

Award No. 7346
Docket No. CL-7362

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

GEORGIA RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee that

(a) The Carrier violated the Agreement when on August 12, 13, 14, 19 and 20, 1953 it required Clerk J. C. Evans to suspend work on his regularly assigned position of stock clerk and perform the duties of the position Clerk-Caller regularly assigned to W. H. Dreyer who was absent account of illness for the purpose or having the effect of absorbing overtime.

(b) The Carrier violated the Agreement when on August 12, 13, 19 and 20 it failed to use Clerk-Caller L. J. Bowers on his rest days at overtime rate to fill the short vacancy caused by the absence of W. H. Dreyer due to illness.

(c) As a penalty for the violation described in (a) the Carrier shall be required to pay claimant J. C. Evans five days pay at pro-rata rate.

(d) The Carrier shall be required to compensate claimant L. J. Bowers at proper rate of time and one-half for the four days he was deprived of the opportunity to work overtime properly due him under Agreement Rules.

EMPLOYEES' STATEMENT OF FACTS: Clerk-Caller W. H. Dreyer, seniority date January 3, 1945 was absent due to illness on August 12, 13, 14, 15, 19 and 20, 1953. His rest days are Monday and Tuesday. (August 17 and 18, 1953) His hours of assignment are 7:00 A. M. to 3:00 P. M.

Claimant J. C. Evans seniority date January 1, 1951 is regularly assigned to the position of Storeroom Clerk, his work week beginning on Tuesday and ending on Monday, rest days being Sunday and Monday. On Saturday, Claimant Evans relieves Clerk-Caller R. C. Hitt, (Hours 3:00 P. M. to 11:00 P. M.), Tuesday through Friday Claimant Evans works in the Storeroom, his hours being 7:30 A. M. through 4:00 P. M.

Claimant L. J. Bowers, seniority date November 11, 1948 is regularly assigned to position of Clerk-Caller, his rest days being Wednesday and Thursday and his hours being 11:00 P. M. to 7:00 A. M.

OPINION OF BOARD: Petitioner contends that the Carrier violated the Agreement on August 12, 13, 14, 19, 20, 1953, by suspending J. C. Evans from his regular position of Stock Clerk on those days to fill a short vacancy due to the absence of W. H. Dreyer, regularly assigned Clerk-Caller who was absent account of illness; and, that Carrier also violated the Agreement by not using Clerk-Caller, L. J. Bowers, seniority date November 11, 1948, on his rest days to fill Dreyer's position.

Compensation is claimed as per items (c) and (d) of the Statement of Claim, on the alleged grounds that Seniority Rules 4, 5, 7, 8, and Rule 38(k) quoted in the record have been circumscribed.

It is Carrier's position that no overtime was worked or needed; that the vacancies relate to an illness for which the regular incumbent of the position has received sick leave benefits; that Evans was compensated at the higher rate of his position; and, since no competent extra employees were available on the active extra board it was proper to fill such vacancies by shifting or stepping up those on regular assignment, same being a rearrangement of regularly assigned employees. Therefore, says the Carrier, relying on Rules 8, 20(b), 40(i), 44(a), its action was proper.

Rule 38(k), mainly relied upon by petitioner, is a standard rule that appears in all Clerks' Agreements. It was bargained for in the early experience of the contracting parties in dealing with punitive rates of pay for work performed outside the normal hours for assigned positions.

The rule has been consistently interpreted and construed, over the years, to prevent carriers from suspending employees from their bulletined and assigned positions for the purpose, or with the effect, of absorbing overtime. The overwhelming weight of authority sustains that proposition. For comparative purposes, see Awards 2695, 2823, 4500, 4646, 5105, 7094.

The many more Awards, that could be cited, are authority for the unyielding principle that there is a definite affinity between overtime and other rules of these Agreements, such as seniority, starting time, and those for bulletining positions. By almost a solid line of authority the Board is committed to the doctrine that an employee may not be used outside his regular assignment to protect another position for the purpose of avoiding payment of punitive rates, because, to do so, weakens the job protection and security to be found in seniority, and, equally important, the bulletining of positions as to hours of work and job duties would have little meaning.

Because of the preponderance of sustaining Awards, Employee Representatives on the Board point to the Garrison "Memorandum", Award 1680, and say that we are under a duty to follow Board precedent. Carrier Representatives call attention to denial Award 7039, on this same property which puts in issue the same rules. Another denial Award (7239) on another property construing similar rules is also cited.

We think it important here that Award 7039, be followed, overruled or distinguished. In that connection, we are told "that such ruling was contrary to Rules 8 and 20, as well as 38(k)"; and, that "this case is distinguishable from the one covered by Award 7039".

There is a striking similarity between this docket and that to which Award 7039 applies. We quote from Opinion of Board, to-wit:

"It appears that a regularly assigned clerk-caller was sick and unable to fill his position on July 16, 1952 and subsequent days. Since it was not then known how long he would be off duty, it was treated as a short vacancy and claimant was temporarily assigned to that position and paid the higher rate of his regular position.

"Such temporary assignment is in full accord with the provisions of Rules 8 and 20(b) and claimant was properly paid under Rule

40(i). No overtime being worked or needed, Rule 38(k) is not applicable to that situation.

"When it was subsequently ascertained that the absent clerk-caller could not return to work within 30 days, Carrier's supervisor sought agreement by the Division Chairman to a continuation of that temporary arrangement. He declined to agree. The vacancy was then bulletined and claimant's regular position was abolished, which had the effect of requiring claimant to bid in the vacancy. The abolishment was handled in accordance with Rule 14 and since thereafter the rules did not require that claimant be paid any more than the rate of the clerk-caller position to which assigned, we find no violation of the agreement in the actions taken. Hence Claim No. 1 must be denied."

It is not always clear where the distinction between this Board's Awards is to be found, but a possible basis for distinction does appear by careful comparison of the record in the two dockets under discussion.

In the case at hand, we note that Evans held a regular position, Store-room Clerk, assigned hours 7:30 A. M. to 4:00 P. M. Tuesday through Monday, rest days Sunday and Monday. On Saturday, hours 3:00 P. M. to 11:00 P. M., Evans was regularly used for tag-end relief on Clerk-Caller R. C. Hitt's position. In the instant case, he was used to fill a temporary vacancy on Clerk-Caller W. H. Dreyer's assigned position, hours 7:00 A. M. to 3:00 P. M., rest days Monday and Tuesday.

In the docket covered by Award 7039 we find claim there was made on behalf of Evans, same assignment as above, account used to fill a short vacancy due to illness of Clerk-Caller W. H. Dreyer, hours 8:00 A. M. to 4:00 P. M., Wednesday through Sunday.

The Carrier represented to us in that docket as follows:

"W. H. Dreyer, Clerk-Caller, seniority date January 3, 1945, went on vacation July 1, 1952, and was scheduled to return to work July 16, 1952. On July 16, 1952, Mr. Dreyer was ill and unable to work. It was first thought the illness would be of short duration and he would return any day, but it developed it would be some two or three weeks before recovery was complete. Through re-arrangement under the Short Vacancy Rule—Rule No. 8, J. C. Evans was assigned in Dreyer's place. As a regular assignment Evans worked Dreyer's job on relief one day per week and as Stock Clerk in Store Room four days per week. No extra employees were available and the four days as Stock Clerk were blanked."

Two points of distinction readily appear in the record. Award 7039 covers a situation where one in a combination assignment, as in this docket, was used temporarily on assignment to protect on a position that the one named in the claim regularly relieved on. His regular assignment of four days on the Stock Clerk position was blanked. In the docket before us, we do not find any evidence that Evans' regular position was blanked. Here he worked a position other than the one on which he regularly relieved.

Apparently the Board, at the time it decided the dispute covered by Award 7039 was impressed that one whose duties required him to fill the same Clerk-Caller position as a part of his regular assignment, on being relieved of all but the Clerk-Caller work for the balance of his assignment and paid the higher rate of his regular position foreclosed any claim that overtime had been worked or was needed on the Clerk-Caller position. The Board also placed some emphasis upon the fact that later on the regular position was abolished in accordance with the rules and the one displaced bid in the vacancy that was the subject of claim.

We will not labor the point here as to whether Carrier was guilty of evasion in the docket earlier declined. No question of blanking or abolishing positions is before us and the Board ruled against the petitioner when that question was up for decision.

As much as we all deplore a conflict of authority, we do not think we should take a new and second look at the rules as applied to this docket. The "Memorandum" in Award 1680 is no bar to a different ruling in this case from that in Award 7039, so far as we are able to see.

Carrier's contention in this docket that no overtime was worked or needed only begs the question. Overtime results primarily from the needs of the service it is true, but some need has been demonstrated when a position is worked by one regularly and normally assigned to another position.

We see enough in Rule 38 in this docket to evidence an intent that all work will not be protected at all times during normal hours of assignments in effect, or without demand being made upon those in assigned positions, when needs of the service require that they give up some of the benefits and advantages of a normal work schedule. Therefore, it is proper to say that the need must be consistent with the rules and in order to determine what constitutes overtime, one must look to both needs of service and the rules that are designed for protecting all service.

To take care of the need for filling short vacancies that might otherwise run into overtime, Rule 19 provides for an extra board, and Rule 20, gives those who have no standing in the Carrier's service except to catch what extra service is made available, a preferred claim to temporary or short vacancies.

Carrier sees in Rule 20(b) an implied consent that makes it proper to shift or step up regularly assigned employees as was here done due to not having competent extra employees available on the extra board for a vacancy which was of less than 30 days duration. Petitioner denies that such was ever intended.

Carrier, on being confronted with a vacancy, which, by its own admission, could not be blanked, next admits that the reason no competent extra employees were available, was account of the non-existence of an established extra board.

Typical of the Carrier's defense to this claim is the statement appearing in the record, "We had no extra employees and Evans could be shifted with less disruption to the service than any other employee. After we filled vacancy as called for in paragraph (b), then the other portions of the rule were not applicable". Carrier could as well have said all other rules were not applicable, because such is the effect of its action in this case.

Petitioner's reference to an Agreement reached in mediation on January 15, 1953, in effect when these claims arose, leaves no doubt about the true purposes and intent of Rule 20(b), and serves to pierce the veil as to any hidden meaning of other rules cited by Carrier and relied upon by it to defeat the claim.

We do not hold with petitioner that Rule 20(c-3) supports Bowers' claim. We see greater merit to the contention that Evans was used on Bowers' rest days in violation of Rule 38(k), and it further appearing that if Evans had not been improperly used Bowers would have been called under penalty of discipline on refusing the call.

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 Employees involved in this dispute are respectively Carrier and Employees 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

Items (a) and (c) Statement of Claim sustained, and (b) and (d) sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June, 1956.