# Award No. 5494

# Docket No. CL-5402

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Dudley E. Whiting, Referee**

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## PARTIES TO DISPUTE:

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

## MISSOURI PACIFIC 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 Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When, on June 11, 1950, the Carrier utilized unassigned Clerk J. L. Pierce to work as Yard Clerk, 8 hours, 1 A. M. to 5 A. M.; 6 A. M. to 10 A. M. at Coffeyville, Kansas, after Clerk Pierce had completed his work week of 40 straight time hours in his work week as an unassigned employe, beginning Monday, June 5, 1950 and failed and refused and continued to refuse to compensate him at the punitive rate of $1.425 per hour, or $17.10, instead of compensating him at the straight time rate of $11.40 day which he was paid;

2. Clerk J. L. Pierce shall be compensated for the difference in the amount of $11.40 and $17.10, or $5.70 for services performed on June 11, 1950 as stipulated in (1) thereof, account Carrier's action in violation of a proper application of the Agreement pertaining to the 40-hour week.

**EMPLOYES' STATEMENT OF FACTS:** Prior to and on the claim date of June 11, 1950, the Carrier's clerical force of the Southern Kansas-Central Division at Coffeyville, Kansas, exclusive of that of the Local Freight Office and Freight Warehouse platform forces, subject to the scope and operation of the Clerks' Agreement on the Station and Yards seniority roster, Groups 1, 2 and 3, were:

| Position | Occupant | Seniority Date | Rate | Assigned Hours | Rest Days |
|---|---|---|---|---|---|
| Chief Yard Clerk | W. A. Journey | 8/13/18 | $12.48 | 7:59AM- 3:59PM | Sat. & Sun. |
| Yard Clerk | A. A. Neal | 8/8/20 | $11.40 | 7:59AM- 3:59PM | Sat. & Sun. |
| Bill Clerk | O. P. Watts | 6/8/43 | $12.30 | 3:59PM-11:59PM | Thurs. & Fri. |
| Yard Clerk | L. J. Sanders | 2/15/47 | $11.70 | 3:59PM-11:59PM | Fri. & Sat. |
| Yard Office Desk Clerk | Carl L. Dempsey | 11/23/41 | $11.70 | 11:59PM- 7:59AM | Tues. & Wed. |
| Yard Clerk | Ralph Hutton | 10/25/43 | $11.40 | 11:59PM- 7:59AM | Tues. & Wed. |
| Yard Clerk | E. E. Umbarger | 12/8/43 | $11.40 | 1:00AM- 5:00AM<br>6:00AM-10:00AM | Mon. & Tues. |
| Yard Clerk | J. R. Powers | 10/8/41 | $11.40 | 12:01PM- 4:00PM<br>5:00PM- 9:01PM | Sun. & Mon. |

fact that the work week for unassigned employes shall mean a period of seven consecutive days beginning with Monday. In any situation it will remain a period of seven consecutive days beginning with Monday for an unassigned employe no matter what the nature of his service might be or the conditions under which it is performed. It is our position that an unassigned employe be worked any five days of his work week at straight time pay and that he may also be worked at straight time pay for six or seven days of his work week if working the sixth and seventh days is due to moving from one assignment to another or to or from an extra or furloughed list. There is nothing in Rule 21—Section 2 (i) that lends any support to this claim.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This claim arises primarily from a difference of opinion as to the meaning of the exception to the premium pay requirements for work in excess of 40 hours or five days per week contained in Rule 25 (c), which reads: "* * * except where such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, * * *."

The precise issue presented is whether the phrase "moving from one assignment to another" is applicable to an extra or furloughed employe called to fill a short vacancy and then transferred to another short vacancy when the first ceased to exist.

The rule involved was first adopted in the Agreement dated January 20, 1950, effective September 1, 1949. New rules must be interpreted in the light of and to accord with the existing rules to which they are added. Of those existing rules, Rule 8 provides that new positions and vacancies will be bulletined and subsequently assigned to an applicant therefor, and Rule 9, headed "Temporary Appointments," provides for the filling of vacancies of less than 30 days' duration and "bulletined positions pending assignment" without bulletining.

In fact, a study of all of the rules indicates that the term "assignment" was used by the parties only to refer to a position held by an employe assigned thereto in accordance with Rule 8. The language adopted by the parties in other rules and particularly in Rule 9 indicates that they carefully and purposely drew a distinction between an assignment and an appointment to a short vacancy or a position pending assignment. Since an agreement must properly be construed as a whole, we conclude that the parties used the term "assignment" in the new rule in the same sense as it was theretofore used in the other rules.

Rule 25 (c) is an outgrowth of the Agreement for the Establishment of a Shorter (five-day) Work Week. It was clearly the intention of that agreement to reduce the hours of work of all employes to 40 hours per week wherever possible, and it provided for penalty pay of time and one-half to discourage work requirements in excess of 40 hours or five days per week. However, it was recognized that the rest days of different assignments would vary throughout the week to cover continuous service requirements. Thus when an assigned employe bid in and was assigned to another position in accordance with the rules, he would in some cases work more than five days per week due to the variance of the assigned rest days upon the two assignments. Hence, considering the purpose and intent of that agreement, it appears that the intent of the exception was to relieve the Carrier from liability for penalty pay in such situations because, acting in accordance with the rules, it could not avoid having the employe work more than 40 hours or five days in the work week. It does not appear to us that the Carrier is unable to avoid such work in the appointment of extra or furloughed employes to short vacancies or to positions pending assignment.

In this case the claimant, a furloughed employe, was recalled to service on May 24, 1950, and utilized to fill three vacant positions pending assignment thereof. In the course of that service the Carrier caused him to work

six days within one work week. Moving from one vacancy to another is not the equivalent of moving from one assignment to another, so the exception does not apply and the claim must be sustained.

**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 the 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 3rd day of October, 1951.

**DISSENT TO AWARD NO. 5494, DOCKET NO. CL-5402**

The decision of the majority appears to result from an error in the use of terms. It fails to distinguish between an "assignment" as such, in the sense of programmed work, and the act or evolution involved in changing assignments or in moving from one assignment to another.

The rule giving rise to the dispute is Rule 25 (c), which provides that employes shall be paid overtime for work beyond five days in a work week except when such work is "due to moving from one assignment to another." The majority hold that in order to invoke this exception the employe concerned must himself be the permanent incumbent of a regular, bulletined, work assignment. They hold that the only employes who can move **between** assignments are employes who are regularly attached to the jobs between which the move is made. They have ignored the fact, uncontested in the evidence, that these assignments are frequently and necessarily worked by other than the regular appointees. As the record shows, they are often filled by extra or unassigned employes who work in the place of regular men. Voluminous and uncontroverted evidence in the case demonstrates that these extra employes, in the course of their work, must and do move "from one assignment to another."

Nothing in the language of the rule restricts the exception to employes "owning" the assignments between which they move. The rule contains no limitation as to the type or character of employes to which it applies. It follows that it must concern any employe engaged in the act of "moving." The restriction is on the places between which the moves are made—not on who makes them. The only requirement is that the move be from "one assignment to another." That this is the purpose of the rule is abundantly clear from its own terms. If the intention had been to confine the exception to regularly assigned employes, it must be assumed that the drafters of the rule would have so provided. It would have been a simple thing to do. They would merely have said "except where such work is performed by **regularly**

**assigned employes** moving from one assignment to another." But they did not do so. As the rule stands the exception is unlimited. It applies to "an employe"; meaning **any** employe. To conclude that the parties who wrote it intended it to apply only to regular employes is thus without foundation in the pertinent language of the agreement.

The conclusion of the majority is rendered even less credible when the entire rule is considered. It says that:

> "Employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks, except when such work is performed by an employe due to moving from one assignment to another or to or from an extra or furloughed list, or where days off are being accumulated under paragraph (g) of Section 1 of this Article."

In the absence of evidence to the contrary, and there was none in this case, can there be reason to presume that the coverage of the exception, in terms of the people referred to, is any less extensive than the coverage of the main body of the rule? Obviously, the primary purpose of the rule is to award overtime to any employe—regular or extra—who works more than five days a week. In the same sentence, however, the rule makes an exception in cases where "such work" on the sixth day is the result of changing from one job to another. In the first case the reference is to "employe"; in the second it is to an "an employe." Surely the majority would not hold that the "employes" who get overtime for work beyond five days must be regular employes. How then, can they say that the "employe" who does not get overtime because he is moving between assignments must be a regular employe?

Further proof of the error into which the majority has fallen appears when reference is had to certain other rules of the agreement, cited in this dispute, and which have a direct bearing on the subject here involved. One of these, Rule 21, 2 (h) of the contract, provides:

> "To the extent extra or furloughed men may be utilized under applicable agreements or practices, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment."

Here is a rule, the meaning of which was not disputed, which specifically applies to extra or furloughed men, and provides that if they **take** the assignment of a regular employe they will have the days off of that assignment. This renders unsupportable the theory of the majority that the only employes who can hold an "assignment" are the regular incumbents of the job. Here is a rule, the meaning of which is plain and unquestioned, which says that extra employes, in filling vacancies on regular jobs, **take the assignment** of a regular employe. Certainly, in order to **take** it under this rule, they must **move to it** under Rule 25 (c).

The majority have based their decision on a finding that the term "assignment," as used in 25 (c), means the same thing as it does in Rules 8 and 9 of the agreement. These latter rules are those which provide for advertising, bidding and assignment of regular work in this craft. Why the majority looked to these rules for guidance, rather than to Rules 28 and 31, also in evidence, which provide for the performance of extra work, is not shown. If reference were had instead of Rules 28 and 31 it would have equally supported the view that the work "assignment" means "temporarily assigned" or a "temporary assignment." Be this as it may, however, the observation by the majority does not support the conclusion they draw from it. As above pointed out, it ignores the distinction between the existence of an assignment and the performance of work on an assignment. Even assuming the word,

as used in 25 (c) means a regular or permanent assignment, it cannot change the other language of the rule under which "an employe"—any employe—moving **to or from** the assignment gets only the straight time rate.

The opinion of the majority is further impeached by the inclusion of certain comments which indicate a misconception of the rules of the basic agreement which protect the seniority of these employes and provide for the exercise of their seniority rights. They say:

> "It was clearly the intention of that agreement to reduce the hours of work of all employes to 40 hours per week wherever possible, and it provided for penalty pay of time and one-half to discourage work requirements in excess of 40 hours or five days per week. However, it was recognized that the rest days of different assignments would vary throughout the week to cover continuous service requirements. Thus when an assigned employe bid in and was assigned to another position in accordance with the rules, he would in some cases work more than five days per week due to the variance of the assigned rest days upon the two assignments. Hence, considering the purpose and intent of that agreement, it appears that the intent of the exception was to relieve the Carrier from liability for penalty pay in such situations because, acting in accordance with the rules, it could not avoid having the employe work more than 40 hours or five days in the work week. **It does not appear to us that the Carrier is unable to avoid such work in the appointment of extra or furloughed employes to short vacancies or to positions pending assignment.**" (Emphasis added.)

The last sentence of this statement is both contrary to fact and without foundation in this record. The fact is that under the rules in effect on this Carrier, and in evidence in this docket, the management of this Carrier is **compelled** to use the senior available extra or unassigned employe to perform available extra work. This requirement was dealt with at great length in the submission of this dispute to this Board, and the Employes have not denied it. If the Carrier had used any other than the senior extra man, it would have been liable to claims for failure to do so. On the **only** evidence on this point then, the Carrier could exercise no choice in the selection of extra employes to do this work. It could not, on the agreed facts, refrain from calling the claimant in this case after he had performed five days of work in the week. This inability of the Carrier to avoid such assignment is the very gist of its case. It was on that ground that it principally defended these claims. That the majority have reached an opinion which not only ignores this fact, but recites an exactly opposite condition, indicates that they either did not consider the evidence in the case or chose to disregard it.

For the reason that the decision of the majority results in an unwarranted and improper application of the rules of the agreement, we dissent.

(s) A. H. Jones
(s) R. H. Allison
(s) R. M. Butler
(s) C. P. Dugan
(s) J. E. Kemp