Award No. 6308
Docket No. CL-6306

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 PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE LAKE ERIE AND EASTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the Clerks' Agreement:

(a) When it required Clerks James Sebastian and Edward Revay to suspend work on their regular assignments and assigned them to other positions in order to absorb overtime, and

(b) That Clerk James Sebastian be allowed an additional day's pay at pro rata rate for each day he was required to work another position during the period of May 7th, 1948 to June 19th, 1948 and

(c) That Clerk Edward Revay be allowed an additional day's pay at pro rata rate for each day he was required to work another position during the period May 7th, 1948 to June 18th, 1948.

EMPLOYES' STATEMENT OF FACTS: On May 6, 1948, I. N. Ankey, who was regularly assigned to Job 3, Rate Clerk at Monaca Freight Station, was awarded position of Rate Clerk at West Aliquippa Freight Station, whereupon his position at Monaca Freight Station was bulletined on Advertisement No. 70 (Employes Exhibit A), issued on the same date.

Prior to that date the regular assigned clerical force at Monaca Freight Station, Monaca Ticket Office and Colona Coal Dock, located at Monaca, Pennsylvania, under the supervision of the Freight and Ticket Agent at that point was as follows:

Job Name		Position	Rate	Hours of Duty	Rest Day
		Monaca Freight Station			
2	J. L. Wagner	Cashier	$11.16	8:00 A. M.-5:00 P. M. (1. hr. lunch)	Sunday
3	I. N. Ankney	Rate Clerk	9.86	8:00 A. M.-5:00 P. M. (1. hr. lunch)	Sunday
4	J. J. Sebastian	Asst.-Cashier & Rate Clerk	9.74	8:00 A. M.-5:00 P. M. (1 hr. lunch)	Sunday

33, which has been the recognized and accepted practice since the agreement was consummated in 1946.

2. Rule 30, "Absorbing Overtime", was never intended to apply to situations of this character.

3. To sustain this claim would have the effect of writing a new rule and eliminate the provisions of Rules 6, 10 (b) and 33 in their entirety.

The incidents involved in this dispute date back to May and June, 1948. The record shows that the employes waited approximately two years and four months following the declination of the General Manager before renewing this claim. Management reiterates the opinion of Referee Elson, as outlined in Award 5839 of this Division, to wit:

"While we are not disposed under the circumstances of this case to invoke the doctrine of laches, we believe the delay is significant. To us it shows a lack of real confidence in the claim and supports our conclusion that the claim is without merit."

Carrier submits, in view of its position as outlined above, that this claim should be denied.

(Exhibits not reproduced)

OPINION OF BOARD: The System Committee contends Carrier violated Rule 30 of the parties' effective Agreement by requiring Claimants to suspend work on their regular assignment and to work other positions in order to absorb overtime. Because of this violation it asks that Clerk James Sebastian and Clerk Edward Revay be paid an additional day's pay at pro rata rate for each day so required to work another position during the period from May 7 to June 19, 1948.

Preliminary to a discussion of this claim on its merits Carrier has raised a procedural question that requires our attention. It points to a considerable period of delay by the Organization in handling this claim both on the property and in appealing it to this Board after it had been denied by the highest officer on the property authorized to handle it. It asks that we not consider but deny the claim because thereof. The Carrier cites no provision of the parties' Agreement relating thereto and there is none in the Railway Labor Act. In the absence of any showing that Carrier has been in anyway injured, damaged or prejudiced by such delay there is no reason why it is material. If a limitation or cut-off rule is desired with reference to the handling of a claim on the property it must be done by agreement of the parties and if desired with reference to an appeal from the property to this Board it must be done by an amendment to the Railway Labor Act. In the absence thereof we do not have authority to write such a provision into either by means of an Award. Since no injury, damage or prejudice has been shown by reason of the delay we find this contention to be without merit. See Awards 3444, 5785, 5859, 5909, and 5920 of this Division.

On May 6, 1948 I. N. Ankney was regularly assigned to and occupied Job 3, Rate Clerk, at Monaca Freight Station. This position had a rate of $9.86. At this same Freight Station there were, among others, the following jobs: No. 4, Assistant Cashier and Rate Clerk, rate $9.74; No. 5, Demurrage Clerk, rate $9.42; and No. 9, Clerk Warehouseman, rate $9.31. The assigned hours of these positions were from 8:00 A.M. to 5:00 P.M. with one hour for lunch. Claimant Sebastian was regularly assigned to and had occupied Position No. 4 since July 26, 1943; W. M. Patterson was regularly assigned to and occupied Position No. 5; and Claimant Revay had been regularly assigned to and occupied Position No. 3 since March 29, 1948. Ankney had successfully bid on the position of Rate Clerk at West Aliquippa Freight Station and was assigned thereto and occupied that position on May 7, 1948,

thus leaving Position No. 3, which he had occupied at the Monaca Freight Station, vacant effective as of May 7, 1948.

As of May 6, 1948 Carrier bulletined this No. 3 vacant position of Rate Clerk at Monaca Freight Station by Bulletin No. 70. Pending the results of this Bulletin, and an assignment thereunder, Carrier used Sebastian to fill Position No. 3. It thereupon filled the temporary vacancy occurring on Sebastian's Position No. 4 by having Patterson fill it. It then used Revay to fill the temporary vacancy on Patterson's Position No. 5 and used M. L. Wyrich, an extra rate clerk, to fill Revay's Position No. 3.

No bids were received so Carrier, instead of attempting to permanently fill Position No. 3 pursuant to its right to do so under the provisions of Rule 10 (b) of the parties' Agreement, again, as of June 12, 1948, bulletined the position only at a higher rate. The rate fixed by the new bulletin was $10.37. See Carrier's Bulletin 84. During the period of this bulletin Carrier had Sebastian, Patterson, Revay and Wyrich continue to work on the same positions as they had done while Bulletin 70 was pending. They continued to do so until June 19, 1948. Thereafter, as of June 22, 1948, W. A. Murphy, Sr., was assigned to and occupied Position No. 3, he having been the successful bidder under Bulletin No. 84. Sebastian, Patterson and Revay were then returned to and occupied their regular positions. It is for the period from May 7 to June 19, 1948, while Claimants were so used, that this claim is made.

There were no furloughed or qualified extra employes available during the bulletining of this position. Consequently Rule 6, paragraph 2, has no application.

Carrier, during this period, paid Sebastian, Patterson and Revay at the rate of the position they were used on in accordance with Rule 33, "Preservation of Rates." This Rule is only a rating provision when Carrier has properly used employes in accordance with the rules of the Agreement. It does not give Carrier any right to move employes from one position to another but only provides the rate to be paid if Carrier has the right to do so. See Awards 2823, 2859 and 5105 of this Division.

Rule 30, violation of which is here contended, provides:

> "Employes will not be required to suspend work for the purpose of absorbing overtime."

We said in Award 5578 of this Division, and many others, that to require an employe to suspend work on his regularly assigned position in order to work another position, except in an emergency, is considered to be a suspension of work to absorb overtime in violation of the rule prohibiting such action.

As summarized in Award 4646:

> "The intent and purpose of the Seniority and Bulleting Rules is to protect the Employes' rights to the respective positions they had secured thereby and not to require them to suspend their regular work to absorb overtime, which either they or other regular employes would have earned had such suspension not taken place. This Board has so held in many Awards. Nos. 2695, 2823, 3417, 4499 and 4500. And the same principle applies even if the hours worked are the same as the hours of the employe's regular assignment."

See also Awards 2859, 3416, 4692, 5105 and 5927 of this Division. For a full discussion of this principle see Award 5105.

The situation here presented brings Carrier's right to use Sebastian on Position No. 3 under that part of Rule 10 (b) applicable "When filling bulletined positions pending an assignment." This is true even though Carrier, after no bids were received in response to Bulletin No. 70, could have

proceeded under the following language of this same rule, to wit; "in the event bulletin fails to develop and applicant with sufficient fitness and ability, the position may be filled without regard to 'these rules". The reason it is true is because Carrier did not choose to do so but again bulletined the position as evidenced by Bulletin No. 84. The use of Sebastian was, under Rule 10 (b), subject to his desiring to be so used. The same condition attaches, by reason of the provisions of Rule 10 (a), to Carrier's use of Revay to fill Position No. 5 while Patterson, the regular incumbent thereof, was temporarily absent therefrom.

It is evident that if Carrier could not properly use Sebastian and Revay in the manner that it did, in the absence of available qualified relief, furloughed or extra employes, it was required, under Rule 28 (a) as interpreted by the Question and Answer appearing under the "Note" thereto, to double over the senior qualified regular assigned employe at this location and to pay him at the rate of time and one-half.

Carrier's right to use the senior qualified employes under Rule 10 (a) and (b) depended entirely on the desire of the employes affected. This rule, when read in conjunction with Rule 6 (a), is intended to and does protect and secure to employes against any unilateral action of the Carrier in moving them, against their desires, from the regular positions which they have obtained and hold by reason of their seniority. Desire, as here used, means to express a wish or request for the temporary assignment. The proper method to proceed thereunder is for Carrier to inform the employe affected of the situation, when one exists to which this rule has application, ascertain his desire in the matter and then proceed in accordance therewith. An expression of desire is not necessarily manifested because an employe does not immediately protest his use by Carrier when assigned to do the work. The rule contemplates the employe, before his use, is to make his own decision in this regard and the Carrier is obligated to see that he is given an opportunity to do so and then comply therewith.

The burden of proof is on the Claimants. Without going into any detail we think the facts adduced by both sides of this dispute fully establish that Sebastian did not desire to temporarily fill Position No. 3. On the other hand we think the facts fail to establish the same as to Claimant Revay. In fact, we think he desired to temporarily occupy Position No. 5 during the temporary vacancy thereon while Patterson was temporarily occupying Position No. 4.

Carrier says it has always applied these rules as it did in this case and no protest has ever been received, until this one, objecting thereto. When the meaning and intent of the provisions of a collective bargaining Agreement are clear and unambiguous unprotested past practices, which are violations threreof, are not controlling and will neither be permitted to vitiate the force nor prevent the enforcement thereof. See Awards 3444 and 5834 of this Division.

In view of what we have said we find Carrier violated Rule 10 (b) and Rule 30 in its use of Sebastian and that the claim in his behalf should be sustained but not as to Claimant Revay.

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 violated the Agreement.

AWARD

Claim (a) sustained as to Sebastian and denied as to Revay.

Claim (b) sustained.

Claim (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of August, 1953.

DISSENTING OPINION TO AWARD 6308, DOCKET CL-6306

The Opinion of Board herein recognizes as follows:

"The use of Sebastian was, under Rule 10 (b), subject to his desiring to be so used. The same condition attaches, by reason of the provisions of Rule 10 (a), to Carrier's use of Revay to fill Position No. 5 while Patterson, the regular incumbent thereof, was temporarily absent therefrom.

" * * *

"Carrier's right to use the senior qualified employes under Rule 10 (a) and (b) depended entirely on the desire of the employes affected.

" * * *

"The burden of proof is on the Claimants."

The Carrier showed that it contacted Claimants Sebastian and Revay as well as Demurrage Clerk Patterson, and that they agreed to protect the positions until the Rate Clerk's vacancy was filled. The Carrier handled all three employes alike and filed affidavits showing that none had registered any objection to moving up to the higher rated positions.

Based on the majority's denial of Revay's claim, Sebastian's claim likewise should have been denied and for the further reason that the Carrier filed an affidavit from the Agent showing that, on two occasions, Sebastian had expressed a preference to work the job himself rather than have an inexperienced man thereon whom he would have had to assist.

Furthermore, the Carrier showed that the history of the Absorbing Overtime Rule uncontrovertibly established the intent of that provision as being clearly inapplicable to the factual situation of this and similar cases in which it has been erroneously interpreted to mean that rearrangements of work constitute suspension of work for the purpose of absorbing overtime.

The instant case is one in which, as has been recognized by Awards of this Division, claimants were not required to suspend work during regular hours inasmuch as their work was continuous within the period of their regular assignments. Furthermore, there was no showing herein that overtime would have been worked in any event as both parties agreed that the

work had to be performed currently and could not have been permitted to accumulate even for one day. In addition there was no one available who was qualified to perform the work on an overtime basis.

Here also the majority have subscribed to and insisted upon the announcement, contained in a dictum, that "If a limitation or cut-off rule is desired . . . . with reference to an appeal from the property to this Board it must be done by an amendment to the Railway Labor Act." That statute now charges carriers and employes with the duty to make and maintain agreements, and to settle all disputes in a prompt and orderly fashion. Untold time and resources have been expended by the parties locally and on a national, industry-wide basis, many times under the aegis of the National Mediation Board, in the formulation of agreement rules providing for the tolling of time limitations against the submission of claims to this Board as well as other lawfully established tribunals. Such an expression is the direct antithesis to the statutory provisions. It is wrong in theory and in law.

For the above reasons we dissent.

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ E. T. Horsley

/s/ J. E. Kemp