Award No. 11753
Docket No. CL-11678

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

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

1. Carrier violated the Clerks' Agreement at Racine, Wisconsin, when it reduced the regularly assigned trucker position to 3 days per week, working the occupant of the position regularly on each Monday, Wednesday and Friday from November 18, 1958.

2. Carrier shall now be required to establish the trucker position at Racine, Wisconsin, on a 5-day, 40 hour week Monday through Friday.

3. Carrier shall now be required to compensate Employe D. W. Whitmer for a day's pay at the trucker rate for each Tuesday and Thursday subsequent to November 18, 1958 that he has been denied trucker work on the trucker position at Racine, Wisconsin, until the violation is corrected. Reparation due to be determined by joint check of Carrier's payroll and other records.

EMPLOYES' STATEMENT OF FACTS: Prior to November 18, 1958 employe D. W. Whitmer was regularly assigned to the trucker position at Racine, Wisconsin, from 8 A. M. to 5 P. M., Monday through Friday.

Effective Tuesday, November 18, 1958, the trucker position regularly assigned to D. W. Whitmer was reduced to 3 days per week and employe Whitmer worked with regularity thereafter on each Monday, Wednesday and Friday.

Claim was filed with Superintendent K. R. Schwartz under date of January 22, 1959 and was declined by him in his letter of February 28, 1959, copy of which is attached as Employes' Exhibit "A."

ity constitutes a "regular" assignment or whether the employe performing such service is "regularly assigned" and there have been a number of awards rendered by this Division holding to the effect that regularly assigned extra work does not constitute a regular position . . . notably Awards 5463 and 6968.

With regard to the employes' contention that Rule 27 (a) is a guarantee rule of the agreement, we again point out that Rule 27 (a) is, as captioned, a "General" rule and is subject not only to other paragraphs of Rule 27 . . . notably (h) and (i) thereof . . . but also to other rules of the agreement. It is the Carrier's position that Rule 15 (e), which reads:

> "(e) Nothing herein shall be construed to permit reduction of days for regularly assigned employes covered by this agreement below five (5) days per week, except if within the five (5) days constituting a work week, one of the seven (7) holidays specified in Rule 35 (b) occurs, the work week may be reduced to the extent of such holiday."

is the only rule of the current agreement which may be construed as a guarantee rule and it specifically states that it has application only to "regularly assigned" employes. It is a familiar principle of contract construction that the specific controls the general. Therefore, greater weight attaches to the specific statement in Rule 15 (e) than to the general statement in Rule 27 (a). Numerous rules of the parties' agreement clearly distinguish a regular employe from an extra, unassigned or furloughed employe.

Summarizing, it is the Carrier's position that:

1. The abolishment of the trucker position at Racine held by claimant was as contemplated by and in compliance with provisions of Rule 12 (a).

2. The recall of claimant Whitmer as an available furloughed employe to perform extra work was as contemplated by and in accordance with provisions of Rule 12 (d).

3. Regularly assigned extra work does not constitute a regular position nor is the performer thereof "regularly assigned" as the employes allege.

4. Rule 27 (a) is not a guarantee rule as the employes allege.

5. Rule 15 (e) has application only to "regularly assigned" employes and therefore did not apply to claimant.

The claim in behalf of claimant Whitmer is not supported by schedule rules and we respectfully request that it be denied.

All data contained herein has been made known to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: It is the contention of the Claimant D. W. Whitmer that prior to November 18, 1958, he was regularly assigned to the trucker position at Racine, Wisconsin, from 8 A. M. to 5 P. M., Monday through Friday; that, effective Tuesday, November 18, 1958, the trucker position regularly assigned to him was reduced from five days to three days per week and Claimant Whitmer worked with regularity on each Monday, Wednesday and

Friday until this claim was filed, after which time the Carrier did not require the same degree of regularity. It is the further contention of the Claimant that Carrier in reducing the assignment of the Claimant from five to three days a week violated the Rules of the Clerks' Agreement, more particularly, Rule 15(e) and Rule 27 (a) which provide as follows:

"RULE 15—BASIS OF PAY

* * * * *

"(e) Nothing herein shall be construed to permit reduction of days for regularly assigned employes covered by this agreement below five (5) days per week, except if within the five (5) days constituting a work week, one of the seven (7) holidays specified in Rule 35 (b) occurs, the work week may be reduced to the extent of such holiday.

"RULE 27—40 HOUR WEEK

* * * * *

"(a) General

"There is hereby established for all employes, except those occupying positions listed in Rule 1 (b), a work week of forty (40) hours, consisting of five days of eight (8) hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable the days off shall be Saturday and Sunday. This rule is subject to the following provisions:"

Carrier concedes that prior to November 17, 1958, it maintained at Racine a position as contended for by Claimant but asserts "the volume of less carload merchandise handled through the warehouse at Racine had diminished to the point where the services of a trucker, to provide assistance to the warehouse foreman, were no longer regularly required"; Carrier maintains that because this situation existed, the Claimant was notified by Carrier on Friday, November 14, 1958, that his regular position as trucker was being abolished, effective upon his completion of his tour of duty on that position on Monday, November 17, 1958, and thereafter the services of a trucker would be dependent on the requirements of the service; that, thereafter, the Claimant was recalled to perform extra work as a trucker at Racine in accordance with the provisions of Rule 12 (d) of the parties' agreement and that such call did not constitute a regular assignment.

Claimant in rebuttal of Carrier's position in this dispute contends that what Carrier in fact did and actually intended to accomplish by the alleged notice to abolish the position was to reduce the position from a five day to three day position, that the position occupied as a trucker by the Claimant was not abolished and Claimant was regularly assigned to continue the work; that there was work left for the trucker to do after the attempted abolishment of the position.

The question then submitted for our decision is: Was Claimant's position actually abolished by the notice given him by Carrier on November 14, 1958, or was the assignment simply reduced from five days to three days and Claimant regularly assigned to that work.

It is important in deciding this question to consider Rule 12 of the agreement.

"RULE 12 — REDUCING FORCES

"(a) In reducing forces, employes in Groups 1 and 2, Rule 1, whose positions are to be abolished will be given at least forty-eight (48) hours advance notice. Regularly assigned employes in Group 3, Rule 1, will be given at least twenty-four (24) hours advance notice. Employes whose positions have been abolished or who are displaced through the exercise of seniority may, fitness and ability being sufficient, exercise seniority within fifteen (15) days from the date affected; if seniority is not exercised the employe will be furloughed and will be recalled to service as per Rule 12(d).

* * * * *

"(d) When forces are increased or vacancies occur, furloughed employes, when available, shall be recalled and returned to service in the order of their seniority and employes shall be required to return when so called. Available furloughed employes recalled for extra work shall be required to return when called except as provided in Section (e) of this rule. Furloughed employes failing to return to service for extra work when called and furloughed employes failing to return to service for other than extra work within seven (7) days after being notified (by mail or telegram sent to the last address given) will be required to give satisfactory reason for not doing so; otherwise they will terminate their seniority."

In connection with the foregoing we must consider Memorandum of Agreement between the parties, dated July 30, 1957, in connection with the application of 12 (d) which reads, as follows:

"As between the undersigned it is agreed:

"1. Except in a case where an employe is on vacation when he is affected by the abolishment of his position or displacement (NOTE following Rule 12(a)) an employe has only fifteen (15) calendar days from the date he is affected in which to exercise his seniority.

"2. During that fifteen (15) day period in which he has the right to exercise his seniority rights he will not be available for call nor can he file claim for not being called as that is a "grace period" for the employe and he would not actually be furloughed until the sixteenth (16th) day after being affected."

Carrier contends that trucker work on three days was extra work for which furloughed employes could properly be called; however, it will be noted under the Memorandum of Agreement that when an employe is affected by the abolishment of his position he will not be available for call for fifteen days nor could he actually be furloughed until the sixteenth (16th) day after being affected. In explaining the failure of the Carrier to comply with the provisions of the Memorandum Agreement, Carrier dismissed it by stating in the submission, "apparently the local supervision lost sight of Section 2 of Memorandum Agreement dated July 30, 1957, when claimant Whitmer was called and used on several dates" but, however, contends that the failure of Carrier

to comply with this provision does not support Claimant's contention in this matter.

The Board does feel, notwithstanding Carrier's position, that it is an element to be considered in determining whether or not it was the intention of the Carrier to abolish the position or an attempt on the part of the Carrier to reduce the working days of the position from five to three days. It is to be remembered that Carrier is bound by the actions of its agents and if it was the intention of the Superintendent to reduce the number of days of work rather than abolish the position the Carrier is bound by his decision, bearing in mind, of course, that the general rule is that the assignment of work is within the province of the Carrier unless such right has been limited by contract.

Carrier has asserted that the handling of LCL merchandise had receded to the point where the services of the trucker were no longer regularly required, but in Carrier's submission it is also asserted that Monday, Wednesday and Friday were generally the days on which the volume of LCL merchandise to be handled through the warehouse was heavier. This indicates there was work remaining to be done on truckers' regular assignment at Racine.

In Award No. 3884 we note the following language:

> "The Carrier assumes that the positions here were in fact abolished because the proper forms were used. That does not follow. First, at least a substantial part of the duties of the position must have disappeared, and second, there must be the actual intent to abolish the position. The Carrier may not use the prescribed procedure for abolishing positions for the purpose of evading its Agreement with the Employes."

From a review of the record in its entirety and considering all of the facts and circumstances therein presented, we must arrive at the conclusion that it was not the intention of the Carrier to abolish Claimant's position but rather that it was to reduce his workweek from five to three days, which is in violation of the Agreement, most particularly, Rule 15 (e) of the Agreement, as Claimant was a regularly assigned employe.

We then come to a consideration of Claim 2 in the Statement of Claim. This Board has held repeatedly it is without power to direct the assignment of work or positions. As was adequately stated in Award 6456:

> "To sustain part (b) of the claim would in effect be granting affirmative relief beyond that granted by the awards of this Division. We have generally held that we will not direct the establishment or re-establishment of positions, but will leave the Carrier free to negotiate thereon with the Organization or to adopt its own method of conforming to the agreement."

For the foregoing reason, Claim 2 must be denied.

As it appears that the Claimant accepted a position of freight caller on April 13, 1959, Claimant will be limited to any monetary loss he may have suffered each Tuesday and Thursday by reason of the violation to a time from November 17, 1958, to April 13, 1959.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 has been violated.

AWARD

Claim No. 1 — sustained.

Claim No. 2 — denied.

Claim No. 3 — sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1963.