Award No. 6016

Docket No. CL-5904

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

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

1. That Management violated rules of the Agreement between the Carrier and the Brotherhood that governs the hours of service and working conditions of the Employes when, effective September 1, 1949, they changed the assignment of Position No. CL-2, first shift clerk, Oaklawn Backshop Office, Seniority District 13, hours of service 8:00 A. M. to 5:00 P. M., five days per week Monday to Friday, Saturday and Sunday rest days, to an assignment requiring service on the first shift job (CL-2) in the Oaklawn Backshop, Seniority District 13, to Mondays, Tuesdays, and Wednesdays of each week and as caller (job CL-2), 3rd shift Oaklawn Roundhouse, Seniority District No. 14 on Thursdays and Fridays of each week.

2. (a) That R. C. Wiese, occupant of Job CL-2 (and his successors if there be any) be compensated for an additional day at time and one-half rate of the $11.01 daily rate attached to his assignment as first shift clerk, Oaklawn Backshop, for services performed on Thursdays and Fridays of each week, commencing September 1, 1949, that he was required to suspend work on his regular assignment of Clerk, Job CL-2, Seniority District No. 13, first shift clerk, Oaklawn Backshop, to fill the third shift, 11:00 P. M. to 7:00 A. M., Caller's position, Oaklawn Roundhouse, Seniority District No. 14, on the Thursdays and Fridays of each week that are the designated rest days of the regular occupant of the latter position.

2. (b) That A. L. Gard, regular assigned occupant of Job CC-6 (and his successors, if there be any) be compensated for time lost by an allowance of one (1) day's pay at time and one-half rate attached to position of third shift Caller, Oaklawn Roundhouse, Seniority District No. 14, account not called to perform service on his regularly assigned position on Thursdays and Fridays of each week, commencing September 1, 1949.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949, the following regular positions covered by the Scope Rule of our Agreements with the Carrier were established in the Oaklawn Backshop (Seniority District 13) and Oaklawn Roundhouse (Seniority District 14):

record is conclusive that not more than three days per week were required to perform the record keeping function in the Oaklawn Backshop. Claimant Wiese was not, therefore, deprived of work he would otherwise have performed.

Rule 45-½ (e) permits the establishment of "Regular Relief Assignments" to "* * * perform relief work on certain days and such types of other work on other days * * *" as may be assigned under the agreement. Such an assignment is classed by the caption to the rule authorizing its establishment as a "Regular Relief Assignment."

The Memorandum Agreement of July 7, 1926 permits the establishment of regular assignments performing relief, to work in more than one seniority district and more than one class of service. Said Memorandum Agreement was not changed by the adoption of the Forty Hour Week, but on the contrary it is expressly stipulated by the parties hereto that relief employes may continue to be assigned in the manner provided therein.

The assignment here in dispute is a "Regular Relief Assignment" within the intent and meaning of the controlling agreement. It was established in good faith in conformity with the rules. Petitioner's claim is, therefore, without merit and must be denied.

The Carrier affirmatively asserts that all data contained herein has been handled with the representatives of the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts of this case are somewhat complicated hence, even though not in dispute, they should be summarized briefly in order to insure a proper understanding of the issues involved.

Prior to September 1, 1949, the effective date of the 40-Hour Week Agreement, H. C. Wiese, one of the employes named as a Claimant herein, was the regularly assigned occupant of Record Clerk Position CL-2, Seniority District No. 13, with hours 8 A. M. to 5 P. M., Monday through Saturday with rest day on Sunday, at Carrier's Oaklawn Backshop Office. A. L. Gard, another employe named as Claimant, was regularly assigned to and occupied Caller Position CC-6, third trick, work days Thursday through Tuesday, with rest day on Wednesday. This position being located at Carrier's Oaklawn Roundhouse in Seniority District No. 14.

In connection with placing provisions of the 40-Hour Week Agreement in force and effect on its property Carrier took the following action during the year 1949 with respect to the positions just described:

On August 19 notice was given by Bulletin B-132 that effective September 1 Wiese's first trick position in the Backshop Office (Seniority District 13) would work 5 days a week Monday through Friday, with Saturday and Sunday as rest days.

On the same date, August 19, by Bulletin B-140 Carrier gave notice that position CL-2, Record Clerk, occupied by Wiese would be abolished, effective with the close of business August 31.

The same day, August 19, Carrier gave notice by Bulletin B-141 to the effect that on September 1 there would be a permanent vacancy for position CL-2, Relief Clerk and Caller in Oaklawn Roundhouse Office, to work as follows:

> "First shift, Oaklawn Back Shop office, hours 8:00 A. M. to 12:00 P. M. and 1:00 P. M. to 5:00 P. M. as CL-2 Record Clerk, Monday, Tuesday and Wednesday, rate of pay $11.01 per day.

"Third shift, Oaklawn Roundhouse office, hours 11:00 P. M. to 7:00 A. M. as Caller, Thursday and Friday, Rate of pay $10.60 per day.

"Saturday and Sunday to be rest days."

Following the posting of this last bulletin Wiese bid in and was assigned to the position therein described.

August 22 Carrier gave notice by Bulletin 1 effective September 1 that the assigned work and rest days of Gard's position would be Saturday through Wednesday with rest days Thursday and Friday..

Effective September 1, in conformity with the notices given in the bulletins heretofore mentioned, Wiese was assigned to and performed work at the Backshop Office in Seniority District 13 Mondays, Tuesdays and Wednesdays of each week as Record Clerk and at the Roundhouse in Seniority District 14 as Caller on Thursdays and Fridays of each week.

The record discloses that on August 25 an authorized representative of the Organization protested in writing the changes which the Carrier contemplated making in the positions in question on September 1 and that the Carrier acknowledged receipt of such protest on August 29; that on September 2 a formal claim was filed with Carrier's Superintendent of Motive Power based on a violation of the Agreement in placing the assignment in force and effect, which claim was denied on October 10, with the statement such assignment was permitted by the Chicago (40-Hour Week) Agreement, and that on October 22 an appeal was taken from that decision to the highest reviewing official of the Carrier who finally denied the claim on April 26, 1950, with the statement that "the Memorandum Agreement dated Chicago, July 7, 1926, provides that employes performing relief work may be assigned to work in more than one district." Although disclosing a shifting of base on the part of the Organization with respect to rules violated and the amount of the penalty claimed as a result thereof, the record makes it clear that at all times while the claims were being progressed on the property the Carrier was fully advised and aware that the Organization was basing its claim on the premise Wiese's assignment as bulletined was in violation of Rules of the Agreement; that it was charging those violations consisted of assigning an employe holding seniority in one seniority district to perform work in another seniority district in which he had no seniority; and that it was claiming reparation in the form of a penalty for the alleged violation so long as it continued.

At the outset Carrier challenges the jurisdiction of the Board to consider the part of the claim relating to Gard on the ground no such claim was ever made or progressed on the property. It must be conceded there is some merit to the contention Gard was not specifically named until the instant claim was filed with the Board. Nevertheless, under the facts as related, it is obvious that the essence of the claims now presented is for a violation of the Rules of the Agreement between the parties. It is equally apparent that the Organization's contentions on the property to the effect the Agreement did not permit Wiese, who held seniority in District 13, to perform relief work in Seniority District 14 where he held no seniority involved Gard's position and that Carrier was fully cognizant of that fact. This Division of the Board has indicated the rule to be followed in disposing of similar contentions. See Award 3256 where it is said:

"The Carrier urges that the claim originally made is not the same claim that is now before this Board. It is a fact established by the record that variances in the form of the claim occurred from time to time until the claim reached this Board. In this respect, it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of

delaying rather than expediting the settlement of disputes. The subject matter of the claim,—the claimed violation of the Agreement, —has been the same throughout its handling. The fact that the reparations asked for because of the alleged violation may have been amended from time to time, does not result in a change in the identity of the subject of the claim. The relief demanded is ordinarily treated as no part of the claim and consequently may be amended from time to time without bringing about a variance that would deprive this Board of authority to hear and determine it. No prejudice to the Carrier appears to have resulted in the present case and the claim of variance is without merit."

See, also, Award 5195 where the following statement appears:

". . . 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."

To the same effect is Award 5330.

We adhere to what is said and held in the foregoing Awards and believe the facts of this case bring it within the rule therein announced. Therefore, we conclude the Board has jurisdiction and shall proceed to dispose of the claim on its merits.

Many of the contentions advanced by the Organization respecting the sustaining of phases of the claim pertaining to Wiese are based and depend on the proposition that position CL-2, as it existed prior to the effective date of the 40-Hour Week, was improperly abolished. We are not disposed to labor this particular contention. The record reveals that the amount of work remaining to be performed on that position was already substantially reduced prior to the time amendments to the agreement, proposed to place the 40-Hour Week into force and effect, were being considered. It also discloses that since September 1, 1949, the Carrier has been able to perform all work rmaining to be done on that former 6 day position during 3 days of the week. Under such circumstances we are unwilling to say the Carrier violated the Agreement in abolishing such positions, or that it had no right to create a new one if properly established. Having reached this decision it can be stated in summary fashion that we have little difficulty, under the existing facts, in concluding Wiese was not required to suspend work during regular hours to absorb overtime in violation of Rule 56 or that Rule 62, guaranteeing him 5 days' work as the occupant of that position, was not violated. However, the foregoing conclusions, as will be presently noted, do not mean that the Carrier's action in connection with the assignment in controversy did not result in a violation of the Agreement.

In its submissions and on oral argument, contrary to some of the reasons given on the property for declining the claim, the Carrier in its defense of the claim as presented to this Board concedes that Rule 45½(e) of the Agreement, executed to conform with the principles of the 40-Hour Week, does not permit the creation of regular relief assignments which—as here—cross seniority lines. Otherwise stated, although it contends such rule permits a regular relief assignment to perform relief work on certain days and such types of other work on other days as may be assigned in one seniority district, it admits that under its terms alone Wiese, who holds seniority in Seniority Group 13 only, could not perform Caller's work in Seniority District 14 where he has no seniority whatsoever. Having conceded this point Carrier takes the position that another agreement between the parties, dated

July 7, 1926, in force and effect by virtue of still another agreement executed on July 20, 1949, providing the 1926 agreement was not to be changed by adoption of the 40-Hour Week, authorizes and permits that action. The Agreement thus relied on reads:

> "We have had considerable correspondence regarding seniority of employes assigned to relieve employes coming within the scope of the Clerks' agreement in order that they may have one day off in seven. In many cases employes have been assigned to relief duty in more than one seniority district and in more than one class of service. To illustrate:
>
> 3 days per week in district 29 in class 2 position.
>
> 1 day per week in district 30 in class 2 position.
>
> 1 day per week in district 31 in class 2 position.
>
> 1 day per week in district 31 in class 1 position, later (sic) is regularly assigned under his application to class 1 position in district 31.
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> "In conference today it was agreed that when necessary to assign employes for regular relief purposes in more than one seniority district such regularly assigned relief employe shall acquire and accumulate seniority in the class of service in each seniority district in which relief service is performed until such relief employe is regularly assigned to a position in any one of the districts in which he has been performing relief service at which time he will be considered as if transferred. His seniority in district 31 is continuous and he will continue to accumulate seniority in class two in districts 29 and 30 for a period of one year. This seniority to be exercised only in the event he is disturbed within that one year.
>
> It must be understood that this is to only apply to regularly assigned positions as above outlined and not to cases where clerks or others are used in more than one district occasionally or in extra service."

When analyzed the gist of the contentions advanced by Carrier on the point now under consideration is that the 3 days' Record Clerk work on position CL-2, as it now exists, is a "type of other work" within the meaning of that term as used in Rule 45½(e) and that therefore, even though such rule does not permit the crossing of seniority lines, the agreement above quoted authorizes work of that type in one seniority district to be combined with relief work in another seniority district. We do not agree. We we construe the July 7, 1926, agreement, it has application, as indicated in its first paragraph and by the schedule therein set forth, to situations where employes have been assigned for regular relief duties or purposes in more than one seniority district. Further indicia of the soundness of this construction appears from the phrase "when necessary to assign employes for regular relief purposes in more than one seniority district," as used in the second paragraph. Moreover, the third paragraph of such agreement expressly states the terms thereof are to apply only to regularly assigned positions (which we interpret to mean regularly assigned relief positions) as therein outlined and not to cases where clerks or others are used in extra service.

Under the facts of this case it is clear the 3 days' Record Clerk work assigned to Wiese was not assigned to him as relief work. The very most that can be said for it was that it was assigned extra work. Therefore, construed as heretofore indicated, it necessarily follows that the July 7, 1926, agreement has no application and that Carrier's position it authorizes a combination assignment of a "type of other work" in Seniority Group 13 and "relief work" in Seniority Group 14, cannot be upheld. The result, since

it could not properly be assigned to Wiese under the agreement, is that in fact the work on Gard's rest days remained unassigned work which should have been assigned to an available or unassigned employe or to Gard as the regular employe in conformity with the terms and requirements of Rule 53(f) of the agreement. Since such work was not so assigned, and we are bound to assume from the record there were no extra or available employes to perform it, we conclude the proper penalty to be assessed for violation of the agreement is reparation to Gard, who was entitled to the work under the provisions of Rule 53(f) but did not perform it because of the erroneous assignment to Wiese, at the pro rata rate for the Thursdays and Fridays of each week commencing September 1, 1949, until correction of the violation.

Award 1528 of the Second Division of the Board, contrary to assertions made by the Carrier, is not in point or an authority to the contrary. Resort to the findings in that case disclose that there it was expressly pointed out that what was said and held with respect to machinists relieving foremen was based upon a rule specifically authorizing that action.

The conclusions heretofore announced mean that Claim 1 should be sustained insofar as it charges the Carrier with a violation of the rules in assigning Wiese to perform work belonging to Gard in Seniority District 14, that Claim 2(a) should be denied and that Claim 2(b) should be sustained at the pro rata, not the punitive, rate as claimed.

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 Agreement was violated.

AWARD

Claims 1 and 2(b) sustained to the extent indicated in the Opinion and Findings. Claim 2(a) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of November, 1952.