Award No. 9437

Docket No. CL-8364

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (CHESAPEAKE DISTRICT)

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

(a) The Carrier violated the terms of Clerks' Agreement when it failed and refused to call J. N. McCloud for Check Clerk's position on July 2, 1955, and instead doubled regularly assigned Yard Clerk on this assignment, and

(b) Mr. J. N. McCloud, cut-off clerk, be compensated 8 hours straight time at Check Clerk's rate for July 2, 1955.

EMPLOYES' STATEMENT OF FACTS: Claimant Mr. J. N. McCloud was, on the date claim arose, a cut-off (furloughed) employe having seniority who had applied for and was entitled under Agreement rules to perform extra work. On his workweek beginning June 27, 1955, Claimant McCloud worked as follows:

Monday, June 27, 1955, 12:01 A. M. to 8:00 A. M., Yard Clerk—8 hours
Tuesday, June 28, 1955, 12:01 A. M. to 8:00 A. M., Yard Clerk—8 hours
Wednesday, June 29, 1955, 10:00 A. M. to 6:30 P. M., Yard Clerk—8 hours
Thursday, June 30, 1955, 10:00 A. M. to 6:30 P. M., Yard Clerk—8 hours
Friday, July 1, 1955, Marked off—Personal business
Saturday, July 2, 1955, Did not work
Sunday, July 3, 1955, 12:01 A. M. to 8:00 A. M., Yard Clerk—8 hours

It is admitted by the Carrier that Claimant McCloud was entitled to work the position of Check Clerk 12:01 A. M. to 8:00 A. M., July 2, 1955. The carrier declined to compensate Claimant McCloud for one pro rata day at Check Clerk rate on the ground that had Claimant McCloud been properly called on July 2, 1955, he would not have been available at the pro rata rate for the next tour of duty which he performed 12:01 A. M. to 8:00 A. M. July 3, 1955.

Claim was duly filed and appealed up to the highest officer of the Carrier to whom appeals may be made. Conference was held on November 14, 1955, the Carrier declining the claim.

would have offset the $11.05, and $11.05 additional would have been due. But the parties did not do this. Instead, they considered the two days together and paid Hocker the difference between $12.13 and $22.10, or $9.97, clearly showing that they intended that the adjustment under Rule 24(e) will be **on an over-all basis** instead of **on a work day basis** as now contended.

If there is to be any change in the intended provision or application of Section (e) of Rule 24, such handling should be through negotiation duly carried out under the provisions for negotiations under the Railway Labor Act.

The Carrier has conclusively shown that the claimant lost no compensation as a result of not being properly called on July 2, 1955, nor could there be any presumption of loss and that his rights were satisfied in every respect, leaving no valid basis for a claim, and the claim should be denied in its entirety.

All data contained in this Brief have been discussed in conference or by correspondence with the Employe Representatives.
(Exhibits not reproduced.)

OPINION OF BOARD: The facts contained in this docket are not in dispute. The Carrier admits that it should have called the claimant to fill the temporary vacancy on position of Check Clerk A-319 on July 2, 1955, 12:00 Midnight to 8:00 A. M. in the sequence provided in Subsection 4 of Section (a) of Rule 12, in preference to using regularly assigned Yard Clerk Money. The reason the Carrier admits that it did not call the claimant was due to the fact that its night force was under the impression Claimant was still laying off, when as a matter of fact he was marked off on July 1, 1955 and was available for work on July 2, 1955.

The Carrier contends that the claimant does not have monetary claim due to Rule 24 (e) and a settlement made by virtue of that rule in the Hocker claim of September 18 and 19, 1950, because the claimant worked on July 3, 1955 from 12:00 Midnight to 8:00 A. M., was paid $13.84 for that day and completed his 40 hours for the week on that day; that he made more money during that 40 hour week, by working on July 3, 1955 rather than July 2, 1955 as his wages for July 2, 1955 would have been $13.77, or 12c less than he did earn, if properly called on July 2, 1955. The Employes state that Rule 24(e) refers to a day and not as the Carrier contends to the 40 hour week.

Whether the Carrier should be compelled to pay a day's wages for time not worked and whether the claimant actually suffered any pecuniary loss from the mistake that was made are questions of equity that this Board has frequently held must yield to the question of whether or not the applicable provisions of the agreement were violated. Award 5893. On July 2, 1955 the claimant had not worked his 40 hours for the week. He should have been called. He was not called for any work on July 2, 1955. In the Hocker claim he was not called for a 7:00 A. M. vacancy on September 18, 1950 but was called for an 11:00 P. M. vacancy on the same day. A vacancy which would have carried over to September 19, 1950. This claim was properly settled under Rule 24 (e) which reads as follows:

> "(e) Employes not properly called for service under the provisions of Rule 12, Section (a), Subsections 4 or 5, will be paid the difference between what they did earn and what they would have earned had they been properly called for service."

This claimant did not work at any time during the day of July 2, 1955, therefore Rule 24 (e) has no bearing on his claim. We must rule that the Carrier violated Rule 12, Section (a), Subsection 4.

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 25th day of May, 1960.