Award No. 6562
Docket No. CL-6569

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) The Carrier violated the Rules of the Clerks' Agreement at Sparks, Nevada, when it failed to call and use Truck Driver George Shaddock to perform service on his position on his rest day, Sunday, September 3, 1950, which service was on a day not part of any assignment and regularly assigned to and performed by him during his work week, Monday through Friday.

(b) Carrier shall now compensate Truck Driver George Shaddock at the rate of time and one-half of his assigned position for Sunday, September 3, 1950.

EMPLOYES' STATEMENT OF FACTS: 1. There is in evidence an agreement between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, bearing effective date of October 1, 1940, which agreement (hereinafter referred to as the Agreement) was in effect on the date involved in the instant claim. The Agreement was amended and/or revised by a Memorandum of Agreement dated July 8, 1949, and supplement thereto dated June 30, 1950, which became effective September 1, 1949, to conform with the National 40-Hour Work Week Agreement signed at Chicago, Illinois, March 19, 1949. Copy of Agreement of October 1, 1940, and subsequent amendments and/or revisions are on file with this Board, and by reference thereto are hereby made a part of this dispute.

2. Prior and subsequent to the date involved in this dispute Mr. George Shaddock (hereinafter referred to as the Claimant) was the regularly assigned occupant of Position No. 2516, Truck Driver, Stores Department, Sparks, Nevada. His assigned hours were 7:30 A. M., to 4:00 P. M., with Saturday and Sunday as rest days, and rate of pay $1.5175 per hour. The duties assigned to the Claimant during his work week, Monday through Friday, consisted of transporting materials by truck as directed.

3. The Carrier called a portion of the Store Department force, assigned Monday through Friday with Saturday and Sunday as rest days, to report for service on Sunday, September 3, 1950, to unload material from

CONCLUSION

The carrier asserts that it has established that the claim in this docket is without merit or basis, and that it should be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants holds a regular assignment as a Truck Driver at Sparks, Nevada, working Monday through Friday, with rest days on Saturday and Sunday. The Carrier called a number of Stores Department employes to work on Sunday, September 3, 1950, unloading two cars of Company materials. Among these employes was a Tractor Crane Operator whose regular assignment (also Monday through Friday) does not include truck driving. The Carrier had not expected that any truck dirving work would be needed in connection with unloading the cars, but when it developed that a switch engine would not be available to move and spot a car, the Tractor Crane Operator was used to haul some material in the truck that the Claimant uses on his assignment. The Employes charge that the Carrier violated the Agreement then in effect by not calling the Claimant to do the truck driving work, and the claim is that he be compensated 8 hours at time and one-half for the Sunday work.

The truck driving work done by the Crane Operator is described by the Employes as follows:

> "Haul 223 pieces redwood lumber from car at Store No. 1 to Store No. 2 storage; 1000 In. feet ¾" quarter round from Store No. 1 to Store No. 2; several pieces Celotex delivered from Store No. 2 to B & B shop out in the yards, and several pieces of freight car material from freight car at Store No. 1 to Store No. 2."

The Carrier does not deny or question this description of the work but it disputes the Employes' statement that the Crane Operator devoted 5 hours or more to this work. It states that he did it in about 3 hours.

The specific rule alleged to have been violated is 20 (e). This provides that work required on a day not part of any assignment "may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe." The Compensation claimed is based on Rule 21 (d) which specifies that employes notified or called for work on Sundays shall be paid a minimum of 8 hours at time and one-half. The Employes argue that Rule 7, relied upon by the Carrier, is not applicable to this case.

The Carrier, on the other hand, contends that Rule 20 (e) is not applicable to the facts in the case, and that Rule 7 is controlling. This rule provides that employes assigned to higher rated positions shall receive the higher rates; and "employes temporarily assigned to lower rated positions shall not have their rates reduced." Since the Crane Operator occupied a higher rated position, the Carrier argues that it was authorized by this rule to assign him to do truck driving work. It states that the truck driving was merely incidental to the Crane Operator's duties in connection with unloading the cars, and refers to it as a "small piece of unassigned and unforeseen work . . . a trivial detail of work involved." It also contends that it had no foreknowledge at the time the Stores Department employes were called to unload the cars that an engine would not be available, and if it had been available as expected no truck driving work would have been necessary; also, that the lack of an engine became evident when the second car was being unloaded. Since there was a shortage of cars, it argues further, that the absence of the engine created an emergency which required the truck driving work to be done in order to avoid holding the car over another day.

The Employes deny there was an emergency, stating that the cars could have been unloaded and the material left to be trucked on Monday. They point out also that the Crane Operator hauled not only materials from the cars to storage but also "several pieces of Celotex delivered from Store No. 2 to B & B shop out in the yards." This was not denied by the Carrier, although the Employes stated that "three deliveries of this material were made." They argue further that the Carrier had ample time to call the regular Truck Driver as it was required to do by Rule 20 (e), that it made no attempt to reach him when (as the Carrier stated) "it became more evident every minute that a switch engine would not be available to switch a carload of lumber to the correct spot for unloading;" and further, that the amount of truck driving work was not a small, trivial piece, but by Carrier's own admission took at least three hours to do.

We cannot agree that there was any emergency involved in this case. The Carrier did not explain why an engine was not available after it had expected that one would be available. No showing was made that it was beyond the control of the Carrier to make sure that the switch engine would be available. Nor did the shortage of cars create an emergency. In Award 6019 where the same parties were involved as here, the Carrier also contended there was "a serious car shortage situation," but we sustained the claim. In Award 5954 where another Carrier contended "that an emergency existed and that there was no way of knowing whether Claimant . . . was available for work on that Sunday," we also sustained the claim. Moreover, neither Rule 7 nor Rule 20 (e) says anything about emergencies, and the Carrier cites no other emergency provision in the Agreement, relying only on the unavailability of an engine and the shortage of cars.

Nor can we agree that 3 hours of Sunday work as described in the record is trivial or a small piece of work. Rule 21 (d) requires a minimum day's pay of 8 hours at time and one-half for any amount of work required on Sunday, even though it my be less than 3 hours, and here the Employes claim 5 hours or more involved. We do not need to decide the exact amount of time the truck driving work took for we think Rule 7 is not applicable to this case. Rule 20 (e) is applicable, and Rule 21 (d) requires payment for a whole day regardless of the actual time required to work on Sunday.

This Division has repeatedly ruled that Rule 7 and similar rules on other railroads is a "rating rule" to preserve wage rates, and does not authorize a Carrier to ignore its obligations under another specific rule of an agreement. In Award 6015 we said:

> "The Carrier's claim that under Rule 44 (the rating rule) it had the right to temporarily assign Claimant to work at Ticket Seller's position . . . without regard to the provisions of Rule 38 (absorption of overtime), and hence such rule has no application to . . . the instant controversy, is not new, and we have little difficulty in concluding that it cannot be upheld. Such claims have been definitely rejected by repeated decisions of this Division of the Board on the basis that rules similar to Rule 44 constitute merely rating provisions, and are not to be construed in such manner as to impair the effectiveness of rules prohibiting suspension of work to absorb overtime. See Awards 2859, 2823, and 3416." (More recent Awards are also cited, e.g., 5578 and 5834).

While the above deals with a contention that the Absorption of Overtime Rule is not applicable because of the Carrier's authority under the rating rule, the principle is the same as in the present case where the rating rule is alleged to make inapplicable the rule governing work on unassigned days. In Award 5782 we held that that portion of the latter rule (Rule 20 (e)) which reads "in all other cases by the regular employe" to be mandatory; and in Award 6019 where the Parties were the same as here, we said it "is the plain mandate of the rule" that the regular employe shall be used in the

absence of a qualified extra or unassigned employe. The obligations of such a mandatory rule may no more be set aside by the rating rule than the absorbing overtime rule can be so set aside.

The evidence is clear that the Sunday when the truck driving work was assigned to the Tractor Crane Operator was a day not part of any assignment, and since he and the claimant both held regular assignments, it is not contended that an extra or unassigned employe was available to do the truck driving work. In the absence of such an employe who would otherwise not have 40 hours' work, "the regular employe" was entitled to the work, and the record shows that the Truck Driver was unquestionably the regular employe.

Claimant should therefore have been called to do the truck driving work, and by not doing so, the Carrier violated Rule 20 (e). It may be, as the Carrier argues, that it did not know, when it called the Crane Operator and the other Stores Department employes for the Sunday work, that the Claimant Truck Driver would be needed, but it made no effort to call him "when it became more and more evident every minute that a switch engine would not be available." This statement indicates that it was aware of the need for the truck driver sometime before the Crane Operator began to do the truck driving work, and the Claimant could have been called then.

Accordingly, the claim must be sustained, but at the pro rata rate. Although the Referee is of the opinion that in this case time and one-half would be justified because Claimant was denied opportunity to earn the Sunday rate, in view of Award 6019 on the same property, he feels bound to follow that Award which allowed only the straight time rate.

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 Rule 20 (e) was violated.

AWARD

Claim sustained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1954.