

Award No. 12354
Docket No. CL-12254

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

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

DES MOINES UNION RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4865) that:

1. Carrier violated the rules of the Clerks' Agreement at Des Moines, Iowa when on Sunday, November 8th, and Monday, November 9th, 1959, it used Lyle Curry to perform work regularly associated with and performed on yard clerk positions.

2. Carrier shall compensate employe L. H. Reynolds for eight (8) hours at the penalty rate of his regular position for Sunday, November 8, and Monday, November 9, 1959.

EMPLOYEES' STATEMENT OF FACTS: Employe L. H. Reynolds, who has a seniority date of August 27, 1958 is regularly assigned from 7 A. M. to 3 P. M., Tuesday through Saturday, with Sunday and Monday as rest days, to a 7-day position of clerk in the yard office at Des Moines, Iowa; rate of pay \$19.59 per day.

The principal duties assigned to and performed by employe Reynolds during his tour of duty are:

Receiving Milwaukee Train No. 72, if late

Making up Wabash Train No. 98

Work on P.D. Book

Answer telephone

Relaying information to switchmen

Type up Milwaukee delivery Form 7

Type up Milwaukee No. 72 code sheet

The work of keeping up the P.D. book is also performed by other clerks in the yard office, the work apparently being performed by such employes whenever they have time from their other duties in which to do so.

Rule 7 certainly provides for the use of an extra or unassigned employee who will otherwise not have forty (40) hours of work that week. Lyle Curry who was used had not otherwise had forty (40) hours of work in each of the work weeks for extra or unassigned employees in which the claim dates fell.

The contention was made in some of the correspondence that the work of entering car records in the car record book was exclusively assigned to Clerk Reynolds. This contention is not supported by the facts. In this connection attention is directed to a statement of work performed on April 16, 1959, by Clerk Reynolds in which he does not show any time consumed in entering car records or posting in the car record ("PD book"); whereas, Clerk McGriff on the same date stated he consumed four (4) hours and forty (40) minutes on that particular day in the performance of such work. See Carrier's Exhibits B and C herewith.

Further in this connection, attention is directed to notices issued by former Acting General Manager Garelick on September 21, 1953, and October 22, 1953, directing that certain other clerks spend time in so called "PD" duties. See Carrier's Exhibits D and E.

The contention of the petitioner in this case amounts to an assertion that a regularly assigned employee must be called to work on his rest days at time and one-half rate, even though his rest days are included within the assignment of a regular relief employee, and that regular relief employee actually works on the days in question, to perform work which is not, either by agreement or otherwise, performed exclusively by the claimant regularly assigned employee.

The rules of the clerks' agreement do not obligate the Carrier to use a regularly assigned employee on his days off and pay him the punitive rate when there is an extra or unassigned employee available who has not already had forty (40) hours of work in his work week. The rules of the clerks' agreement are not susceptible to such a construction, and such a construction would most certainly be contrary to the intent and purpose of Rule 6 of that agreement.

Further, claim is presented on behalf of Mr. Reynolds for payment at the rate of time and one-half. The claim is clearly one for a penalty. There is no provision in the clerks' agreement for the payment of the time and one-half penalty rate except where the person to whom it is paid performs work.

The claim is not supported by the rules of the clerks' agreement, and the contentions of the petitioner should be dismissed and the claim denied.

(Exhibits not reproduced.)

OPINION OF BOARD: At the time this claim arose, L. H. Reynolds, the Claimant was regularly assigned as a Clerk on a work-week of Tuesday through Saturday, with Sunday and Monday as assigned rest days. Clerk S. E. Allan worked a regular rest day relief assignment on Sunday and Monday doing the same general work as Mr. Reynolds.

On Sunday, November 8, 1959 and Monday, November 9, 1959, Mr. Reynolds was off on his usual rest days, and Relief Clerk Allan was on his usual relief assignment. However, another employee Lyle Curry described by the Carrier as an "extra or unassigned clerk" was also put on for those two days, spending most of his time entering car records in the record book, the so-called "P.D. Book", one of the tasks usually performed at various times by Mr. Reynolds as well as by other clerks.

The Claimant and his Organization protested, demanding that Mr. Reynolds be paid at the rate of time-and-one-half for eight hours work on Sunday and for eight hours work on Monday, which hours it is claimed, were improperly assigned to Curry instead of to Reynolds.

We must deal initially with the threshold problem of identifying the position presented by the Claimant to the Carrier before the dispute was submitted to this Board, inasmuch as the Carrier contends that said position was altered in the Employee's ex parte submission.

The record contained in the docket bears out the Carrier's contentions that new grounds and allegations appear in the Employees' ex parte submission which were not part of the claim on the property.

The correspondence reproduced in the docket and not questioned by the Petitioner as to authenticity, accuracy or completeness shows two letters in support of the claim. The first is dated December 28, 1958 and is from the Local Chairman of the Employee's Organization to the Carrier's General Manager. This letter quotes in full the two short communications by the Claimant in initiating his claim. These make only two statements in support of the claim:

"I claim I should have been called"
and
"This extra work should have been mine."

Under "Employees' statement of facts", it is alleged in the letter of December 28th that on the two days in question, "the carrier called Mr. Lyle Curry an extra employee to perform work on the PD book". It is further alleged that the work done was "a part of employee L. H. Reynolds regular assigned duties" and that the work done by Curry was on the PD book. The statement of facts concludes by quoting Rule 7 of the Agreement, emphasizing the words "which is not a part of any assignment".

Under the caption "Position of employees", Mr. Curry is again referred to as an "extra employee". The statement in full therein is:

"Position of employees:

The employees contend in view of the facts and circumstances existing in connection with the case and the language of the rules agreement, that a violation took place when the Carrier called extra employee Lyle Curry instead of employee L. H. Reynolds to perform the work in the PD book on Nov. 8 and 9, 1959 and request that employee L. H. Reynolds be compensated as set forth in the above 'Statement of claim.'

It will be seen from the foregoing that the Petitioner takes for granted the characterization of Curry as an "extra employee" and does not challenge Curry's classification by the Carrier as an extra clerk.

In the second and final pre-submission letter sent by the Employee's Organization, there is a reference to Curry which only a hindsight view may reconstruct as a hint of the position later to be taken more explicitly and then to be put on newly-stated grounds for the first time. The letter, sent to Mr. Devlin on March 10, 1960 by the Brotherhood's General Chairman Gilligan contains the statement:

"You also state that Lyle Curry is an extra clerk. We find no provision in the Agreement for so-called extra clerks. There also is no provision for an extra board."

The passing allusion to "so-called extra clerk" and the statement regarding an extra board are not enough to establish the posture towards the Carrier on behalf of the Claimant, which was later expressed in the allegations and arguments addressed to this Board. In its ex parte submission, the Petitioner alleges that Mr. Curry did not have seniority standing as a clerk, that he had seniority status instead as a telegrapher and makes certain other statements concerning Curry's alleged intermittent or simultaneous employment on another railroad and here as a telegrapher. The Carrier's statement to us stands unrefuted that neither the Claimant nor his representatives made any such claims during any of the discussions on this controversy on the property.

Although the Carrier responds to this newly-taken position in its reply to the employees' ex parte submission, we must find that neither the new facts and position nor the answers thereto can be properly before us. This is firmly established by the Rules of Procedure in Circular No. 1 of the N.R.A.B. and by a line of Awards supporting these rules when a change is made as here from the case on the property to one on different grounds before this Board.

We must say here, as we did in Award 10416 wherein the Board denied that claim on the grounds of deviation from the one handled on the property, that:

"The Organization in the instant case elected to pursue its theory of agreement violations as set forth in its original statement of claim, and in reliance thereon, the Carrier is not burdened to look at matters other than those contained in the original statement of the claim to prepare a defense if it has one."

"Therefore, the record in this claim before the Board was not handled in the usual manner, as provided in Section 3 First (i) of the Railway Labor Act as amended."

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 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 for the reasons stated in the Opinion, this claim will be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1964.