# Award No. 12460
# Docket No. CL-11540

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**John H. Dorsey, Referee**

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## PARTIES TO DISPUTE:

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

## INDIANA HARBOR BELT RAILROAD COMPANY

**STATEMENT OF CLAIM:**

(1) Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the Clerks' Agreement when on or about November 14, 1957 it arbitrarily changed the previously understood interpretation and application of Rule 19 of the General Agreement between the parties hereto and

(2) That the Carrier violated and continues to violate the Clerks' Agreement when it declined to pay Claimants H. C. George, J. J. Casey, D. E. Arney, E. J. Kraft and C. J. Miller at the overtime daily rate of their regularly assigned job for overtime service performed on other assignments as shown in Part 3 of this Statement of Claim, and

(3) That Carrier shall now be required to pay Claimants the difference between the overtime daily rate of their regularly assigned job and the overtime daily rate of the job worked as follows:

H. C. George — Regular Job No. 127 — Overtime Rate $32.28 per day.

| Date Claimed | Job Worked | Overtime Rate | Amount Claimed |
|---|---|---|---|
| 6-20-58 | 128 | 31.08 | 1.20 |
| 6-23-58 | 17 | 30.92 | 1.36 |
| 6-24-58 | 17 | 30.92 | 1.36 |
| 6-27-58 | 128 | 31.08 | 1.20 |

J. J. Casey — Regular Job No. 55 — Overtime Rate $30.81 per day.

| Date Claimed | Job Worked | Overtime Rate | Amount Claimed |
|---|---|---|---|
| 10- 2-58 | 9 | 28.11 | 2.70 |
| 10- 4-58 | 4 | 29.25 | 1.56 |
| 10-10-58 | 37 | 28.47 | 2.34 |
| 10-14-58 | 35 | 29.25 | 1.56 |

D. E. Arney — Regular Job No. 3 — Overtime Rate $30.195 per day.

| Date Claimed | Job Worked | Overtime Rate | Amount Claimed |
|---|---|---|---|
| 6-21-58 | 28 | 28.425 | 1.76 |
| 6-22-58 | 28 | 28.425 | 1.76 |

E. J. Kraft — Regular Job No. 35 — Overtime Rate $31.16 per day.

| Date Claimed | Job Worked | Overtime Rate | Amount Claimed |
|---|---|---|---|
| 1-12-59 | 37 | 29.16 | 2.00 |
| 1-16-59 | 26 | 28.84 | 2.32 |

C. J. Miller — Regular Job No. 61 — Overtime Rate $31.455 per day.

| Date Claimed | Job Worked | Overtime Rate | Amount Claimed |
|---|---|---|---|
| 9-3-58 | 155 | 27.615 | 3.84 |
| 9-6-58 | 211 | 29.07 | 2.39 |

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

At the outset, the General Committee points out that the five claimants and fourteen claims, shown in Part 3 of Statement of Claim, were selected at random from several hundred identical claims submitted by a large number of individual employes employed in the various seniority districts of the Carrier. All of these claims with the exception of those submitted subsequent to the present submission have been processed through the normal channels provided by the Rules Agreement to and including the Assistant General Manager, Labor Relations, the highest officer designated by this Carrier to handle such matters.

Because of the large number of claimants and the extremely large number of small individual claims, it has been mutually agreed between the Carrier and the Brotherhood that the claims listed in Part 3 of Statement of Claim are representative of all others and that the decision of your Honorable Board with respect to the fourteen claims here involved will be applied in settlement of all other claims including those processed through the normal appeal channels subsequent to this submission. Mutual agreement to this effect is evidenced by Employes' Exhibit No. 4 attached hereto.

The primary issue involved in this dispute concerns the application of Rule 19 of the General Agreement when considered in its relationship to other rules and Memorandum Agreements which form a part of the same General Agreement between the parties to this dispute.

In each of these individual claims the Claimant is a regularly assigned employe assigned to a regular position five days per week at a specified daily rate of pay which comprehends a daily overtime rate as shown in Part 3 of Statement of Claim. The dispute arose when these employes were required, under other applicable rules of the Agreement, to work other positions carrying lower rates of pay for which the employe involved was paid the

4. Awards of the National Railroad Adjustment Board support Carrier's position.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Claimants were regularly assigned employes who, upon completion of their regular tour of duty on the dates set forth in the claim, doubled over on other assignments at their respective locations, filling vacancies. There is no question that for this work they were entitled to overtime rate. The issue is whether the overtime rate was that of their regular assignments; or, the lower rate of the vacancy which they filled.

The Agreement provision involved, effective December 1, 1949, is Rule 19 — Employes Used on Other Positions, which provides in pertinent part:

> ". . . employes temporarily assigned to lower rated positions shall not have their rates reduced."

Petitioner contends that the overtime rate of the employes filling vacancies in positions having a lower rate, is to be computed on the rate for their regular assignment. Carrier contends that it could not require Claimants to work the vacancies; therefore, Claimants were "volunteers" and consequently, the applicable rate was that of the vacancy filled. It cites many of our Awards to the effect that volunteers are entitled only to the overtime rate of vacancy filled. None of these Awards is apposite in that they do not decide the issue in a factual situation analogous to that in this case.

From the execution of the Agreement in 1949, Carrier, until 1957, consistently paid employes, who worked overtime in a vacancy having a lower rate, at the overtime rate of their regular assignment. Then, unilaterally, in 1957, it decided that this formula was in "error" and what it chooses to call "volunteers" should be paid, under the Agreement, only the overtime rate for the vacancy filled. What brought about this decision is not revealed in the record other than by surmise or speculation, in which we cannot engage.

The collective bargaining relationship is not terminated with the execution of a Collective Bargaining Agreement. The legal obligation of the parties to bargain concerning wages, hours and other conditions of employment is a continuing one, not only as to interpretation and application of the Agreement; but, also, as to later developments and situations affecting the employer-employe relationship.

It is a well established rule of labor contract interpretation that where the parties to a Collective Bargaining Agreement have uniformly, for a long period of time, applied and accepted a provision of an agreement, this constitutes a meeting of the minds of the parties as to its meaning and no deviation may be brought about except through the process of collective bargaining.

Where, as here, Carrier, for a period of years, had uniformly computed overtime rates, the collective bargaining agent has the right to conclude that the formula will continue to be applied for the term of the agreement absent a supplemental agreement of the parties. We will sustain the claim.

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

It will be noted that Rule 55 in the aforementioned Award is very similar to Rule 19 in the instant case. In the above Award as in the instant claim, the employe chose, of his own volition, to work the lower rated position, receiving the overtime rate for the additional work.

Carrier has shown at page 9 that payments of higher overtime rates when employes worked on lower rated positions were erroneous and when discovered such payments were discontinued. Undoubtedly, the Employes will attempt to convince this Board that these erroneous payments were of such a nature as to establish a valid precedent for sustaining their claims. That there is no support for such a contention is illustrated in Award No. 6912, which involved the same parties, the Opinion of that Award being quoted at pages 11, 12, and 13.

In addition to Award No. 6912, the following awards definitely establish that payments made in error do not create a precedent.

In First Division Award No. 15485, Referee Mabry held with respect to payments made in error:

> "Overpayment as in this case which was in violation of schedule rules, in the absence of a clear agreement made by parties authorized to contract for and on behalf of the parties concerned, or authorized to establish or permit a pattern of practice indicating a waiver of the schedule rates, cannot be permitted to set aside governing agreements."

In First Division Award No. 14441, the Division, without a Referee, denied the claim filed by the conductors in which they wanted to perpetuate a timekeeper's error in paying a differential for handling baggage, mail and express every day instead of just on the days when such work was handled.

In Third Division Award No. 7584, Referee Smith held:

> "This Division stated in Award 6748 that:
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> '. . . the Carrier asserts the rule is that the burden of establishing facts sufficient to permit the allowance of a claim is upon the party who seeks its allowance. . . . There is such a rule, which is frequently applied, and we think in the instant case is one requiring its application. . . . Claimant has failed to maintain the burden of establishing his claim and it must be denied.' A similar burden has not been discharged here, so therefore this claim must be denied."

## CONCLUSION

Summarizing, Carrier submits it has shown clearly that claim should be denied because:

1. No rule of the agreement was violated and no provision exists for the payment of the higher rate in the dispute at hand.

2. Rules cited by the organization are not applicable.

3. The transfer of rates is prohibited by rule.

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 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 30th day of April 1964.