

Award No. 8865
Docket No. CL-8501

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis B. Murphy, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement at East Buffalo Freight Office when it permitted extra employee Mrs. Sadie Mrad who worked forty hours on an assignment of a regular employee, to work on one of the days of rest of the assignment thereby depriving a senior qualified employee of one day's pay at time and one-half rate, and

That Carrier shall compensate J. Cavanaugh, a senior employee, one day's pay at time and one-half rate for November 12, 1954, date on which he was available and willing to perform the duties of the Assistant Rate Clerk's position had he been called or notified to report for the assignment which was worked by employee Mrad in violation of the Agreement. (Claim 1106)

EMPLOYEES' STATEMENT OF FACTS: On October 31, 1954 Mr. D. A. Boyer, incumbent of position of Typist, East Buffalo, New York, last worked his position. He failed to report for duty on November 1, 1954 or explain his absence. He resigned on November 3, 1954. Mrs. Mrad, Extra Clerk, was called to fill the vacancy starting November 1, 1954. She worked the position each day thereafter as follows: November 1, 2, 3; Off November 4 and 5 account rest days; position was bulletined November 5; Mrs. Mrad worked the position November 6, 7, 8, 9 and 10; off November 11, rest day; on November 12, position was assigned by bulletin to Mr. N. A. Scott; on November 12 Mrs. Mrad was called to fill a one-day vacancy on position of Assistant Rate Clerk—November 12 was one of Mrs. Mrad's earned rest days which she had earned on position of Typist.

Mr. J. M. Cavanaugh, a senior available and qualified employee was not called to fill the vacancy of Assistant Rate Clerk on November 12. Instead, Mrs. Mrad, a junior employee who had had forty hours of work in her work-week was called on her earned rest day to fill the vacancy.

pay, she was not only entitled to the work but Carrier was, under the Agreement, obligated to call her.

Moreover, this Board has held that the work week of an extra employe doing work which is not a part of a regularly assigned position is governed by Rule 20-2(i). In Award 6973, the Board said:

"We can see that an extra employe doing extra work which is not a part of a regularly assigned position, and consequently has no assignment of rest days, could fall within the provision of paragraph (i) making his work week seven consecutive days commencing with Monday . . ."

When the foregoing pronouncement is considered in the light of the holding of Award 5465 and applied to the facts in this case, it is clear that the claim herein is without merit.

As indicated in Carrier's Exhibit "C," Petitioner will no doubt attempt to mislead the Board by citing Awards 6970, 6971, 6973 and 7032. None of these awards has application here. The distinction lies in the fact that in each instance the extra employe was performing work that was a part of a regular assignment, and as a consequence it was the assigned work that determined the work week of the extra employe who assumed the conditions of the regularly assigned position. Here we are dealing with an **unassigned employe** who was doing **unassigned work**. Thus, the awards referred to can have no application to the facts here involved. Furthermore, it will be observed that there is no claim here in behalf of the extra clerk alleging that she performed work in excess of forty hours in her work week, or that she worked on the sixth or seventh day of her work week.

Since the Carrier has shown that the work on November 12, 1954 was properly performed by the extra employe and that the claimant had no demand right thereto, it is not necessary for this Board to decide the secondary issue in this case of whether the penalty rate of time and one-half is proper compensation. However, the Carrier submits that the claimant is not entitled, in any event, to a day's pay at the overtime rate as claimed. This Board has repeatedly held that the right to perform work is not the equivalent of work performed. See Awards 4962, 5176, 5261, 5267, 5271, 5333, 5967, 5831, 5950, 6262, 6730 and many others.

Based upon the rules here involved when applied to the facts in this dispute the Carrier submits that the claim is not supported by the applicable Agreement and it should, therefore, be denied.

All data contained herein have been presented to or are known to the Petitioner.

(Exhibits not Reproduced.)

OPINION OF BOARD: It is the contention of the Claimant, J. M. Cavanaugh, a senior qualified employe, that he was available and should have been called to fill the vacancy on the position of Assistant Rate Clerk on the date of November 12, 1954. The evidence shows that a junior employe (Mrad) was used instead, even though she should have been required to rest on this date as it was her second rest day of her assignment on the typist position.

Under Rule 20, 2(h)—

“Rest days of Extra or Furloughed Employees

“* * * if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment.”

Mrs. Mrad took the position vacated by D. A. Boyer, Typist, hours 8:00 A. M. to 5:00 P. M., rest days Thursday and Friday. Mrs. Mrad (an extra clerk), filled this regularly assigned position starting Monday, November 1, through Wednesday, November 3. Since Thursday, November 4 and Friday, November 5 were rest days for this position, nobody worked it. The position was bulletined for applicants on November 5, and assigned on November 12th. Mrs. Mrad was again called to fill it on Saturday, November 6, through Wednesday, November 10; Thursday, November 11 and Friday, November 12, again becoming the rest days of the involved position.

The Carrier on the second rest day of Mrs. Mrad, November 12, called her to fill a one day vacancy on another regular position, namely, Assistant Rate Clerk, hours 11:59 to 7:59 A. M. On this same day, Claimant J. M. Cavanaugh, a senior qualified employe was available to fill this vacancy but was not called.

In view of the evidence and facts in this case Mrs. Mrad would be classified as a Extra or furloughed employe coming under above quoted Rule, which would require Mrs. Mrad to take the rest day of Thursday and the second rest day of Friday, November 12. Supporting rulings were made by this Division in Awards 6970 and 6971. When Carrier worked Mrs. Mrad on her second rest day she should have received pay for this work at the time and one half rate.

Carrier's contention that “Under the Agreement before us the controlling rule, Rule 7(f), gives exclusive preference to temporary vacancies of the length here involved to qualified extra employes”, would not apply under the facts in this case because Mrs. Mrad was called on her second rest day and was paid at the straight time which is an attempt to circumvent the agreement.

After a review of all the facts and evidence in this case there is but one question before this Board and that is, did Claimant Cavanaugh have prior claim to this position on Friday, November 12, and we feel that Seniority Rules 3, 6, 7 and Work Week Rule 20 give him preferential right, and that Carrier violated the agreement by not calling Cavanaugh.

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 J. M. Cavanaugh's claim for one day pay as Assistant Rate Clerk, for November 12, 1954, is sustained at the straight time rate.

AWARD

Claim sustained at straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 30th day of June, 1959.