

Award No. 8898

Docket No. CL-8669

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**

THE BELT RAILWAY COMPANY OF CHICAGO

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees:

(1) The Carrier violated the Clerk's Agreement in payment of compensation to Mr. J. P. Jacobs, Chief Clerk, Trainmaster's Office, Seniority District No. 4, when on March 21 and 23, 1953 and subsequent dates thereto, the Carrier required Mr. Jacobs to protect and fill a lower rated temporary vacancy, on an overtime basis and compensated him at the rate of the position worked, instead of his regularly assigned rate of pay.

(2) When the Carrier expected and required other higher rated employes in Seniority District No. 9, to protect and fill lower rated short temporary vacancies on an overtime basis and compensated them in the same manner.

(3) That Mr. Jacobs and all other higher rated employes in Seniority District No. 4, namely, F. Sakach and R. Beilka, be allowed compensation for the difference between what they were paid at the rate of \$14.98 per day and what they should have been paid at \$17.62 per day, at penalty rate, or \$3.96, for each and every day involved, effective with the date of March 21, 1953, and that all of the higher rated employes in Seniority District No. 9, namely, J. Heiser, J. McGrath, P. Schmidt, Wilber Savage, W. Powers, H. Dimer, J. LaGrippe, W. Weller, M. McGory, F. Dimer, A. Van Dahm, H. Mills, A. Rankin, J. Irwin, H. Reikowsky, J. Wojcik, E. Terry, H. Cammack, M. Steed, F. Utenweiler, W. Mutzbauer, H. Webber, J. Behrschmidt, M. Loftus, J. Klotz and R. Hager, who likewise were expected and required to fill lower rated short temporary vacancies, on an overtime basis and incorrectly paid, be allowed compensation in the same manner, at the prevailing and

penalty rate, of their regularly assigned positions, effective with the date of September 1, 1949.

It is understood that Claimants herein named in Seniority District No. 9, prior to 1950, performed services in what was then Seniority District 1, 2, and 6, which in February, 1950, were consolidated into one seniority roster and is now known as Seniority District No. 9.

EMPLOYEES' STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees:

(1) The Carrier violated the Clerk's Agreement in payment of compensation to Mr. J. P. Jacobs, Chief Clerk, Trainmaster's Office, Seniority District No. 4, when on March 21 and 23, 1953 and subsequent dates thereto, the Carrier required Mr. Jacobs to protect and fill a lower rated temporary vacancy, on an overtime basis and compensated him at the rate of the position worked, instead of his regularly assigned rate of pay.

(2) When the Carrier expected and required other higher rated employees in Seniority District No. 9, to protect and fill lower rated short temporary vacancies on an overtime basis and compensated them in the same manner.

(3) That Mr. Jacobs and all other higher rated employees in Seniority District No. 4, namely, F. Sakach and R. Beilka, be allowed compensation for the difference between what they were paid at the rate of \$14.98 per day and what they should have been paid at \$17.62 per day, at penalty rate, or \$3.96, for each and every day involved, effective with the date of March 21, 1953, and that all of the higher rated employees in Seniority District No. 9, namely, J. Heiser, J. McGrath, P. Schmidt, Wilbur Savage, W. Powers, H. Dimer, J. LaGrippe, W. Weiler, M. McGory, F. Dimer, A. Van Dahm, H. Mills, A. Rankin, J. Irwin, H. Reikowsky, J. Wojcik, E. Terry, H. Cammack, M. Steed, F. Utenweiler, W. Mutzbauer, H. Webber, J. Behrschmidt, M. Loftus, J. Klotz and R. Hager, who likewise were expected and required to fill lower rated short temporary vacancies, on an overtime basis and incorrectly paid, be allowed compensation in the same manner, at the prevailing and penalty rate, of their regularly assigned positions, effective with the date of September 1, 1949.

It is understood that Claimants herein named in Seniority District No. 9, prior to 1950, performed services in what was then Seniority District 1, 2, and 6, which in February, 1950, were consolidated into one seniority roster and is now known as Seniority District No. 9.

EMPLOYEES' STATEMENT OF FACTS: Under dates of March 21 and 23, 1953, Mr. Jacobs, regularly assigned as Chief Clerk, in accordance with the terms of the current Agreement, was called and/or notified to fill the position of Train Clerk, a lower rated position, on an overtime basis. This is the regular procedure in District No. 4, as there are no extra or furloughed employees and the regularly assigned employees are expected and required to fill all short temporary vacancies.

As the past practice of the Carrier in this Seniority District was to compensate the employees at either the rate of their own position, or the rate

to higher rated position and were compensated at the rate of the position filled temporarily. Certainly they as General Chairmen were familiar with Rule 55, but they made no protest with regard to the payment received. They, together with Mr. Mutzbauer, the present General Chairman, are named for the first time in item No. 3 of the Employees' Statement of Claim in letter to Mr. Tummon, dated December 19, 1955.

While the arrangement has been in effect since 1943, the employees ask for payment of their claims from September 1, 1949; why they have picked this date has never been explained to the representatives of Management.

Even in a clear cut decision of violation, which the Carrier does not here concede, the employees would not be entitled to profit by the delay caused by reason of their alleged ignorance of a situation that existed more than ten years prior to filing claim in the instant case.

During the handling on this property, the employees cited Awards Nos. 2687, 3413, 4469 and 5924, of the Third Division, N. R. A. B., to support their contentions. These Awards do not reflect situations that are identical or even comparable to our situation as explained in this submission, and do not set precedent for an award in this case.

The Carrier contends that having failed to name the employees involved and dates on which violations are alleged to have occurred in handling with the officers of the company, the employees are barred from presenting such additional information to the Board at this time.

All matters referred to herein have been made known to the employees either orally or by correspondence.

The Carrier asserts the claims are not valid and requests your Board to confirm its position.

(Exhibits not Reproduced.)

OPINION OF BOARD: The Board is asked by Claimants to find that the Carrier violated their Agreement in the three instances as shown by their statement of claim, which briefly are:

1. In payment of compensation to Mr. J. P. Jacobs, Chief Clerk, when on March 21 and 23, 1953 and subsequent dates thereto, Carrier requested Mr. Jacobs to fill a lower rated temporary vacancy, on an overtime basis and compensated him at the rate of the position worked, instead of his regularly assigned rate of pay.

2. When the Carrier expected and required other higher rated employees, to protect and fill lower rated short temporary vacancies on an overtime basis and compensated them in the same manner.

3. That Mr. Jacobs and all other higher rated employees in Seniority District No. 4, who were expected and required to fill lower rated short temporary vacancies, on an overtime basis and incorrectly paid, be allowed compensation in the same manner, at the prevailing and penalty rate, effective with the date of September 1, 1949.

The organization cites as the particular rules involved in this case, Rule 55, Rule 66 and Rule 69, which read:

Rule 55. "Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such position; employees temporarily assigned to lower rated positions shall not have their rates reduced.

"A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher-rated employee due to a temporary increase in the volume of work does not constitute a temporary assignment."

Rule 66. "When ruling is made by officers of the railway affecting the interpretation of any rule in this agreement, or any part of a rule, the General Chairman representing the employees shall be furnished with a copy of such ruling."

Rule 69. "This agreement shall be effective as of September 1, 1949, and shall continue in effect until it is changed as provided herein or under the provisions of the amended Railway Labor Act."

Back in 1943 the Carrier experienced an acute labor shortage as a consequence of World War II. As a result, it filled short vacancies in clerical positions by using regularly assigned clerks at the penalty overtime rate of pay after they had completed their own regular assignments, there being no extra or furloughed clerks available. With the increased number of war-time vacancies, this resulted in a situation where the clerks were earning more money than the Chief Yard Clerks, who for the most part, had more seniority.

The General Chairman of the Organization requested that all clerical employees in the seniority district be allowed to share in and profit from this overtime work on a seniority basis, regardless of position occupied. Such an arrangement was put into effect.

On April 2, 1953 Claimant Jacobs filed a claim, contending that by virtue of Rule 55 of the parties Agreement of September 1, 1949, he was entitled to the differential between the overtime rate of his own higher rated Chief Clerk's position and the overtime rate of the Clerk's position, which carried a lower rate and on which he performed service on March 21 and March 23, 1953.

The claim was denied on the basis that since the Claimant had worked his regularly assigned position on those two dates and had been paid the Chief Clerk's rate for such work, he had not been assigned to a lower-rated position on the afternoon of the dates in question, but he had filled a temporary vacancy on a seniority basis in accordance with the arrangement aforementioned. The General Chairman appealed to the General Superintendent and "extended the claim to include employees in District 9 at this time, because up to the instant dispute, the Employees Representatives had no knowledge of Carrier's Officer's irregular and inconsistent application of the rule here involved and that these employees were incorrectly paid and were unwittingly receiving such payment."

While the claim in behalf of Claimant Jacobs alleges a continuing violation commencing with March 21, 1953, the claim on appeal in behalf of certain named claimants in Seniority District No. 9 contains an initial violation date of September 1, 1949.

The facts in evidence present to us the issue of whether the claimants are entitled to be paid at the overtime rate of their higher-rated positions when they double over, performing extra work in filling temporary vacancies in lower-rated positions.

Rule 11 provides that: "Employees will be selected to fill positions pending assignment and all other vacancies of less than thirty (30) days duration in accordance with Rule 8 and third paragraph of Rule 19."

Rule 8 covers promotion.

The third paragraph of Rule 19 gives preference to qualified available furloughed employees to all extra work, temporary vacancies and positions pending assignment by bulletin.

The Organization in relying on Rule 55, overlooks the fact that the claimants were not taken off their regularly assigned positions, to work a lower rated position, they actually worked their own higher rated positions and were paid for same, and they chose to work the lower rated position, receiving the overtime rate for this additional work. There is no question or proof that the Carrier was getting any benefit by this arrangement.

The Organization also contends that Rules 7 and 8 of the Agreement gives claimants the right to all extra work on temporary vacancies when there were no extra or furloughed employees available. In considering Rules 7 and 8 one must give regard to the provisions of Rule 49, or we would create a situation whereby the regularly assigned occupants of the Clerk's positions would be precluded from earning any overtime because the higher-rated clerical employees would not only be entitled to perform the overtime work on their own positions but also on the lower-rated positions to the complete exclusion of lower-rated clerks.

The evidence shows that the Carrier and the Organization made arrangements during a time of an acute labor shortage "of giving employees the choice of accepting or refusing calls on temporary vacancies, on an overtime basis" which "was concurred in by the employees and their representatives."

The evidence also shows that two former General Chairman, Mr. Mills and Mr. Van Dahm, are claimants in this case having worked lower-rated positions at the time in dispute which would prove knowledge on the part of the Organization of the above quoted arrangement.

We are unable to find any merit to the claim of Mr. J. P. Jacobs and it is hereby denied. Because the claims (2) and (3) are similar in nature and dependent upon the claim of Mr. Jacobs they fail by the same reasoning.

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 Carrier did not violate the Agreement in parts (1), (2), or (3).

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 28th day of July, 1959.