Award No. 10780
Docket No. CL-10508

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Eugene Russell, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 4-A-1 (a), at Davenport Avenue Freight Station, Cleveland, Ohio, former Lake Division, when it failed to pay J. E. Dabney, Extra Tallyman, and Frank Jackson, Extra Trucker, the time and one-half rate of pay for the second tour of duty worked within a twenty-four hour period on October 12, 1955.

(b) Claimants, J. E. Dabney, Extra Tallyman, and Frank Jackson, Extra Freight Trucker, should be paid the difference between the pro-rata rate that was paid and the punitive rate that should have been paid for the second tour of duty worked October 11, and 12, 1955. (Docket 70)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representatives of the class or craft of employes in which the Claimants in this case hold positions and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to the Agreement. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that under the applicable Agreement, the Claimants are not entitled to the additional compensation which they claim.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimants, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

All data contained herein have been presented to the employes involved or to their duly authorized representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The joint statement of agreed upon facts, among other things provides that;

Claimants are assigned to the extra list of Truckers at Davenport Avenue Freight Station, Cleveland, Ohio, as provided for in Rule 5-C-1. This extra list protects vacancies and extra work accruing to Group 2 employes and in addition includes the filling of vacancies in positions of Tallyman (Group 1).

On Tuesday, October 11, 1955, claimant J. E. Dabney was used to fill the vacancy of a regular Stower in a regular gang from 9:25 A. M. to 12:55 P. M., and was then used as an extra Tallyman in an extra gang from 1:55 P. M. to 6:25 P. M. He was next used as Tallyman on a position under advertisement beginning midnight, Wednesday, October 12, 1955, for eight hours with one hour lunch period.

On October 11, 1955, claimant Frank Jackson was used to fill a vacancy in a regular gang from 6:00 A. M. to 3:00 P. M., and was then used as a Trucker on position under advertisement beginning midnight, October 12, 1955. In all of the foregoing instances, the claimants were used for extra work only.

The Brotherhood contends that Carrier violated Rule 4-A-1(a) and the Carrier contends that the work hereinvolved comes within the exception provided in the above numbered Rule.

The Agreement provides under Rule 4-A-1 (a) as follows:

"(Effective September 1, 1949) Unless otherwise provided in this agreement, eight consecutive hours on duty, exclusive of the meal period, shall constitute a day's work for which eight hours' pay will be allowed. Time worked in excess of eight hours in any twenty-four hour period will be considered as overtime and paid for at the rate of time and one-half, except that:

A relief or extra employe who performs relief work in two or more positions within a twenty-four hour period will be paid straight time for the first eight hours worked in each position. For time worked in excess of eight hours on any of the positions so relieved, he will be paid time and one-half."

In the opinion of your Board Rule 4-A-1(a) was fully and accurately interpreted in Award Number 5415, involving similar facts wherein the Board stated:

"When analyzed it is clear the above rule contains an overall provision that unless otherwise provided by the Agreement all employees are to be paid at the rate of time and one-half for time worked in excess of eight hours in any 24-hour period but that embodied therein is an exception as to relief or extra employes who perform relief work or are assigned to a relief position within the meaning of the terms just emphasized as used in the Agreement. It is clear the exception included within the rule has application only to extra employes who perform relief work on two or more positions. Therefore based on the Carrier's admission and applying the well established rule (see Awards 2009, 3825, 4551 and 4854) that where one or more exceptions to a provision are expressed no other or further exception can be implied, we are constrained to hold that unless modified and rendered inoperative because of interpretation, practice or subsequent agreement, or other rules of the Agreement, Rule 4-A-1(a) in and of itself requires a sustaining award."

From a thorough study of this entire record your Board does not find any basis for agreeing with the Carrier's position that the work complained of in this case falls under the exception contained in Rule 4-A-1(a), therefore under the plain and unambiguous terms of Rule 4-A-1(a) a sustaining award is required.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of September 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10780, DOCKET CL-10508

The fundamental error committed by the Majority here was its finding:

". . . In all of the foregoing instances, the claimants were used for **extra work only.**" (Emphasis supplied)

The Majority agreed that the Rule in question was "fully and accurately interpreted" in **Award 5415**, and the Carrier agreed with this conclusion. It was the Organization that disagreed with the holding in **Award 5415** and this they expounded upon in the record when they said in their Oral argument, page 4:

"The Carrier recognizes that the Opinion of Board in Award 5415 established that since the Claimant in Award 5415 performed one tour of duty in 'purely extra service' and one tour of duty in 'relief service', such service was not subject to the exception contained in Rule 4-A-1 (a) and Claimant was entitled to be paid at the punitive rate for the second tour of duty within a twenty-four hour period. **We also concur with that holding except that we do not agree there was any 'relief service' involved in the second tour of duty worked by the Claimant.** * * *" (Emphasis supplied)

In short, in **Award 5415**, we found that the use of an employe "in augmentation of service" was extra work but the use of an extra employe to fill a position under advertisement was "relief service". The Carrier accepted this interpretation and paid one of the original claimants in this dispute because he, like the claimant in **Award 5415**, worked in augmentation of service for one trick and in relief service for the second trick. In order to be excepted from the overtime provisions of Rule 4-A-1(a), he must work **both** tours in relief service.

The Majority in the present case not only repudiates the holding in **Award 5415**, although they overtly pretend to follow it, but they calmly and placidly ignore the **Organization's** statements made in the earlier case where they admit the tpye of work involved here is relief work and **not** extra work.

In the Carrier's second submission (p. 1) of Docket CL-5453 (**Award 5415**), the Carrier made this statement:

"* * * The question to be determined by your Honorable Board is whether the Claimant, who performed within the same 24-hour period, a tour of duty in purely extra service in augmentation of the regular force and a tour of duty in relief service in place of a regular

employe, is entitled under the applicable Agreement to the time and one-half rate for the second tour of duty."

The Petitioner replies to this in their Sur-Rebuttal Brief: p. 1

"The Carrier herein correctly states the issue in the case and the basis under the Rules for the Employes' position."

p. 3

"It does not speak of the issue in the case — outlined in the first paragraph of this submission of the Carrier."

Even the Petitioner's position in the handling on the property in that case clearly disclosed their agreement that the filling of a vacancy in an advertised position was in relief service. Their sole argument was that augmentation of service was extra work. In their "Position of Employes", they said:

"It is stated in the Joint Statement of Agreed Upon Facts that the claimant was used to augment the regular force to handle overflow work for a period of eight hours following which he was used for eight hours filling a vacancy in a regular position.

* * *

"In this case the claimant did **not** perform relief work in two positions. **He did fill a vacancy in one regular position.** Then within a twenty-four hour period was used **to augment the regular force — not filling any position**". (Emphasis supplied)

It was found by this Board, based upon these assertions of the parties and their obvious agreement upon the issue posed in Docket CL-5453 (**Award 5415**) that:

"From the foregoing it is apparent the claim in this case involves the proper basis of payment to an extra clerk required to perform two tours of duty in a day or 24-hour period and the question to be determined is whether the claimant, who performed a tour of duty in purely extra service in augmentation of the regular force and a tour of duty in relief service in place of a regular employe within the same 24-hour period is entitled, under the current Agreement, to be paid at the time and one-half rate for the second tour of duty instead of the pro rata rate as paid by the Carrier."

Thus, we found as a fact that filling an advertised vacancy was relief service, not extra service. It is clear from this that had there been no augmentation of service involved in that dispute, the claim would have been denied. In our case, each of the Claimants filled vacancies in advertised positions during each of the two tours. They performed relief service in two tours within a 24-hour period and were properly compensated at the straight time rate.

For the Majority to sustain this claim it was obliged to hold that **Award 5415** was palpably erroneous, which they not only failed to do but pretended to follow, and they were also obliged to wink, indeed close their eyes, to the undeniable fact that Petitioner had agreed in the earlier case that this was relief work and not extra service.

This award is without any legal effect because it is grounded on an erroneous evaluation of the facts and decision of an earlier award, which, it agrees, properly construes Rule 4-A-1(a). We cannot expect our decisions to have final and binding effect on the parties when they contain such naked errors.

For the foregoing reasons, we vigorously dissent.

/s/ W. F. Euker

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ G. L. Naylor

/s/ O. B. Sayers