Award No. 9436

Docket No. CL-8363

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated the Agreement when, on March 27, 1955, it failed to call or notify Deduction Clerks, Mr. W. T. Newman and Mr. E. Ergle to work their positions on their unassigned day, and

(b) The Carrier shall now be required to compensate Claimants, Mr. W. T. Newman and E. Ergle, for one day's pay at proper rate of time and one-half.

CARRIER'S STATEMENT OF FACTS: (1) During the second period March 1955, Clerks W. T. Newman and E. Ergle occupied regular clerical assignments in the Deduction Section of the Centralized Timekeeping Bureau, office of Mr. M. F. Hawkshaw, Auditor of Payrolls, Materials and Supplies, Atlanta, Georgia. The deduction force in March 1955 consisted of a head clerk and ten clerks. The preponderating duties shown on the bulletins covering the deduction clerk positions were:

> A general knowledge of timekeeping and a general understanding of the preparation of payrolls and handling of payroll deductions. Duties will include assistance in the maintenance and balancing of payrolls, control totals, and handling of payroll deductions. Assisting in assembling of taxable compensation figures and work of a general nature in connection with the compilation of payrolls, deduction reports and statement data relating thereto.

(2) All clerical employes in the centralized bureau, over 125 in number, are assigned to work five days of eight hours each, 8:15 A. M. to 4:45 P. M., Monday through Friday, with rest days of Saturday and Sunday.

(3) On Friday afternoon, March 25, 1955, employes in the payroll department of the bureau were notified that overtime work would be necessary over the week end to meet pay draft delivery dates. Preference was extended

turned to work Sunday and worked the same hours. Under Rule 33, there were four "calls" involved, since a meal period was observed on both Saturday and Sunday, which broke the continuity of service on each day.

The Carrier's declination of the claim is based on the statement that "The overtime work performed on Sunday was part and parcel of the job these employes started on Saturday". (Employes' Exhibit "G")

Rule 28 (b) does not link the unassigned days together so as to make a unit of the two days, as the Carrier apparently holds. Thus, an available extra or unassigned employe might have been used on Saturday to complete his forty hours of work that week. But, after so working his forty hours that week, the Carrier could not have so used him to work on Sunday, because he "would otherwise" have had forty hours of work that week.

In Award 6019 (Referee Parker) the Agreement between the Parties contained a Rule (20 (e)) identical with Rule 28 (b) of the Agreement between the Parties in dispute in the instant claim. In the "Opinion of Board" it is said:

> "Before giving consideration to contentions advanced by Carrier as grounds for denial of the claim it should be stated that since the advent of the 40-Hour Week there can be no doubt regarding the force and effect to be given the provisions of Rule 20 (e) or others containing similar or identical language. The rule, firmly established by repeated decisions, is that work on rest days should be assigned in the first instance to a regularly assigned relief man if there be such; secondly, to an extra or unassigned employe; and finally, if such employes are not available to the regular occupant of the position on an overtime basis (See Awards 5271, 5333, 5465, 5475, 5558, 5708, 5804 and other decisions of this Division cited therein). Where such work is unassigned work it may be performed in the first instance by extra or unassigned employes; in all other cases by the regular employe".

See also Awards 7001, 6693, 6562, 6258, 6520 and 5972.

Having shown that Claimants Newman and Ergle were, under Agreement Rules entitled to preference for work on their positions on the unassigned day of Sunday, March 27, 1955, a sustaining Award is requested.

It is hereby affirmed that all data herein submitted in support of Claimants' position have been submitted in substance to the Carrier and made a part of the claim.

(Exhibits not reproduced)

OPINION OF BOARD: This claim arose in the Office of Auditor, M. F. Hawkshaw, at Atlanta, Georgia, out of the improper assignment of work on Sunday, March 27, 1955, this being a rest day or an unassigned day of the claimants. The claimants, Newman and Ergle, are deduction clerks in the Auditor's Office at Atlanta, Georgia. All clerks in this office work Monday through Friday with rest days or unassigned days of Saturday and Sunday.

There being no available extra or unassigned employes on Friday, March 25, 1955, the Carrier found it necessary to work the positions occupied by these two claimants, along with employes occupying other similar positions,

on the following day, Saturday, March 26, 1955, which was a rest or unassigned day for all the employes so used.

The claimants, after they were approached on Friday, March 25th, in connection with this Saturday work, asked to be excused therefrom, stating that they had made other commitments for that day. The Carrier excused these claimants from working on March 26th.

On Saturday, March 26th, at about 3:00 p.m., Chief Clerk, B. W. Monroe, observed that the payroll balancing work was lagging and that he would require all the employes working on Saturday, March 26th, plus another employe to work on Sunday, March 27th, to complete the work. The Carrier did not notify the claimants that there would be work to be performed on Sunday, March 27th.

The Organization claims that these claimants should have been notified or called to work in their regular positions on Sunday, March 27th, and that the Carrier violated Rules 25(b), 28(a) and (b), and 33(d) of the effective Agreement.

The Carrier states that the claimants turned down the overtime work when it was offered to them and that they now seek to separate and distinguish the overtime work by days for the purpose of this claim only. The claimants, when they turned down the overtime work on Saturday, did not only turn down the overtime work that was to be performed on Saturday, March 26th, but also the overtime work to be performed on Sunday, as the overtime work on Sunday was nothing more than a continuation of the overtime work begun on Saturday, but not completed on Saturday. The claimants relinquished their preference for the Sunday work to those employes who had accepted the overtime work on Saturday.

The Carrier says that it is not required to give claimants separate preference to each unassigned day when overtime is involved. The amount or extent to which the overtime work would be necessary could not be forecast on Friday, March 25th, with certainty, but depended entirely on the progress made on Saturday, March 26th. The claimants were given the opportunity to work on overtime but they declined to accept; a reasonable and sensible construction of Rule 28 (b) would require where it is known overtime work is to be performed over the weekend, that preference thereto should be extended to employes in accordance with the rule before they go off duty on Friday.

The Carrier is not required to re-arrange the overtime force to suit some employes who had declined to accept the overtime when first offered to them. Once an employe who was entitled to preference to the overtime declined same he relinquished his preference to employes who in their turn had accepted. There is no rule in the Agreement which would require the Carrier to again call these claimants for overtime work that they have declined and when the claimants declined to accept the overtime on Saturday they voluntarily removed themselves to be available for the overtime work on Sunday.

The question to be decided in this claim is whether or not the Carrier violated Rule 28(a) and (b), and if they did violate this rule, whether or not they should be paid for the violation under Rule 33(d).

Rule 28(a) and (b) reads as follows:

"(a) When necessary to work overtime before or after assigned

hours, the employe occupying the position on which overtime work is necessary will be given preference.

"When necessary to work extra time (as distinguished from relief work, regularly assigned or otherwise) on rest ayds or holidays, the above principle shall apply.

"It is not intended that this rule shall require the calling of employes on rest days or holidays to perform less than one hour and thirty minutes work when there are other employes (either non-schedule or schedule supervisory employes or schedule employes of the same or a higher classification in the same group) already on duty in the department who can perform the service.

"(b) Work on Unassigned Days—Where work is required by the Carrier to be performed on a day which is not a part of any assignment, either an available extra or unassigned employe who would otherwise not have forty (40) hours of work that week or the regular employe may be used; unless such work is performed by an available extra or unassigned employe who would otherwise not have forty (40) hours of work that week, the regular employe shall be given preference.

"Wherever the words 'the regular employe' are used in this Rule 28(b) they shall mean the regular employe entitled to the work under this agreement."

The above rule states that where work is required by the Carrier to be performed on a day which is not a part of any assignment that if an available extra or unassigned employe who would otherwise not have 40 hours of work that week is not available then the regular employe shall be given preference. This rule talks about a day and does not state, and it cannot be read into the rule, that if overtime is offered to the regular employes for a Saturday which is his rest day or unassigned day and he declines, and if this overtime continues over into the following Sunday, that the Carrier is not required to notify the employe who declined the work on Saturday and ascertain from him whether or not he will perform the necessary work on Sunday. In other words, it cannot be read into this rule that if an employe declines overtime work on one day and the overtime work lasts more than one day, that he has declined all of the overtime work. When the word "day" is used in this rule, the Board finds that the Carrier must notify the regular employes that there is work on each additional day and give him an opportunity to accept or decline this overtime work. This Carrier knew at 3:00 p.m. on Saturday, March 26, 1955, that there would be overtime work to be performed on Sunday, March 27th, and under this rule it had the obligation to notify the claimants who had declined the Saturday work and ascertain from them whether or not they wished to work on Sunday, March 27th. Therefore, the Carrier violated Rule 28(a) and (b).

The Organization claims compensation for the claimants for one day's work at the time and one-half rate. The Carrier states that if the claim is sustained the claimants should receive compensation at the pro-rata rate because it is a penalty payment for work not performed.

This Referee is in accord with the findings in Awards 4571, 5579, 9309, and 9257, wherein it was held that since the regular occupant of the position

was denied the overtime work because the Carrier violated the effective Agreement, and if the Carrier had not violated the effective Agreement he would have been compensated at the time and one-half rate if he had performed the work, that, therefore, the penalty rate for the work lost, because it was given to one not entitled to it under the Agreement, is the rate which the regular occupant of the position would have received if he had performed the work. Therefore, the claim will be sustained for one day's pay for each of the claimants at the time and one-half 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty

Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1960.