Award No. 12646
Docket No. CL-12444

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4909) that

(1) The Carrier violated the current Clerks' Agreement at its Deramus Yards, Shreveport, Louisiana, on June 28, 1959 when it called regular Crew Dispatcher, Mr. A. A. Lasiter, Jr. on his assigned rest day to perform service of position of Caller-Messenger and failed to accord him payment at the time and one-half rate of his regular assignment.

(2) Mr. A. A. Lasiter, Jr. shall now be compensated eight (8) hours' pay at the time and one-half rate of his regular position of Crew Dispatcher for service performed on June 28, 1959, less the amount he has actually been paid for that date.

EMPLOYES' STATEMENT OF FACTS: Among other positions subject to the Clerks' Agreement, Carrier maintains two seniority Group 2 positions entitled Caller-Messenger at its Deramus Yards, Shreveport, Louisiana. Both of these positions are worked seven days per week, but the rest days of the two positions are not included in a regular relief assignment. Relief for the incumbents is ordinarily provided by utilizing extra or furloughed employes.

Of the two Caller-Messenger positions just mentioned, the one assigned Position No. 13 with assigned hours of 7:00 A.M. to 4:00 P.M. is involved in this dispute. The regular incumbent of Position No. 13 is assigned a work week of Tuesday through Saturday with rest days of Sunday and Monday.

The claimant, Mr. A. A. Lasiter, Jr., is regularly assigned to Group 1 Position No. 56, Crew Dispatcher, with assigned hours of 7:59 A.M. to 3:59 P.M. His regular work week extends from Monday through Friday and he has assigned rest days of Saturday and Sunday.

On Sunday, June 28, 1959, there was no extra employe available for service necessary to be performed on Position No. 13, Caller-Messenger. The

(When this claim first came to the attention of the carrier's highest appeals officer, it was discovered that claimant through error in carrier's accounting department, due to insufficient information as to what had occurred, had been paid penalty time (at caller-messenger rate) on the date in question, which erroneous payment (of penalty time) was deducted from claimant's next pay check).

Carrier's position, in summary, is that claimant, for the work performed on Sunday, June 28, 1959, was entitled to pro rata time at the caller-messenger rate, and respectfully requests the Board to so find.

(Exhibits not reproduced.)

OPINION OF BOARD: There are two principal questions to be resolved in this case. They are:

1. Is the Claimant entitled to penalty time or straight time for working the Caller-Messenger job on the date in question?

2. Regardless of which of the above is appropriate, should it be at the Caller-Messenger rate or at the Claimant's regular crew dispatcher rate?

We shall first address our attention to the first of these questions. The Organization, in its original ex parte submission, relies on several rules of the Agreement which it has with the Carrier.

The Carrier, in its answer to the Organization's submission, protests the fact that the Organization is basing its case on rules which it contends were not involved on the property. Specifically, the Carrier requests this Board to expunge from the record and eliminate from its consideration of the instant case the following rules of the Agreement: 1 (a), 1 (c), 3 (a), 3 (b), 6 (a), 6 (b), 7 (a), 7 (b), 8, 23, 37 (a), 40 (a), 40 (e), 40 (i), 40 (j), 41 (a), 41 (b), 41 (d), 41 (e). It further requests this Board to confine and restrict its deliberations to the applicability and interpretation of Rules 47 (a) and (b) of the Agreement quoted below, which, it maintains, were the only rules upon which the Organization relied on the property.

"PRESERVATION OF RATES.

Rule 47. (a) Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates for the full day while occupying such position; employes temporarily assigned to lower rated positions shall not have their rates reduced.

(b) A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time involved."

A review of the documentary evidence available to the Board reveals a series of letters interchanged between the Organization and the Carrier.

An analysis of this correspondence beginning with the July 15, 1959, letter and ending with the October 6, 1959, letter, indicates that the Organization is citing Rules 47 (a) and (b) as its authority. It is evident that the Claimant, having been paid the penalty rate, time and one-half, at the Caller-

Messenger level, is interested at this stage of the handling on the property, only in being compensated for his work, not at the Caller-Messenger rate, but at the level of his regular assigned position, Crew Dispatcher.

We should now direct our attention to the letter dated September 29, 1959, from Mr. G. C. Grayson, General Chairman, to Mr. D. E. Farrar, Assistant to President. In this letter, a demand is made that the Claimant be compensated at the rate of his assigned position under Rules "47 (a) and (b) and other rules of the agreement." Under date of November 5, 1959, in a letter from Mr. D. E. Farrar to G. C. Grayson, the Carrier states its disagreement with the applicability of Rules 47 (a) and (b), questions and objects to the invocation of "other rules" as being too general, denies the claim and further finds that the Claimant was erroneously paid at the penalty rate on the messenger job on the grounds that he moved from one assignment to another. It bases this latter decision on Rule 41 and Awards 5629, 5705, 5798, 6018, 6266, 6970, 6971, 7086, and 7295, and decrees that the overpayment shall be deducted.

At this point on the property, a new issue of penalty time has been introduced. The only other document attesting to the progress of this claim on the property is one dated August 2, 1960 from Farrar to Grayson, in which reference is made to a conference held on July 28, the specific files discussed, the awards cited, and a stipulation that an extension of time would be granted upon the date of the conference, or until January 28, 1961, to progress these claims to this Board.

In consideration of the foregoing, we are constrained to focus attention on the fact that once the Organization had been in receipt of the November 5, 1959 letter, it should have invoked the proper rule of the Agreement for the penalty rate, since that had been denied, and it should have specified what "other rules" were, in its judgment, germane to its case. This, it failed to do, until it filed its original ex parte submission. It was then too late.

The principle that the Petitioner is precluded from changing the issues discussed and rules invoked on the property, when appealing to this Board, is well established. Awards 12354 — Yagoda, 12325 — Seff, 5469 — Carter, 11034, 10529, 11908 — Hall, 11178 — Ray, and Article 1. We take cognizance of but need not elucidate on the various arguments propounded by both Carrier and Organization on this very same issue, other than to say that once a judgment was made that the Petitioner and the Organization were estopped from presenting the penalty time issue to the Board, these other discussions became ancillary to the main issue, and require no comment. We find, therefore, that the Claimant is not entitled to penalty time.

We shall now direct our attention to the second question. Should the Claimant be paid straight time at the Caller-Messenger rate, or at his regularly assigned Crew Dispatcher's rate?

The Petitioner and the Organization base their claim on Rule 47 (a) and (b) entitled, Preservation of Rates, as quoted above.

They specifically concentrate on the last phrase of Rule 47 (a) "employes temporarily assigned to lower rated positions shall not have their rates reduced." They likewise maintain that Rule 47 (c) contains the only exception to the rule requiring that employes temporarily assigned to lower rated positions shall not have their rate reduced. Rule 47 (c) is quoted:

"(c) Assisting a higher rated employe due to a temporary increase in the volume of work does not constitute a temporary assignment."

Carrier maintains that the Claimant was called for the Caller-Messenger job in accord with the extra Board Agreement, that further he must have filed a written notice requesting such work as a condition precedent to his being considered and as such was in the position of a volunteer. They further assert that Rule 47, upon which the Petitioner and Organization rely pertains only to the guaranteed position of the regular assignment and in view of this the Claimant should be paid at the Caller-Messenger rate.

In view of the foregoing, therefore, it is the considered judgment of this Board that a realistic evaluation of the intent and meaning of Rule 47 (a) would lead to the inescapable conclusion that it was designed principally for the protection of the employes, to prevent them from being arbitrarily shifted to a higher paying position while being compensated at the lower rate as well as to prevent them from being transferred to a lower paying position, compensation for which would be at the lower rate. The purpose and intent of Rule 47 was clearly to protect the employe during the guaranteed portion of his regular assignment. (See Award 2680.) In the instant case, the Claimant had completed his regularly assigned 40 hour week position and had made himself available for additional work. He consequently placed himself in the position of a volunteer, and thus subjected himself to the rate of the position filled. This case is distinguished from Award 4469 (Robertson) on the Volunteer vs. non-volunteer theory and we rely principally on Awards 2670 and 2672 in furtherance of our position.

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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1964.

LABOR MEMBER'S DISSENT TO AWARD 12646, DOCKET CL-12444

A reading of the Statement of Claim in Award 12646, Docket CL-12444, and the two principal questions set out in the "Opinion" shows quite clearly

the issue involved. That issue had not changed throughout the course of handling the claim.

That the Referee was led into a hodgepodge of legal niceties is not unusual, but the fact that he deprived Claimant of money earned and properly belonging to him is inexcusable.

Carrier's main objection to consideration of this claim was that the Organization based its case on rules of the Agreement which the Carrier had failed and refused to properly apply. As will be noted in the Award: "Specifically, the Carrier requests this Board to expunge from the record and eliminate from its consideration of the instant case * * *" certain rules of the Agreement. That the Referee acceded to Carrier's request is quite evident from the Award. But more than that, the Referee, after finding that Organization should have invoked the **proper rule** on the property and had failed to do so and, consequently, was estopped, proceeded to find that Claimant was not entitled to penalty time. Quite obviously, if the matter was not properly before him, no finding as to whether or not Claimant was entitled to "penalty time" could properly be made. Furthermore, in finding that Employes failed to invoke "the proper rule", the Referee recognized that "the proper rule" required time and one-half payment to Claimant for the service he rendered on his assigned rest day.

After first "discussing" and then erroneously answering the first of the two principal questions, the Referee proceeded to find, contrary to the facts of record that Claimant "volunteered" for the position of Caller-Messenger. On that unsound, unsupported and clearly refuted basis, this case was "distinguished" from Award 4469 and based principally on Awards 2670 and 2672. Even the Awards on which the Referee relied contained the following admonition, which was ignored:

> "Precedents must always be weighed and evaluated in the light of the facts upon which they are predicated."

A casual reading of Awards 2670 and 2672 will show that there was involved an offer of work after hours at **time and one-half** on the basis of a specific hourly rate which was tendered by the Carrier in order to get several employes to help in handling a backlog of freight deemed "necessary to the war effort."

In finding as he here did, the Referee completely ignored many facts of record and sound precedent presented to him in Awards 5873, 5924, 9106, 9487, 12043, 12145, 12460 and others.

The Carrier here involved ignored the rules of the Agreement it had made, withheld additional wages from Claimant when their action was contested, and then was successful in having the Referee render this Award which condones, if not in fact, encourages, Carrier's wrongful acts.

For the above reasons, I dissent.

D. E. Watkins
Labor Member 7-16-64