

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

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

(a) Carrier violated rules of the Agreement governing the hours of service and working conditions of the employes when on August 3, 1950, they did not observe seniority rules in calling employes who were off on their rest days but available for service to fill newly created position of Utility Clerk in the Roper Yard Office, Salt Lake City;

(b) E. I. Fitches, who was available for service and senior to K. H. Bullock who was called for service, be allowed pay for time lost namely—nine (9) hours at rate of time and one-half of the \$12.31 daily rate attached to the position of Utility Clerk.

EMPLOYEES' STATEMENT OF FACTS: Effective Wednesday, August 2, 1950, Carrier established an additional position of Utility Clerk, rate \$12.31 per day, in the Roper Yard Office at Salt Lake City, Utah.

Pending assignment of an employe to the newly created position, which was not accomplished until August 14, 1950, the temporary vacancy was filled by working the regular force overtime or by extra employes when available. On Wednesday, August 2, 1950, there were no extra employes available and Carrier utilized the service of E. I. Fitches, the senior available employe off on his rest day. On the following day, Thursday, August 3, 1950, there was no available extra man and Mr. Fitches was again the senior available employe off on his rest day. Notwithstanding this fact, however, Management called and assigned K. H. Bullock, a junior employe who was off on his rest day, to fill the temporary vacancy of Utility Clerk. Mr. Fitches' seniority dates from April 28, 1924. Mr. Bullock's seniority dates from February 14, 1943.

August 6, 1950, Mr. Fitches filed claim for time lost—nine (9) hours at time and one-half, rate \$12.31 per day, which was attached to the Utility Clerk's position. Employees' Exhibit No. 1.

August 14, 1950, Superintendent Decker declined Mr. Fitches' claim, citing Rule 40 of the Agreement in support of his (Management's) position. Employees' Exhibit No. 2.

operator. Organization contended that under Rule 40 Carrier should have used Sam Musso, a junior employe, to operate the tow motor on his rest day.

In view of the settlement above quoted the present claim must be denied.

All data in support of Carrier's position have been submitted to Organization and made a part of this particular question in dispute. The right to answer any data not previously submitted to Carrier by Organization is reserved by Carrier.

(Exhibits not reproduced.)

OPINION OF BOARD: At its Roper Yard Office, Salt Lake City, Utah, on August 2, 1950, Carrier called E. I. Fitches, filling vacancy on position of Bill Clerk, on the basis of seniority to perform extra work as a Utility Clerk from 1:00 P. M. to 9:00 P. M.; August 3, 1950, it called K. H. Bullock, holding junior seniority and filling vacancy on position of Utility Clerk, hours 12:01 A. M. to 8:01 A. M. to perform the same type of work from 12:00 noon to 9:00 P. M. on his rest day; August 4, 1950, it called R. L. Irvine, a Bill Clerk, to perform like work from 9:30 A. M. to 5:30 P. M.; it called Swenson August 5 and Jones August 6, who performed the same kind of work from 8:01 A. M. to 4:01 P. M.; beginning August 7th to 13th, inclusive, it assigned other employes to perform similar work and August 14th it bulletined a new position of Utility Clerk to perform such work on a permanent basis.

August 3, 1950, is the only date here involved, the claim being that on that date Carrier should have called Fitches as the senior employe instead of Bullock.

The Organization contends a new position of Utility Clerk was created on August 2nd and that hence, there being no extra or furloughed employes available, the work on such position should have been performed by Fitches on August 3rd upon the overtime basis as the available senior employe because of the provisions of Rule 3 (d) of the current Agreement providing "Seniority will apply only when new positions are created, vacancies occur, positions abolished, or in reduction of force."

Carrier's position is that the extra utility work on August 3rd was overtime work and was therefore properly performed by Utility Clerk Bullock by reason of the provisions of Rule 40 of the Agreement which, so far as here pertinent, read:

"Consistent with service requirements effort will be made to distribute overtime, as far as possible, to employes ordinarily performing class of work for which overtime is necessary."

Since Rule 3 (d), to which the parties have agreed by incorporating it in their contract, expressly provides that seniority will apply only when new positions are created or vacancies occur it is apparent our first problem is to decide whether on August 3rd a new position of Utility Clerk had been created by the Carrier. Differently stated, whether Bullock's assignment on that date is to be classified as work on a newly created position or extra unassigned work in the nature of overtime. This raises a factual issue which we are obliged to determine from the facts of record. With respect to the point the Organization takes the position that because a new position was ultimately established it must be regarded as having been created on August 2nd, the very first day on which the Carrier ascertained extra Utility Clerk work was required at the Yard Office. On the other hand the Carrier insists the new position cannot be regarded as having been created until it was bulletined under date of August 14, 1950. We are unable to agree with either position. Instead we are inclined to the view the Carrier must be given some leeway in determining whether a

new position is to be established but that such a position must be regarded as created for all purposes of Rule 3 (d) the moment the Carrier, in the exercise of sound business judgment, can determine its temporary or permanent establishment is going to be necessary and essential to the proper maintenance of its operational facilities.

Turning to the record we note repeated statements, none of which are denied, to the effect the extra Utility Clerk work required on August 2nd, 3rd and 4th was due to an unexpected increase in business and that on those dates Carrier had no knowledge the increased business in evidence at the time would continue and necessitate the establishment of an additional Utility Clerk's position. Touching the same point we note the starting time and hours worked in the performance of such extra work were not the same for those three days and that it was not until August 5th the starting time and the hours of service performed leveled off and became uniform. Under such circumstances, and others of a persuasive nature to be found in the record, we do not believe it can be held the Carrier was required to or did create the involved position of Utility Clerk prior to August 5, 1950. It necessarily follows that when Bullock worked the August 3rd assignment he was not performing work on an existing or newly created position.

Having reached the conclusion just indicated we have little difficulty in concluding that under the existing facts and circumstances the involved work was overtime work which, notwithstanding Rule 3 (d) or other Seniority Rules of the Agreement, the Carrier could properly assign to Bullock as an employee ordinarily performing the class of work for which overtime was necessary. Rule 40 of the Agreement so provides in clear and unequivocal language and the Organization, having agreed thereto, must resort to negotiation as a remedy if it desires a change therein. We have not rejected, not overlooked, divers arguments advanced by the Organization as compelling a contrary result. Nevertheless, they will be reviewed in a somewhat summary fashion.

One of these contentions is to the effect that (a) the sole purpose and intent of the quoted paragraph of Rule 40 was to distribute casual overtime when necessary to be worked by employees for variable periods of time before or after the regular work period in offices or departments where a number of employees have the same assigned hours and perform the same type or class of work and that such rule was never intended to apply to employees in Yard Offices or other departments where around-the-clock shifts are worked and (b) notwithstanding the rule past practice has been to call the senior available employee to perform work such as is here in question even though employees ordinarily performing the class of work were available. This claim lacks merit because the record fails to sustain the Organization's position on either phase of its contention.

Another contention is that to construe Rule 40, as we have construed it, makes a chaotic situation in conflict with the provisions of Rule 3 (d) and restricts the operation of seniority when necessary to fill a vacancy or new position on an overtime basis. We do not share that view. To provide in a rule that overtime shall be worked by employees performing work of like class is just one step removed from a rule providing extra or overtime work on a position will belong to the occupant of that position. Such rules are to be found in many Agreements and when incorporated therein are given full force and effect. In any event responsibility for whatever chaos may arise from our construction of Rule 40 rests with the parties to the Agreement not this Division of the Board. When—as here—a rule is clear, concise, and unequivocal all we can do is to give the language used therein its ordinary and commonly accepted meaning.

It is also argued Bullock did not have a preferred right to be called and used to fill another position of Utility Clerk simply because he occupied a position having the same title. We do not agree. In the first place this contention is based on the erroneous premise he was called to fill a newly

created and existing position. In the next, the rule expressly provides that work such as is here involved will be given to employees ordinarily performing that class of work.

Next it is urged the fact the work was assigned to Fitches on the basis of seniority on August 2nd is indicative of the interpretation placed on the rule by the parties and required that it be assigned thereafter on that basis. The Carrier explains its assignment of Fitches, on the date mentioned, by stating Bullock was unavailable. We do not place too much weight on the explanation. The logical answer is that Fitches' assignment as of that date does not change Rule 40 or make proper application of its provisions on August 3rd a violation of other rules of the Agreement.

Finally claimant calls our attention to numerous Awards of this Division recognizing the established principals that seniority will apply when new positions are created and vacancies occur. We have no quarrel, in fact we are in entire accord, with the principles announced in those decisions. The trouble is they have no application where—as here—no new position or vacancy existed and the parties by another rule have agreed that overtime work shall be distributed in a manner other than on the basis of seniority.

Finding nothing in the facts of record or the arguments advanced by Claimant to warrant the sustaining of his claim under the existing facts and circumstances it is our duty to render a denial award and it is so ordered.

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 Employees involved in this dispute are respectively Carrier and Employee 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 did not violate the Agreements claimed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 12th day of September, 1952.