

Award No. 5979
Docket No. CL-6046

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Fred W. Messmore, 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 Employees, that:

(a) Carrier violated rules of current Agreement effective July 1, 1921 (revised March 1, 1947) that govern the hours of service, working conditions and rates of pay of the employees, when during period March 26, 1948 to May 29, 1948, Management required Miss Viola Hickman, regularly assigned to position of General Clerk, Master Mechanic's Office at Grafton, West Virginia, to suspend work normally attached to her regularly assigned position to perform clerical work in the Division Accountant's Office at Grafton, West Virginia, abstracting certain data from time sheet records in the Accountant's Office for Carrier's use in the settlement of pay claims of certain individuals employed in the shops at various points on the Monongah Division.

(b) Employees in the Division Accountant's Office be compensated as wage loss for the equivalent number of hours that Miss Hickman deprived them of work normally attached to their position in the Division Accountant's Office, namely:

Name	Payroll Classification	Position No.	No. of Hrs.	Wage Loss Claim Over- Rate time of Pay Rate	Amount
W. F. C. Crow	Accounting Clerk	68-1-25	52½		\$112.68
Linn Norman	Timekeeper	68-1-26	51½		101.88
F. C. Cutright	Time Clerk	68-1-27	43½		83.19
C. L. Shroyer	Distribution Clk.	68-1-29	40		74.16
F. J. Proudfoot	Clerk-Typist- Compt. Operator	68-1-31	40		71.88

JOINT STATEMENT OF FACTS: Between the dates of March 26th and May 29th, 1948, Miss Viola Hickman, General Clerk, Master Mechanic's

was temporarily assigned to fill a position of Tariff Clerk, rate \$234.98, while the occupant of that position was attending Trunk Line meetings. Both positions are in the same office and have the same assigned hours of work. During the time that Claimant worked the lower rated position he was paid his regular rate.

Employees assert that Rule 5 providing that employees will not be required to suspend work during regular hours to absorb overtime has been violated by this action of the Carrier. Carrier contends that Claimant was properly paid under the rule providing for the preservation of rates and that no overtime was absorbed by the assignment of Claimant to the lower rated position.

The principle is well settled by awards of this Board that payment in accord with the "Preservation of Rate" rule is not a defense to a claim such as the instant one if the temporary assignment of a regularly assigned employee to another position has the effect of a suspension of hours and the absorption of overtime, whether the overtime absorbed is on the Claimant's own position or the one to which he was temporarily assigned. Thus, there is but one issue to be decided here and that is whether or not this temporary assignment, in fact, had the effect of absorbing overtime on either position. In the absence of any evidence to the contrary, prior awards of this Board appear to raise a presumption that overtime is absorbed by suspending an employee from his regular assignment to work another over an extended period. However, the presumption disappears in the light of evidence and in this instance Carrier shows by affirmative evidence that the work of Claimant's position, or of the position he worked during the period involved in the claim, could have been permitted to accumulate for a month or more without prejudice to Carrier's business; and that it would not have been necessary to have ordered overtime if Claimant had not been temporarily assigned to the lower rate position. It follows that in this instance the effect of the temporary assignment was not to absorb overtime and, therefore, a denial award is required." (Emphasis added).

In his "FINDINGS" the referee held " * * * that Carrier did not violate the Agreement." The claim was denied.

The Carrier asserts that in the instant case the effect of the temporary assignment " * * * was not to absorb overtime * * *." Certainly, " * * * the work of Claimant's position, or of the position he worked during the period involved in the claim, could have been permitted to accumulate for a month of more without prejudice to Carrier's business, * * *."

The Carrier submits that the Employees have not established the validity of their claims. On this basis, and on the basis of all that is contained herein, the Carrier respectfully requests the Division to find these claims as being without merit and to deny them accordingly.

(Exhibits not reproduced).

OPINION OF BOARD: There is in evidence an Agreement between the parties effective July 1, 1921, amended June 1, 1927, revised March 1, 1947, that governs the hours of service, working conditions and rates of pay of employees.

At the time the dispute arose, the claimants were regularly assigned to the positions shown after their names, Item (b) of the "Statement of Claim", all located in Division Accountant's Office, Grafton, West Virginia.

At the same time Miss Viola Hickman held a regular position of General Clerk in the Master Mechanic's Office, Grafton, West Virginia.

The parties submitted a Joint Statement of Facts as follows: Between the dates of March 26th and May 29th, Miss Viola Hickman, General Clerk, Master Mechanic's Office, at various intervals, worked in the Division Accountant's Office abstracting information from the time sheets, which information was to be used in the settlement of pay claims of certain individuals employed in the shops at various points on the Division. A total of 227½ hours was spent on this work by Miss Hickman. Both Miss Hickman and the claimants hold seniority on the Monongah Division's Clerks' seniority roster (i.e., all on the same seniority lists). Miss Hickman and the claimants have assignments at different locations.

The duties of a General Clerk in the Master Mechanic's Office consist of the following:

- "(a) Maintaining record of apprentices.
- (b) Maintaining seniority rosters.
- (c) Stenographic work.
- (d) Preparing miscellaneous reports in connection with mechanical operations."

The duties of claimants in the Division Accountant's Office consist of:

- "(a) Booking time of all Mechanical Department employes.
- (b) Preparing payrolls and pay charts for Mechanical Department employes.
- "(c) Labor and material distribution by I.C.C. Accounts.
- (d) Making monthly reports of expenses, labor and material.
- (e) Abstracting any and all data from time sheets and payrolls."**

It is agreed the claimants worked their eight-hour assignments, as did Miss Hickman, at the time she performed the work about which the dispute arose.

The Brotherhood states: "It has always been the practice of the Carrier in instances of this kind where data was drawn from time sheets in connection with claims presented by various organizations that the Accounting Clerks, Distribution Clerks, Typist Comptometer Operators in the Division Accounting Office would be assigned the work of assembling such data from the time sheets."

Therefore, Miss Hickman was required to suspend work on her regular assignment to do work that rightfully, under the Rules of the applicable Agreement, belonged to claimants, thus resulting in violation of Rule 4 contained therein reading as follows:

"Employes will not be required to suspend work during regular hours to absorb overtime."

The following emphasizes the Carrier's position: The Carrier's Superintendent denied the claim on the basis (a) Accounting Department and Mechanical Department are on one and the same roster (Seniority Roster). (b) The work that was performed was of a special nature. The District Accountant previously rejected the claim on July 12, 1948, giving as his reasons for doing so that Miss Hickman's name appears on the same seniority

roster as claimants, the work performed by her being of a special nature and not in the category of regular assigned duties to be performed by Accounting Department Clerks, and there being no rule in the Clerks' Agreement to support the claim. Upon appeal of the claim to Mr. R. L. Harvey, Manager, Labor Relations, he denied it, giving as his reason as follows: "There is no limitation in Rule 4 that would prevent diverting an employee from normal routine of work performed in his position in order to do such other work as may be necessary. Rule 24 (a) specifically contemplates that employees may be temporarily required to perform service away from their usual appointment." Rule 24 (a) is a traveling rule, applying to employees not regularly assigned to road service, temporarily required to perform service away from their headquarters. It provides for their expenses and pay while traveling, with certain exceptions, not necessary to relate here. The point made is, the rule contemplates the permissibility of diversion from normal routine of an employee's work. Since this is true, that an employee may be sent from one station to another, it is entirely proper to send him from one office to another within the same seniority district. This rule by its title and substance has no relation to the dispute in this case.

The Carrier also cites and relies on Rule 15 of the applicable Agreement and contends the instant case falls under this rule. This rule is a Preservation of Rates Rule, and reads as follows:

"(a) Except as provided in Rule 23 (d), employees temporarily assigned to higher rated positions, shall receive the higher rates for four (4) hours' work or less, and if held on such positions in excess of four (4) hours, a minimum of eight (8) hours at the higher rate. Employees temporarily assigned to lower rated positions shall not have their rates reduced.

"(b) A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher rated employee due to a temporary increase in the volume of work does not constitute a temporary assignment."

The Carrier relates in the record the historical background giving rise to Rule 15 above. In the Clerks' Agreement dated July 1, 1921, as revised June 1, 1927, which Agreement immediately precedes the current Clerks' working Agreement, Rule 15 as it now appears was identified as Rule 20 of that Agreement. In addition to Rule 20 of the Agreement dated June 1, 1927, there appears in this contract the negotiated interpretation to Rule 20, now Rule 15. We have reviewed this interpretation to correlate the same with Carrier's contention that Rule 15 cannot be merely construed as a rating rule.

It is the Carrier's contention that the Employees have concurred with the interpretation of Rule 15 of the current Clerks' Agreement for more than 20 years. This interpretation is not included in the revised Agreement between the parties dated March 1, 1947. The Carrier asserts the evidence discloses the work Miss Hickman performed was of a special nature, a special report for use by the Master Mechanic's Office, and the data compiled by her was done as her time permitted. It was not a rush report with a specified time limit.

The foregoing substantially discloses the position taken by the respective parties and their contentions. The principle is well settled by Awards of this Board, that payment in accord with the Preservation of Rates Rule is not a defense to a claim such as the instant one. We discern no difference between Rule 15 here and other Preservation of Rates Rules passed upon by this Board in cases of like nature. If the work which Miss Hickman

was doing was the work of regularly assigned employees, whose work is in a position different from hers, has the effect of a suspension of hours and the absorbing of overtime, then Rule 4 of the applicable Agreement is violated. See Awards 2823, 2854, 4499, 4500, 2695, 3873, 4646, 4690, 4692, 3416, 5625 of this Division.

The contention of the Carrier with reference to the acquiescence of the Employees as to the interpretation placed on Rule 15 for a period of more than 20 years, and their understanding as to the manner in which the same applied to them, can operate only to defeat reparation for past violations. It does not change the collective Agreement or deprive the Organization of the right to insist upon compliance with the rules from the time the violation is called to the attention of the Carrier. See Awards 3125, 2695 and 4710.

As we read the record, it is the duty of clerical workers in the Division Accountant's Office to abstract any and all data from time sheets and pay-rolls. This would by necessity mean any information to be obtained therefrom as it relates to time and pay affecting mechanical workers.

If the claimants had been allowed to perform the work here involved, which constitutes part of their assignment, though by its very nature not regular, it would be on an overtime basis as they admittedly worked eight hours during such time on their own assignments. Though it might not have been considered as regular, it would be performed on an overtime basis. Therefore, when the Carrier had Miss Hickman perform this work, it was tantamount to suspending her work during regular hours to absorb overtime, in violation of Rule 4 of the applicable Agreement. Whether or not it was intentionally designed by the Carrier to bring about the result, it constitutes a violation if the assignment brings it about. Awards 2859 and 2593.

We conclude the claim should 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 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.

AWARD

Claim (a and b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of October, 1952.