

Award No. 13114
Docket No. CL-12192

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Francis M. Reagan, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4846) that:

1. Carrier violated the Clerks' Agreement when it failed to assign Clerk D. M. Mowrey, Kansas City, Mo., by July 14, 1959, to position of Industry Clerk No. 67, advertised per Vacancy Bulletin No. 129, dated July 2, 1959, bids closing at 11:59 P. M., July 9, 1959, and assignment not being made until July 22, 1959, per Assignment Bulletin No. 129, in violation of Rule 8 (c).

2. Carrier violated the Clerks' Agreement when it failed to compensate Clerk D. M. Mowrey at the time and one-half rate for working on Monday, July 20 and Tuesday, July 21, 1959, which were rest days of the Industry Clerk position No. 67, which action was in violation of Rule 26 (a).

3. The Carrier shall be required to compensate Clerk D. M. Mowrey for the difference between the pro rata rate of \$18.90 allowed and the punitive rate of \$28.35 to which he was entitled, amount \$9.45, for each date, Monday, July 20 and Tuesday, July 21, 1959, account working on the rest days of Industry Clerk position No. 67, in violation of Rule 26 (a).

EMPLOYEES' STATEMENT OF FACTS: Clerk D. M. Mowrey, seniority date December 31, 1946 on the Kansas City Terminal Division Station and Yards seniority district and roster, held a regular assignment of Rest Day Relief Clerk, position No. 5, scheduled to work as follows:

Saturday and Sunday—General Clerk No. 5 7 A. M.-3 P. M. rate \$18.90
Monday and Tuesday—General Clerk No. 6 7 A. M.-3 P. M. rate 18.90
Wednesday—General Clerk No. 9 7 A. M.-3 P. M. rate 18.90
Rest days—Thursday and Friday.

On July 2, 1959, per Advertisement Bulletin No. 129, Agent C. R. High advertised the permanent vacancy of Industry Clerk position No. 67 for bids, with bids closing at 11:59 P. M., July 9, 1959. The assigned hours of position No. 67 were 7 A. M. to 3 P. M., rest days Monday and Tuesday, rate \$18.90 per day.

Clerk Mowrey was the senior employe making bid for that position, how-

penalties for withholding an employe under these circumstances can be no more or no less than those agreed to by the parties. Carrier did not agree to these penalties only to provide a gratuity. The reason for such penalties is to provide such an employe a measure of compensation to make up for his being withheld from a more desirable position. In the instant case claimant has been paid all the penalties provided for in the agreement. The Employes are requesting this Board to amend the rule to provide additional payments to the employe which the parties have not seen fit to write into the rules on the property. It is, of course, universally recognized that this Board is without authority to change the rules to provide that which the parties did not see fit to provide. Carrier's position in this case is supported by long years of application on the property and the Employes are here attempting a new and different application of a long established rule which is contrary to its long accepted application on the property.

The rules and their accepted application on the property support Carrier's position. The burden of proving otherwise rests squarely with the Employes and they have failed completely to support their position in this case.

This claim is totally lacking in merit and we respectfully request that it be denied.

OPINION OF BOARD: Contention was made in this claim that Clerk D. M. Mowrey was entitled to be paid at the rate of time and one-half for working on Monday, July 20, 1959 and Tuesday, July 21, 1959.

Claim was made this violated Rule 26 (a) of the Agreement of September 1, 1952 between the parties.

Facts. Carrier by its Vacancy Bulletin No. 129 advertised Industry Clerk position No. 67, bids to close at 11:59 P. M., July 9, 1959. Clerk D. M. Mowrey was the successful bidder.

In violation of Rule 8 (c) Carrier did not assign Clerk Mowrey to position 67 until July 22, 1959 per its Assignment Bulletin No. 129.

Carrier admitted it violated Rule 8 (c) and chose to pay Mr. Mowrey pursuant to the penalties prescribed under Rule 10:

"(a) When an employe is awarded a bulletined position and is not moved thereto on or before the date assignment notice is issued, he will be paid the higher rate of the two positions effective with such date. (Emphasis ours.)

(b) If an employe is not moved within five days after issuance of an assignment notice . . . , the employe will be paid additionally \$3.60 per day for each assigned work day . . . Should the delay in making the move deprive the employe of work on a holiday or on one or both of the rest days of his new position, he will be made whole and on such days the \$3.60 allowance will not apply . . ." (Emphasis ours.)

Carrier recognized the penalties of Rule 10 and paid the Claimant at the higher rate of the Industry Clerk position No. 67 effective July 15, 1959 while working on his former position but refused him the penalty payment of \$3.60 for July 20 and 21, 1959 for they were rest days of the new position, Industry Clerk No. 67.

We believe the Carrier is correct it should not have paid Claimant the \$3.60 penalty allowance for such days for Rule 10 is clear:

"Should the delay in making the move deprive the employe of work on . . . one or both of the rest days of his new position, he will be made whole and on such days the \$3.60 allowance will not apply." (Emphasis ours.)

Claimant did in fact work the rest days of Industry Clerk position No. 67 while tied to his old position.

Application of the rules seems inconsistent. On one hand the rule is applied to recognize the right of the Claimant to compensation at the higher rate because he should have been promoted to the better position. On the other hand compensation is denied him for working the rest days of that better position. Rule 26(a) should apply in computing his compensation for working Monday, July 20, 1959 and Tuesday, July 21, 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 allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1964.