Award No. 8776
Docket No. CL-8467

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated the provisions of Rule 28.5(e) during the period September 1, 1949, to February 28, 1954 by its failure to establish regular relief assignments to perform the work of assistant general foremen, mail and baggage department, named below, on their respective rest days, and, further;

(b) The Carrier violated the provisions of Rule 37(f) during the same period when it failed to notify, call or assign assistant general foremen to perform the work on their respective positions on their several rest days, and further;

(c) The Carrier required by direction or otherwise, certain foremen and assistant foremen, mail and baggage department, named below, to perform in whole or in part the work of assistant general foreman on the rest days of the latter during the same period in violation of Rule 40, and, further;

(d) The Carrier shall pay the assistant general foremen referred to above, namely, R. E. Stephens, Thomas Ellerton, John G. Ellis, J. H. Ammerman and Vern F. Juel one day's pay each at time and one-half the rate of their respective positions for each rest day occuring during the period September 1, 1949, to February 28, 1954, except such days they may not have been available account vacation, sick or other leave of absence, and, further;

(e) The Carrier shall pay the foremen and assistant foremen referred to above, namely A. A. Gadow, F. W. Giles, Frank Beck, L. T. Stoughton, Samuel S. McBee, O. A. Brown, W. H. Vandivort, S. H. Steele, A. H. Buttermore and E. A. Meyer, one day's pay each at pro

with the Organization in presenting them to your Board as joint exhibits. The statements do not portray correctly the day to day duties performed and are inaccurate as to the alleged starting time, among other things. We believe them to be of no value to your Board in settlement of the dispute.

Your Board's attention is further directed to the fact that the Organization in Statement of Claim has made the claim retroactive to September 1, 1949, in spite of the fact that reference to Joint Exhibit "A" discloses the first claims filed by the General Chairman are contained in a letter dated July 16, 1953. It is the Carrier's position that this antedating of the claim is improper, and should not be given consideration by your Board. The Carrier's statements concerning the dates of claim are not to be construed as a deviation from the Carrier's position that the claims are in there entirety without merit.

Part (d) of the Statement of Claim makes claim for the assistant general foremen at the time and one-half rates although they performed no work. Awards of your Board announcing the well established principle that the right to work is not the equivalent of work performed are too numerous to require citation here. They all disclaim any right to the overtime rate under circumstances such as these. On the basis of those Awards the claims at the time and one-half rate are without support. For that matter, there is no meritorious claim, pro rata or time and one-half, in the record before you.

Without prejudice to the Carrier's position that there is no merit to all the claims here presented it will be observed that the claims filed form a double penalty. Your Board has consistently denied double penalty claims. (See Awards 6750 and 6869 for the more recent decision on that subject.)

Based on the record and for those reasons herein advanced, we submit that the claims are wholly unsupported by the rules of the Agreement and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claims herein are premised upon alleged violations by Carrier, of the provisions of the Agreement between the Parties, brought about by the failure of Carrier to properly fill positions of Claimants, on their rest days, beginning September 1, 1949, and continuing to February 28, 1954 and March 3, 1954.

There is a Joint Statement of Facts as shown by the record, as agreed to by the Parties.

Carrier did, effective September 1, 1949, the effective date of the National 40-Hour Work Week Agreement, assign regular weekly rest days, no action was taken by Carrier to assign regular relief on rest days for employes, as provided by Article 2, Section 1 (e) of the 40-Hour Week Agreement, until March 17, 1953. See Record.

By this latter Agreement, the provisions thereof became effective September 1, 1949.

The Agreement itself places Assistant General Foremen under Rule 1, in Class B. Foremen are placed in Class D. Therefore, as the provisions of Rule 1 state, the employes under Class B and Class D are separately classified.

From the facts of record before the Board Carrier has not complied with the provisions of Rule 28.5 (e) of the Agreement, par. 2—of the rule, in that

employes assigned to relief positions were not of the same class and same seniority district as provided in the rule.

It is further evident from the record, that Carrier by its failure to use the incumbents on their rest days, further violated the provisions of Rule 37 (f), since the employes used on the relief positions were not shown to be extra or unassigned employes. On the contrary the employes used held regular assignments of their own, but in a different classification.

This Board already, in numerous awards, has expressed itself concerning the allowance of penalty claims. We follow the same reasoning and hold that claimants recovery herein, is limited pro rata rates.

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 Carrier has violated the Agreement.

AWARD

Claim sustained as per 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, 1959.

DISSENT TO AWARD 8776, DOCKET CL-8467

This Award is erroneous on several grounds.

All the employes involved are within the Scope of the Agreement; however, Assistant General Foremen are not "Class B" under Rule 1. Neither are Foremen "Class D" under Rule 1. Under "Exception (B)" in Rule 1 Assistant General Foremen are subject to all rules except Rule 5 to 12, inclusive, Rules 14, 15, 29 and 36, and under "Exception (D)" in Rule 1 Foremen are subject to all rules save Rule 5. The distinction between the employes was not for the purpose of establishing seniority, but rather, for the purpose of the degree of Agreement coverage. Moreover, **they, in fact, hold seniority in common.**

This dispute was that Carrier did not establish regular relief assignments under Rule 28.5 (e) for Assistant General Foremen; hence, the statement with reference to that rule "that employes assigned to relief positions were not of the same class and same seniority district as provided in the rule" is

not only without foundation, but assumes that Carrier did the very thing contended for, but improperly. Carrier did not establish such relief assignments for Assistant General Foremen and that was the bone of contention.

This Board has consistently held that the establishment of regular relief assignments under rules identical to Rule 28.5 (e) is not a condition precedent to Carrier's right to stagger work weeks. The record showed that work weeks were staggered with all necessary work being performed by on-duty regular employes. Where, as here, the distinction between the employes is for purposes other than the establishment of seniority, Carrier properly had the work performed in the manner it did without establishing regular relief assignments. In **Award 6946** (Carter) it was held,—

> "The next question that naturally follows is what positions might be staggered to accomplish the purposes of the agreement. It is clear, we think, that a position within the scope of one craft could not be staggered with a position under another craft when the work is the exclusive work of one. Two positions occupied by a signalman and a telegrapher, for instance, could not be staggered as craft lines are not wiped out by the 40-Hour Week Agreement. Neither could two employes in the same craft holding positions in different seniority districts be staggered under this agreement; nor may two positions in different classes be staggered where common seniority between the classes does not exist. But **where classes are established within a craft for purposes other than the establishment of seniority rights, positions in the two classes may properly be staggered if each is qualified to perform the work of the other.** If these are the proper concepts contained in the 40-Hour Week Agreement, and we think they are, the Carrier had the right to stagger the two positions in the dispute before us. * * *" (Emphasis added.)

The Award is otherwise erroneous in that it undertakes to allow eight hours at the pro rata rate to the Claimants in Paragraph (d) of the claim and the same amount of time to the Claimants in Paragraph (e) of the claim. This notwithstanding the Claimants in Paragraph (e) lost no time, they worked their regular hours, did not work in excess of eight hours, performed work of the craft to which they belonged and did not perform work which they would otherwise have performed during overtime hours. **Awards 8531, 8205.** As between Paragraphs (d) and (e) of the claim, Paragraph (e) is nothing short of a double penalty, something this Division has consistently refused to allow. **Awards 8033, 8013, 8004, 7370.**

For the reasons stated, the Award is erroneous and we dissent.

/s/ C. P. Dugan
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp