Award No. 6503
Docket No. CL-6387

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William M. Leiserson, Referee

PARTIES TO DISPUTE:

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

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that The Northern Pacific Terminal Company of Oregon violated the current Clerks' Agreement.

(1) That Cecil Jones, Cashier, Job 102, rate $16.12 per day, Portland Ticket Office, be paid for services performed as ticket clerk on his designated relief day, Saturday, January 6 and Sunday, January 7, 1951, at overtime rate of time and one-half less payment heretofore made on a pro rata basis.

EMPLOYES' STATEMENT OF FACTS: Mr. Cecil Jones is the incumbent of Cashier's job No. 102 in the Ticket Office at the Union Station in Portland, Oregon. Hours: 7:00 A.M. to 4:00 P.M. with one hour for lunch. Rate: $16.12 per day.

Mr. Smith is the incumbent of Job No. 132, Relief Position, rates various, to be paid the rate on the position which he is relieving. Mr. Smith was the regular relief man on Mr. Jones' Cashier position on Saturday, January 6 and Sunday, January 7, 1951. On Saturday, January 6 and Sunday, January 7, 1951, Mr. Smith, the regular relief man, was absent, and Mr. Jones in compliance with provisions of Rule 37G was used to perform work on his own position of Cashier, Job No. 102, Saturday, January 6 and Sunday, January 7, 1951. He was paid the straight time rate of $16.12 on January 6 and 7, 1951, whereas he should have been paid at the overtime rate in accordance with Rule 37G.

March 28, 1951, formal claim was filed for remuneration at the overtime rate on behalf of Mr. Jones with management. April 11, 1951, claim declined by Manager Jones. Subsequently, further efforts were made to compose the claim on the property but to no avail. Manager Jones definitely declined it on April 28, 1952, notwithstanding awards of your honorable board, such as 5494, that supports our contention in its entirety. These awards were cited in our handling of this case with him.

POSITION OF EMPLOYES: (1) That management violated rules of agreement with the carrier that govern the hours of service and working

off on his rest days would have been used, **not the occupant as such.** (Item 5 of the Memorandum).

Thus it is perfectly clear that the "regular occupant" as such on this property is about the last person to be used when on a time and one-half basis. He as such most assuredly does not follow the extra man as set forth in Award 5475. In the case of Jones, he **was not used on Job 102 as the occupant,** but **on Job 132 as the senior assigned employe** who made the proper written application therefor.

It is clearly obvious, therefore, that the "long list of Awards" referred to **could not possibly apply to this** property. Nor does Award 5475, the Carrier maintains.

The Carrier believes the reasoning expressed in Award 3398, as follows, more nearly fits the instant situation: "The first sentence of the rule, upon which this claim rests, merely confers a right upon regularly assigned employes to fill temporary vacancies of less than seven calendar days in their own offices. **It clearly contemplates that one exercising the right must take over the vacant position in its entirety on a pay basis of straight time.**" (Emphasis ours.) With a very few changes, these findings could apply perfectly to the situation and claim before you.

The Carrier maintains that the interpretation given to the rules involved over a period of years is indicative of the true intent of said rules, and this Division, as well as the entire Board, has held that continued practice and application of rules over a span of years best show what the parties had in mind when said rules were promulgated. As this Division said in Award 1435: "Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written. Here there is so much uncontradicted evidence of unambiguous conduct by both parties to the issue, evidencing the conclusion which is considered determinative, that no course is open for a judicial pronouncement other than that the claim be denied." The same applies to the case now before you.

It is the Carrier's further contention that the application to the rules involved, seemingly desired by the Brotherhood, should be accomplished by negotiations under Section 6 of the Railway Labor Act, rather than by means of time claims. As this Division said in Award 732: "Agreement cannot be changed or modified, or any of its provisions waived except in the manner provided therein, or by mutual agreement between the parties who negotiated and executed the same."

CONCLUSION

It has been shown in Part "A" hereof that the instant claim has not been handled on the property in conformity with the Railway Labor Act and the Rules of Procedure of the National Railroad Adjustment Board, therefore, **said claim should be dismissed for lack of jurisdiction.**

In the event the Division fails to dismiss this claim, the Carrier has shown in Part "B" that the applicable rules of existing agreements were carefully and correctly followed in using Cecil C. Jones on Job 132 on January 6 and 7, 1951, at straight time rate, and that there were no rules whatsoever violated at that time; consequently, **the claim before you should be denied** for the reason that it is not supported by agreement rules, past practice, or applicable Adjustment Board Awards.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier objects to the Division taking jurisdiction of this dispute on the ground that it was not handled in the "usual manner" on the property as required by the Railway Labor Act. It admits

that it twice declined the claim, and there appears to have been a third rejection. The first two letters denying the claim were written in 1951. On March 29, 1952, the General Chairman filed another claim in behalf of all employes who have suffered monetary losses because of the practice alleged to be a violation of the Clerks' Agreement in the present case involving Cecil Jones. A month later, the Carrier replied in a long letter which ended: "It seems clear, therefore, that Jones' claim (and another) are not in point."

There is conflict of testimony as to whether Jones' claim was considered in any conference with the Management, but the correspondence in the record shows that the claim was fully discussed by the parties without reaching an adjustment. Since the violation alleged in this claim is also the basis of the later claim involving a number of other employes, it seems reasonable that Jones' claim should be submitted here separately in advance of the later claim to get a final determination of the basic alleged violation. We think the record shows that the claim has been handled on the property substantially in the usual manner as required by the Railway Labor Act and the rules of the Adjustment Board. The objection to the Division taking jurisdiction must therefore be overruled.

Turning now to the merits of the claim, we find the essential facts in the case clear, although they have been somewhat confused by the arguments of the parties. On January 6 and 7, 1951, there was a temporary vacancy on a regularly bulletined relief assignment due to the incumbent taking part of his vacation on those days. The assignment was for five working days beginning Saturday and ending Wednesday, with Thursday and Friday assigned as rest days. It is admitted that no extra or other unassigned employe was available and therefore the Carrier was required by Rule 5 of the June 10, 1949 Agreement to use the senior regular man available to fill the vacancy. Two regular men who were off on their rest days applied for the vacancy, and it is agreed that Claimant Jones was properly chosen because he was senior. He was paid the regular rate of the Relief Assignment on which the vacancy occured. The claim is that he should have been paid at the punitive rate of time and one-half for the two days.

There was some argument that claimant filled the vacancy on days "not part of any assignment," as referred to in Rule 37 (j). This is obviously a misconception. Actually, the temporary work was done on the first two days of a regular assignment of five working days. True, it was a relief assignment, but a relief assignment is bulletined the same as any other regular assignment, though Rule 28½ (e) permits different starting time, duties, and work locations on different days. It happened that the first two days of the regular relief assignment were also the two rest days of the claimant on his own assignment. But this must always happen when extra or other unassigned men are not available to fill such vacancies, and senior men off on their rest days must, under the rules, be used to fill them.

The Employes contend that by "requiring or permitting" the claimant to work on the first two days of the relief assignment, the Carrier was working him on the 6th and 7th days of his own assignment; and by not paying him the punitive overtime rate for these days, it violated the working Agreement between the parties, particularly the Forty-Hour Week rules. Primarily, they charge, the Rules violated were 37 (g) and 37 (j). The latter deals with "Work on Unassigned Days" and we have already found that the work here involved was on assigned days. Therefore, this rule is not pertinent to the present case.

Rule 37 (g) provides that "Employes worked more than five days in a work-week shall be paid time and one-half for work on the sixth and seventh days of their work-week, except where such work is performed by an employe due to moving from one assignment to another." Rule 37 (f) provides this same exception for work in excess of 40 hours in any work-week. The Carrier relies on this exception for justification of its payment of the regular, straight-

time rate of the relief assignment where the vacancy occurred. The Employes' position is that the punitive overtime rate of the claimant's regular assignment applies.

The facts in the case make plain that claimant did move from his regular assignment to fill a temporary vacancy on another assignment. His own assignment was to rest on January 6 and 7. He had the right to insist on those two days of rest by reason of his assignment; he did not have to accept the two days' work on the other assignment. He could have let the other applicant for the vacancy work the two days. Instead of choosing to rest, he chose to apply for the work on the ther assignment. When he made that choice of his own accord, the Carrier was obligated by the seniority rules to give him that work. Having so chosen, he took the conditions, including the rate of pay, of the assignment on which he worked the two days. Had the temporary vacancy lasted five days, he would have been entitled to the rest days of this assignment.

If there is doubt about the conclusion, we think the doubt may perhaps be resolved by the "Memorandum of Agreement effective June 10, 1949." Rule 5 of this agreement seems to distinguish between the occasions when punitive overtime is necessary and when it may not be necessary.

> "When it is impossible to fill short vacancies as provided above, (i.e., by unassigned employes), and it then becomes necessary to use employes at punitive rate to fill said vacancies, the senior qualified regular employe in the department where vacancy exists will be doubled through when there is no overlap of the hours of the shifts involved. If this does not take care of the situation, then the regular men off on rest days will be used in seniority order when qualified."

This makes clear that when punitive overtime is necessary, a different employe would probably have the required seniority to fill the short vacancy than the senior employe among those who happen to be off on their rest days. Also, the specific reference to punitive overtime in the first sentence, and its omission from the second, indicates that punitive overtime may not be involved when men off on their rest days are used to fill short vacancies as in the case here. When such service is done under the Call Rule (No. 38), pay at the overtime rate is specified, though not necessarily for a full day. There may be other occasions where factual situations justify overtime pay for rest day service. But the facts and the rules involved in the instant case do not require the payment of punitive overtime because of the exception when moving from one assignment to another.

This conclusion is based on the rules of the Agreement between the parties applied to the facts in the case, without regard to precedents set by awards under agreements on other railroads. But examination of the awards cited in support of the Employes' position shows they did not deal with the same issue as we have here. On the other hand, the Carrier's position has been sustained in a number of awards where the issue was, as here, whether an employe moved from one assignment to another (e.g., Awards 4592 and 6408).

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 did not violate the Agreement by paying the straight-time rate.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of February, 1954.