status under the Clerks' Agreement when he was assigned to and worked the position of Crew Dispatcher-Yard Clerk.

When Honnaker accepted employment as a brakeman with seniority date as of February 27, 1947, he lost his former seniority under the Clerks' Agreement unless he comes within the exception thereto provided by the Letter Agreement of November 2, 1943.

This Agreement provides, as far as here material, as follows: ". . . we are agreeable effective May 1, 1943, that temporary transfer be given employes under the scope of our Agreement for the purpose of accepting employment as brakeman . . . for the duration of the War and 40 days thereafter . . . with the understanding that such employes retain all seniority rights and privileges under our Agreement."

By Circular No. 636 dated November 10, 1943, Carrier set forth the procedure an employe must follow to bring himself within the provisions of the Letter Agreement of November 2, 1943. The record does not show that Honnaker complied therewith. In fact, it is abundantly clear from the record that when Honnaker accepted the position of brakeman with seniority as of February 27, 1947, he intended to make his transfer permanent and it was so understood and subsequently acted upon by Carrier. It was not then the thought of either Honnaker or the Carrier that Honnaker was doing so with the intent of bringing himself within the Letter Agreement of November 2, 1943.

This being true the action of Carrier, which is here complained of, was in violation of the Clerks' Agreement.

Carrier contends that if the claim is allowed it should be on a pro rata basis. With this we agree. "The contractual right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. 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, Third Division.

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.

AWARD

Claim sustained but on a pro rata basis.

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.