Award No. 6732
Docket No. CL-6884

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) Carrier violated the rules of the Clerks' Agreement at Bakersfield, California, when, on March 28, 1952, it required Manuel P. Borba and Sidney Waldrop to suspend work on their regular assigned positions of Train Clerk and Yard Clerk, respectively, in order to absorb overtime; and,

(b) That Manual P. Borba and Sidney Waldrop be compensated an additional day's pay at the pro rata rate of their respective assigned positions for March 28, 1952.

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 its Employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, bearing effective date of October 1, 1940, which Agreement, reprinted January 1, 1953, including revisions (hereinafter referred to as the Agreement) was in effect on the date involved in the instant claim. A copy of the Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

2. Prior and subsequent to March 28, 1952, the date involved in the instant claim, Mr. Manual P. Borba (hereinafter referred to as the first Claimant) was occupying a regular assignment as Relief Clerk No. 25, Bakersfield, California, daily except Tuesday and Wednesday, scheduled to relieve Position No. 112, Train Clerk, 12:00 midnight, to 8:00 A. M., on each Friday. Mr. Sidney Waldrop (hereinafter referred to as the second Claimant) was occupying a regular assignment as Yard Clerk No. 127, 12:00 midnight, to 8:00 A. M., daily except Sunday and Monday.

3. On Thursday, March 27, 1952, at approximately 9:00 P. M., Mr. J. F. Eyraud, while occupying Position No. 101, Assistant Chief Clerk, 4:00 P. M., to 12:00 midnight, received information that Mr. Charles Ervin, the incumbent of Position No. 102, Assistant Chief Clerk, 12:00 midnight, to 8:00 A. .M., would be unable to protect his regular assignment on Friday, March 28, 1952. There were no qualified unassigned employes available to fill this vacancy; however, there were a number of assigned employes off duty,

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: On Friday, March 28, 1952, Claimant, M. P. Borba, was the regularly assigned occupant of Relief Clerk Position No. 25, at Carrier's Bakersfield, California yard and on that date, as a part of his regularly assigned duties, was to relieve Train Clerk, Position No. 112, hours 12:00 midnight to 8:00 A. M. Claimant Waldrop was the regularly assigned occupant of Yard Clerk Position No. 27 at the same point, hours 12:00 midnight to 8:00 A. M. Both men had been assigned their positions under seniority rules of the current Agreement.

About 9:00 P. M., Thursday, March 27, some three hours before each Claimant was due to commence work on his regular assignment, the Assistant Chief Clerk, who was on duty 4:00 P. M. to midnight, received word the Assistant Chief Clerk, assigned to work that position midnight to 8:00 A. M. on March 20, was ill and would be unable to work his position. Immediately after being apprised of this situation the Assistant Trainmaster gave instructions that Borba remove from his assigned position, hours 12:00 midnight to 8:00 A. M. on Friday and fill the position of the Assistant Chief Clerk during those hours, also that Waldrop remove from his position as Yard Clerk and fill Borba's position during that period of time.

The record discloses that at the time of giving the foregoing instructions there were no qualified unassigned employes available to fill the involved Assistant Chief Clerk position. However it warrants the conclusion there were available regularly assigned employes who would be off duty during his absence and fails to disclose that the Carrier made any effort to call such employes or induce the acting Assistant Chief Clerk to double on the third trick Clerk position because of an existing emergency.

On their arrival at the yard to commence their tours of duty on their respective regular assignments Claimants were advised of the instructions issued by the Assistant Trainmaster and in conformity therewith Borba worked the Assistant Chief Clerk position, Waldrop the position thus made vacant by such action, and an extra clerk was assigned to fill Waldrop's Yard Clerk position, all such employes being ultimately compensated at the respective rates of the positions so filled.

While other provisions are mentioned it can be said that primarily each of the parties bases his position upon single, but entirely different rules of the current Agreement.

Rule 22, titled "Absorbing Overtime", on which the Brotherhood relies, reads.

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

Pertinent portions of Rule 7, titled "Preservation of Rates", which the Carrier insists is decisive, provides:

> "Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced.

Carrier insists that under Rule 7 it had the unqualified right to temporarily assign Claimants as heretofore indicated without regard to Rule 22. Such a contention has been definitely rejected by repeated decisions of this Division of the Board on the basis that rules similar to Rule 7 constitute merely rating provisions and are not to be construed in such manner as to

impair the effectiveness of rules identical with Rule 22. See Awards Nos. 2823, 2859, 3416, and 5105. The above conclusion, we believe, is inescapable when it is remembered that to hold otherwise would result in multiple situations where Rule 22 would be virtually emasculated if not entirely nullified. Moreover we have held that a valuable right cannot be abrogated by implication in one section of an agreement when such right is expressly and plainly granted in another section. (See Award 2490.)

Turning to the Brotherhood's position it may be said at the outset there is no question respecting the general and prevailing doctrine in this particular jurisdiction respecting the force and effect to be given provisions of a rule identical with those appearing in Rule 22 as heretofore quoted. In Award No. 5578, with Referee Whiting sitting with this Division of the Board, we said:

> "Starting with our Award No. 2346 and continuing to the present time, we have uniformly held that to require an employe to suspend work on his regularly assigned position in order to work on another position, except in emergencies, is considered to be a suspension of work to absorb overtime in violation of the rule prohibiting such action."

A similar, but more complete statement of the same principle, with citation of many Awards supporting it, will be found upon resort to the Opinion of Award No. 5105.

For other Awards, omitting for purposes of brevity those cited in the two decisions above mentioned, particularly applicable from the standpoint of the factual situations involved, see, with Referees noted, Awards Nos. 2695, 4499 (Carter); 2823 (Shake); 4646, 4690 (Connell). For others less similar factually but nevertheless recognizing and applying the same principle, see Awards Nos. 4500 (Carter); 5115, 6308 (Wenke); 5331 (Robertson); 5640 (Wyckoff).

With the foregoing principles determined there remain two fundamental questions for decision, both dependent on the facts of record. They are—(1) was there such an emergency as is recognized by our decisions and (2) did the instructions of the Trainmaster, followed by compliance on the part of the Claimants, result in the suspension of their work to absorb overtime? Without laboring the point it can be stated that in the face of the record we think the first question requires a negative answer. There was no effort whatsoever on the part of the Trainmaster to obtain and assign qualified regularly assigned employes who were off duty to fill the involved vacancy and absolutely no proof they could not be obtained. In that situation we are unwilling to say the emergency recognized by our decisions as grounds for disregarding Rule 22 existed (see Award No. 2282). As to the second question there can be no doubt that the involved action of removing Claimants from their respective positions resulted in the absorption of overtime. That under our Awards (see e.g., 139, 3301, 3396 and 5105, also preceding citations) is all that is required to bring such rule into play in the absence of anything else precluding its application.

Based on what has been heretofore stated our only alternative is to sustain the claim in its entirety. This it may be added is true notwithstanding Award 5105, rendered by this Division when the present referee was sitting as a member, which we pause to add otherwise fully sustains our conclusion, holds that although a similar rule was violated compensation was limited to the higher rate of the position worked, not an additional day's pay on the position from which the regularly assigned employe had been suspended. As to that particular point it is to be noted subsequent convincing Awards, and what now constitute the great weight of authority, have failed to follow that theory. Therefore in the interest of uniformity of interpretation of rules and the stabilization of current, as well as prospective agreements, this referee has decided there is now no sound ground for concluding such theory should be adhered to.

We have no quarrel with Awards cited by Carrier holding that if a true emergency exists Rule 22 may be disregarded on occasions without resulting in a valid claim for its violation. Here, as we have previously indicated, no such emergency existed.

In conclusion it should be stated we have rejected, not disregarded Carrier's contention to the effect past practice, warranting its action, was established by the facts of record. The same holds true of its contention Decision No. 6 of a System Board of Adjustment is contrary to our decision. It is true, as Carrier points out, that this Division of the Board recognizes decisions and interpretations of such a Board as binding even though those decisions may be at variance with its Awards on other properties. The trouble from Carrier's standpoint is that we regard the decision on which it relies as clearly inapplicable under the confronting facts and circumstances.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record, and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1954.