Award No. 8303
Docket No. CL-7701

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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

(a) That Carrier violated the rules of the Agreements when with effective date of the Forty Hour Week Rules, September 1, 1949, and continuing thereafter, it failed to establish a relief position or utilize the services of a proper clerical worker for relief service on the rest days of the Yard Clerk at Illmo, Missouri.

(b) That Yard Clerk, Charles Hahn, and his successors, if there be any, be reimbursed for wage loss sustained representing a day's pay at punitive rate of pay for Saturday and Sunday of each week retroactive to September 1, 1949, and continuing thereafter until the violation is corrected.

NOTE: Reparation due employes to be determined by joint check of Carrier's payroll and other records.

EMPLOYES' STATEMENT OF FACTS: Carrier designated position of Yard Clerk at Illmo, Missouri, with hours of service assignment 7 A. M., to 3 P. M., as a seven-day per week position with application of the Forty Hour Week Rules effective September 1, 1949. Incidentally the same job was designated as a seven-day per week position prior to September 1, 1949.

As of September 1, 1949, Charles Hahn was the regular assignee, Monday to Friday. Saturday and Sunday was designated as his rest days. The Carrier did not establish a regular relief worker to do the necessary relief work on Hahn's rest days, Saturdays and Sundays, in accordance with Article II, Section 1 (e) of the March 19, 1949 National Agreement reading:

"All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under individual agreements. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week."

Further, the Emergency Board's report indicated it was their intention to apply the 40-hour principle in the manner which would be the **least disturbing and costly to the industry.**

This intent is further evident from Article II, Section 1(g)(7) of the Forty-Hour Week Agreement in which it is stated regarding problems arising in connection with assigning employes with non-consecutive rest days:

> "(7) The least desirable solution of the problem would be to work some regular employes on the sixth or seventh days at overtime rates and thus withhold work from additional relief men."

The intent thus was to spread the work, and it is clear that the provisions of the agreement should be construed with that thought in mind.

The fact that no claim was filed for some one and one-half years is itself good evidence that the Employes considered the relief proper in the present case. If they had considered that a violation of rules existed no doubt they would have filed claim promptly. The board has held that employes must exercise due diligence if a claim is to be made.

Award 2811 denied a claim of a pumper assigned less than six days a week because of delay in making and progressing claim. The assignment was in effect from April 16, 1933 until January 1937, without protest. The Opinion included the following:

> "Under circumstances such as we have related when the claim involves merely the right to compensation, we are certain the far greater number of our decisions and those which are sound in principle hold to the rule that the doctrine of estoppel is applicable and that claims similar in character to this one are barred because of inaction and delay on the part of the party making them and that their laches in failing to present them within a reasonable time, make it unjust and inequitable that they should be permitted to recover. * * *"

The Carrier respectfully submits there clearly was no violation of the rules in this case. **It was proper to use T&E Caller Gibbs to relieve the yard clerk,** and use an extra Group 2 employe as caller in place of Gibbs.

Without prejudice to its position, as previously set forth herein, that the claim is entirely without support under the rules, the Carrier submits that the claim that Yard Clerk should receive an allowance at time and one-half rate for work not performed is contrary to the well established principle consistently recognized and adhered to by the Board that the right to work is not equivalent to work performed under the overtime and call rules of an agreement. Please see Awards 4244, 4645, 5195, 5437 and 5764. There are many others also.

In conclusion, the Carrier respectfully reasserts that the claim of the Employes is entirely without merit or support under the rules and should be denied in its entirety.

All data herein has been presented to representatives of the Employes.

(Exhibits not Reproduced.)

OPINION OF BOARD: This case presents the not uncommon but always difficult problem of trying to divine the intended meaning and effect upon one another of provisions of an agreement negotiated at different times, with different purposes, and in different frames of reference, but which cover in part the same subject matter and thus are necessarily interrelated. The rules involved here are **Rule 11—Temporary Assignments, Short Vacancy** and the rules covering the forty-hour work week, particularly **Rule 32-8, Work**

On Unassigned Days. The earlier of the two rules is Rule 11 which, insofar as it is involved here, provides as follows:

RULE 11

Temporary Assignments

Short Vacancy

"11-1. A new position or vacancy of less than thirty (30) calendar days duration shall be considered temporary and shall be filled without bulletining. A new position or vacancy of indefinite duration need not be bulletined until expiration of thirty (30) calendar days. A new position or vacancy known to be of more than thirty (30) calendary days duration shall be promptly bulletined and filled under the provisions of Rule 10. Notation shall be made on such advertisement bulletin showing probable duration. The following provisions shall apply in filling such new position or vacancy:

(a) Furloughed or extra employes shall be used to fill a new position or temporary vacancy for which they are qualified and available, in accordance with their seniority.

(b) An employe holding Group 1 seniority and regularly assigned to a Group 2 or Group 3 position shall be used on a new position or temporary vacancy in Group 1, for which he is qualified, and makes application, provided no senior qualified furloughed or extra employe is available . . .

Interpretation

A temporary position is one authorized for thirty (30) days or less and need not be bulletined. A position authorized for more than thirty (30) days is a permanent position under the provisions of this agreement.

A temporary vacancy is a vacancy created as the result of granting a leave of absence to a regularly assigned employe under provisions of Rule 26."

Rule 32-8 was incorporated into the Agreement effective September 1, 1949; it was taken verbatim from Section 3 (i) of the National 40-Hour Week Agreement:

"Where work is required by the Carrier to be performed on a day which is not part of any assignment, it 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 factual situation to which these rules must be applied is undisputed. Claimant is assigned to a seven-day Group 1 Yard Clerk position at Illmo, Mo., 7 A. M.—3 P. M., rest days Saturday and Sunday. These rest days were never made part of a regular relief assignment; instead, since the inception of the 40-hour week on September 1, 1949, the work of the position on those two days has been performed by A. L. Gibbs, who holds Group 1 seniority but is regularly assigned to a Group 2 Train and Engine Crew Caller position at Illmo, 5 A. M.—2 P. M., rest days Thursday and Friday.

Petitioner contends that the work on Claimant's rest days is unassigned work; that Gibbs is not "an available extra or unassigned employee who will otherwise not have 40 hours of work that week," but a regularly assigned em-

ploye with 40 hours work each week; and that therefore under Rule 32-8 the work belongs to Claimant, the regular employe. Further, Petitioner contends, Rule 11-1(b) can have no effect upon this situation since it deals only with a new position or temporary vacancy in Group 1, neither of which is involved here.

Carrier contends that the claim should be dismissed for laches. If not so dismissed, Carrier argues, it should be denied on the basis of Award No. 1 of Special Board of Adjustment No. 169 which decided this precise issue between these parties. Finally, on the merits, Carrier asserts that Rule 11-1(b) gives regularly assigned Group 2 employes the right to perform extra work in Group 1; that Rule 32-8 does not define "extra or unassigned employe", thus leaving this to be ascertained from other provisions of the Agreement; and that since regularly assigned employes in Group 2 have the right to perform extra work in Group 1 under Rule 11-1(b), they must of necessity be "extra or unassigned employes" under Rule 32-8.

In the course of the submissions and arguments, there is also a good deal of discussion on the question of when an extra employe will or will not otherwise have 40 hours of work under Rule 32-8, but our disposition of the claim makes it unnecessary to discuss this point.

Rule 32-8 came into the Agreement as one of a comprehensive set of rules negotiated to deal with the problems created by the reduction of the work week on this and other carriers to 40 hours. In general, the rules provide for the establishment of regular work weeks of five 8-hour days and two rest days. Where six and seven day service is required, some provision had to be made for the performance of such service on the rest days of the regular employes. Under Rule 27-3(e), Carrier is required to establish all possible regular relief assignments to do this work. The remaining rest day work, not included in regular relief assignments, is specifically dealt with by Rule 32-8. It is undisputed that during the period of the claim, no regular relief position was established which included the rest days of Claimant's position. These days not being part of any assignment, therefore, the work thereon is required to be performed under Rule 32-8 by an available extra or unassigned employe not otherwise having 40 hours of work that week or by Claimant, the regular employe.

The parties agree that there was no extra or unassigned Group 1 employe, as such, available to do the work. But, Carrier contends, Rule 11-1(b) in such a situation gives regularly assigned Class 2 and 3 employes the right to all Class 1 unassigned or extra work, thus making such employes, in effect, extra or unassigned Class 1 employes. The rule is written in terms of "new positions" and "temporary vacancies," Carrier maintains, only because at the time it was written these terms covered the kinds of extra or unassigned work then required to be done; the intention, however, was to cover all extra or unassigned work as distinguished from the work of regular employes on their own positions. Carrier argues that this construction of Rule 11 is consistent with the purpose of Rule 32-8 and other 40-hour week rules in that it results in spreading the work among more employes and avoids working regular men on their rest days at overtime rates, which, according to Rule 27-3(g)(7) is "the least desirable solution of the problem."

The language of Rule 11-1(b) is clear, unambiguous and precise. The right of Group 2 employes to be used in Group 1 is expressly limited to new positions and temporary vacancies. The rest day work is not a new position and, while Carrier's argument that it is in effect a temporary vacancy would be entitled to most careful consideration in the absence of any further definition of "temporary vacancy," it cannot prevail here where the parties have included an interpretation in the rule which specifically defines the phrase. We cannot conclude that Gibbs is an "extra or unassigned employe" under Rule 32-8 by virtue of the language of Rule 11-1(b) without assigning to that language a meaning broader than that which was specifically set down by the parties. To do this would be to ignore the sound rules of

construction which have been adhered to consistently by this Division. Where there is no ambiguity in the language of a rule, we must accord its plain meaning to it. If, because of later rules or changed conditions, the rule becomes obsolete or otherwise unsatisfactory, it must be changed by the parties rather than by this Board. Rule 11-1(b) does not make Gibbs an extra or unassigned employe in Group 1 for the purposes of Rule 32-8, since the rest day work of Claimant's position is neither a new position nor a temporary vacancy under Rule 11-1(b). Therefore, under Rule 32-8, the work belongs not to Gibbs but to Claimant, the regular employe.

Award No. 1 of Special Board of Adjustment No. 169 did not decide the issue presented in this case. There, the work done by the Group 3 employe is not specifically described, but it is referred to throughout as being a "temporary vacancy." Apparently, the issue as to whether or not the work was a temporary vacancy under Rule 11, which is the decisive issue in this case, was not raised in Award No. 1. Nor was the claim made by the "regular employe" under Rule 32-8. Neither did any of the other awards cited by the parties decide the same question, based upon the same or similar rules, as is presented in this case, although Award 7297 dealt with a somewhat similar problem of interpretation and reached the same conclusion.

Although an excessive amount of time was consumed by the Petitioner in bringing this case to the Board, we do not think a dismissal is warranted under all the circumstances. However, in view of the delay and the continuing nature of the claim, we will deny any compensation for the period from June 19, 1952, the date of the final declination on the property, until May 20, 1955, the date of Petitioner's notice of intention to file with the Board. See Awards 7048, 7135. The balance of the claim is sustained at pro rata, not penalty, 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 the Agreement was violated.

AWARD

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 8th day of April, 1958.