# Award No. 16611
# Docket No. CL-17015

## 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

## CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6214) that:

1. Carrier violated the Clerks' Rules Agreement at Minneapolis, Minn. by unilaterally removing a regularly assigned employe from his regular position to perform keypunching, thereby requiring him to suspend work of his position to absorb overtime that otherwise would have been required of a Keypunch Operator position.

2. Carrier shall now be required to compensate employe B. C. Ruddy, Jr., regularly assigned occupant of Keypunch Operator Position 8774, at the penalty rate of his position for the number of hours on the following dates:

| | |
|---|---|
| 8/23/65 – 5 hrs. 25 min. | 9/13/65 – 7 hrs. 20 min. |
| 8/24/65 – 6 hrs. | 9/14/65 – 7 hrs. |
| 8/25/65 – 4 hrs. 57 min. | 9/15/65 – 8 hrs. |
| 8/26/65 – 5 hrs. 10 min. | 9/16/65 – 8 hrs. |
| 8/27/65 – 1 hr. 30 min. | 9/17/65 – 8 hrs. |
| 8/30/65 – 6 hrs. 20 min. | 9/20/65 – 8 hrs. |
| 8/31/65 – 4 hrs. 45 min. | 9/21/65 – 8 hrs. |
| 9/1/65 – 5 hrs. 20 min. | 9/22/65 – 8 hrs. |
| 9/3/65 – 4 hrs. 45 min. | 9/23/65 – 8 hrs. |
| 9/7/65 – 6 hrs. 55 min. | 9/24/65 – 8 hrs. |
| 9/8/65 – 7 hrs. 10 min. | 10/7/65 – 6 hrs. 45 min. |
| 9/9/65 – 7 hrs. 5 min. | 10/8/65 – 7 hrs. 10 min. |
| 9/10/65 – 6 hrs. 40 min. | 10/12/65 – 8 hrs. |
| | 10/13/65 – 4 hrs. |

EMPLOYES' STATEMENT OF FACTS: Employe B. C. Ruddy, Jr. is the regularly assigned occupant of Keypunch Operator Position 8774 at Minneapolis, Minn. in Seniority District No. 150.

**OPINION OF BOARD:** Employes regularly assigned to positions covered by Clerks' Agreement, other than Keypunch Operator, were allegedly transferred during their regularly assigned hours, on specified dates, to Keypunch Operator work. The transferred employes are herein called Transferees.

The theory of Clerks' case is that Carrier by requiring Transferees to vacate their regularly assigned positions during the regularly assigned hours of their positions and temporarily assigning them to Keypunch Operator work caused Transferees to suspend work on their respective regularly assigned positions to absorb overtime which otherwise would have accured to Claimant, a regularly assigned Keypunch Operator, all in violation of the following provision of Rule 32–Overtime:

> "(h) Employes will not be required to suspend work during regular hours to absorb overtime."

It is Carrier's position that: (1) Transferees were not required to suspend work during their regular hours; (2) Transferees worked no overtime; (3) it is an assumption on the part of Clerks that Claimant would have worked overtime absent the transfers; (4) Claimant was not directed by Carrier to work overtime — an indispensable condition to working overtime, prescribed in the following provision of Rule 32:

> (a) **No overtime hours will be worked except by direction of proper authority,** except in cases of emergency where advance authority is not obtainable." (Emphasis ours.)

(5) Clerks have not proven the existence of an "emergency"; and (6) Rule 17, which reads in material part, with emphasis supplied:

"RULE 17.

PRESERVATION OF RATES

> (a) Employes **temporarily** or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes **temporarily** assigned to lower rated positions shall not have their rates reduced.
>
> (b) **An employe temporarily assigned by proper authority** to a position paying a higher rate than the position to which regularly assigned for four (4) hours or more in one day will be allowed the higher rate for the entire day. **An employe temporarily assigned by proper authority** to a position paying a higher rate of pay for less than four (4) hours in one day will be paid the higher rate therefor on the minute basis.
>
> (c) **A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or the temporary assignee does the work irrespective of the presence of the regular employe.** Assisting a higher rated employe due to the temporary increase in the volume of work does not constitute a temporary assignment."

is a recognition of Carrier's managerial prerogative to make the temporary assignments alleged to be violative of the Agreement.

In our consideration of this case we have studied the large number of our Awards, cited by the parties, in which provisions identical to or like Rule 32 (h) were at issue — included were denial Awards 10625 and 14480 in which the parties herein were parties therein. Any attempt, we have concluded, to distinguish or interpolate the Opinions in those Awards would only accentuate the conflicts and compound confusion. Consequently, we approach resolution of the issue as though **de novo** and consider it in the light of this Board's jurisdiction and the application of principles of contract construction.

Clerks would have us insert into Rule 32 (h) the phrase within the parenthesis:

> "Employes will not be required to suspend work (on their positions) during regular hours to absorb overtime."

This we cannot do because: (1) this Board has no jurisdiction to add to or subtract from the provisions of the Agreement; (2) in the absence of substantial probative evidence of intent of the parties to the contrary, the words in a rule must be interpreted as communicating their usual common meaning.

Rule 32 (h) is addressed to a situation consisting of two factors: (1) an employe required "to suspend work **during regular hours**"; and (2) the suspension of work **during regular hours** with the design of absorbing overtime; meaning, the holding out of service of an employe during his regular assigned hours to evade payment of the overtime rate penalties prescribed in the Forty Hour Week Agreement. Inasmuch as Clerks admit that Transferees were not required to suspend work during their regular hours its has failed to prove a violation of Rule 32 (h).

We now move to consideration of Rule 17. Clerks say this rule by its caption is only concerned with rates of pay and is not susceptible to any other concoction. We construe the Rule as prescribing the rates of pay agreed upon by the parties upon the exercise by Carrier of a management prerogative recognized by the parties — the temporary assignment by Carrier of an employe to work on a position other than one to which he is regularly assigned.

For the foregoing reasons we will deny the Claim.

**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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1968.

## LABOR MEMBER'S DISSENT TO AWARD NO. 16611 (DOCKET CL-17015)

The majority erred in agreeing with Carrier's contentions that:

"* * * (1) Transferees were not required to suspend work during their regular hours; (2) Transferees worked no overtime; (3) it is an assumption on the part of Clerks that Claimant would have worked overtime absent the transfers; (4) Claimant was not directed by Carrier to work overtime — an indispensable condition to working overtime, prescribed in the following provision of Rule 32:

> '(a) **No overtime hours will be worked except by direction of proper authority,** except in cases of emergency where advance authority is not obtainable.' (Emphasis ours.)

(5) Clerks have not proven the existence of an 'emergency'; and (6) Rule 17, which reads in material part, with emphasis supplied:

'RULE 17. PRESERVATION OF RATES

(a) Employes **temporarily** or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes **temporarily** assigned to lower rated positions shall not have their rates reduced.

(b) **An employe temporarily assigned by proper authority** to a position paying a higher rate than the position to which regularly assigned for four (4) hours or more in one day will be allowed the higher rate for the entire day. **An employe temporarily assigned by proper authority** to a position paying a higher rate of pay for less than four (4) hours in one day will be paid the higher rate therefor on the minute basis.

(c) **A "temporary assignment" contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or the temporary assignee does the work irrespective of the presence of the regular employe.** Assisting a higher

rated employe due to the temporary increase in the volume of work does not constitute a temporary assignment'."

Rule 32–Overtime, reads in part:

"(h) Employes will not be required to suspend work during regular hours to absorb overtime."

To answer Carrier's contentions in items (1), (2), (3), (4), (5) and (6), we have but to refer to Awards of this Division to dispel such drivel; for example, Award 4646 (Referee Charles S. Connell) held in part as follows:

"The intent and purpose of the Seniority and Bulletining Rules is to protect the Employes' rights to the respective positions they had secured, and not to require them to suspend their regular work to absorb overtime, which either they or other regular employes would have earned had such suspension not taken place. This Board has so held in many awards. Nos. 2695, 2823, 3417, 4499 and 4500. And the same principle applies, even if the hours worked are the same as the hours of the employes' regular assignment. The foregoing rulings are hereby reaffirmed and the claims will be sustained."

See Awards 2695, 2823, 3417, 4499 and 4500 cited therein.

It is axiomatic that with Carrier's violative action in having required a regularly assigned employe to move off his position to work an entirely different position, there was no need for Carrier to authorize overtime, either to Claimant or to the "transferees."

Clerks never suggested that an emergency existed — and neither did the Carrier. Contrary to item (5) contention, if an emergency had existed, the burden of proof fell on Carrier, not the Employes, to prove such an emergency existed and compelled Carrier's actions.

With respect to item (6) pertaining to Rule 17 — Preservation of Rates, we call attention to Award 4352 in which Referee Francis J. Robertson held in part pertinent thereto:

"Carrier advances four contentions justifying its shifting of Mr. Kramer from his regular assignment: * * * (3) That is was permissible under Rule 48 (the Preservation of Rate Rule). That contention has been advanced before and previous Awards of this Board have rejected it, said Awards holding that such a rule is purely a rating provision and not one which permits the shifting of an employe from his regular assignment.* * *.

* * * * *

It was said in Award 2695 that regular assignments should not be disturbed except as a last recourse. There was a recourse here, — the occupants of the other positions could have been called in to work their assignments on their relief days.

Award 2695 involved the same parties as the current docket. There it was held that it was necessary to give effect to Rule 48 (now 41) of

the Agreement providing that 'Employes will not be required to suspend work during regular hours to absorb overtime.' The effect of the suspension of work on Mr. Kramer's position during regular hours was to prevent the payment of overtime to the regular occupants of those positions on their relief days. The factor of the hours of the other assignments being identical with those of claimant on the days in question does not make it any the less a violation of the rule, if the actual result was to absorb the payment of overtime on the other positions (see Award 3417)."

The Referee was skillfully persuaded that the parenthesis he added in Rule 32(h) was the only way which Clerks could hope to be sustained. We use the word "skillfully" because, although nearly all Carriers have argued to that effect over the many years in which this standard rule has been in existence, we find at this late date a neutral entrapped by such persuasive mumbo jumbo.

Attention is directed to Award 5105 in which Referee Jay S. Parker held in part:

"The Employes, as will be noted from the claim itself, insist that Rule 41 authorizes and requires a sustaining Award. It reads:

'Employes will not be required to suspend work during regular hours to absorb overtime.'

On the other hand the Carrier contends that Rule 48, titled 'Preservation of Rates,' is decisive and permitted Claimant's temporary assignment to Yard Clerk work without violation of Rule 41. The pertinent portion of such rule reads:

'Employes temporarily or permanently assigned to higher rated positions or work shall receive the higher rate while occupying such positions or performing such work, unless absent employe is being paid account of sick leave allowance; * * *'

The Carrier's claim that under Rule 48 it had the right to temporarily assign the Claimants to work of a Yard Clerk's position during their regularly assigned hours as Messengers without regard to the provisions of Rule 41, and hence such rule has no application to a determination of the instant controversy, is not new and we have little difficulty in concluding it cannot be upheld. Such claims have been definitely rejected by repeated decisions of this Division of the Board on the basis that rules similar to Rule 48 constitute merely rating provisions and are not to be construed in such manner as to impair the effectiveness of rules prohibiting suspension of work to absorb overtime. See Awards 3416, 2859 and 2823.

Rule 41 relied on by the Employes is clear and unambiguous. No exceptions are to be found therein. It prohibits the Carrier from suspending work of employes during regular hours for the purpose of absorbing overtime. That its terms encompass overtime absorbed by an employe, suspended during his regular hours, on the position of

another employe as well as on his own position is no longer an open question. We have expressly so held in Awards Nos. 2823 (Referee Shake) and 2884 (Referee Tilford). Other decisions placing a like construction upon the rule by sustaining claims based upon its alleged violation by reason of a suspended employe having absorbed overtime on a position other than his own, are so numerous that they hardly require citation. For just a few of them, with reference to the Referee sitting as a member of this Division of the Board at the time they were handed down, see Awards Nos. 4499, 4500, 2695 (Carter); 3873 (Douglas); 3301 (Simmons); 4646, 4690, 4692 (Connell); 2859 (Youngdahl); 4352 (Robertson); 3416, 3417 (Blake); 3582 (Rudolph)."

In Award 5578, under "Position of Carrier," we find the following arguments advanced by the Carrier involved:

"The work on the position of head tabulating clerk is just as important one day as another and there was no particular circumstance at the time Mr. D. C. Brown requested a leave of absence to justify denying it without running afoul of the 'unjust treatment' rule. Therefore, carrier had no choice but to grant the request.

As pointed out above, the absence was to be such short duration that it would not have been feasible to scramble the entire office in order to fill both positions. Mr. Hyder was asked to report to the tabulating room, this situation is adequately covered by Rule 37(a), as follows:

'(a) Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced.'

The rule just quoted indicates that, under some conditions and under certain circumstances, such as we have here, employes must be temporarily shifted from one position to another in order for carrier's work to proceed efficiently. Were this not true there would be no necessity for the rule which protects the employes' rates of pay under those circumstances."

However, Referee Dudley E. Whiting answered those assertions in the following manner:

"OPINION OF BOARD: Starting with our Award No. 2346 and continuing to the present time, we have uniformly held that to require an employe to suspend work on his regularly assigned position in order to work on another position, except in emergencies, is considered to be a suspension of work to absorb overtime in violation of the rule prohibiting such action. In some of those Awards there were differences in factual situations but the factual situation involved in Award No. 4499 is in all material respects identical to the situation involved here.

Thus in effect the Carrier here is asking us to overrule that consistent line of decisions. Certainly among the fundamental purposes

sought to be achieved by the establishment of this Board were (1) uniformity of interpretation of the rules, (2) stabilization of relationships between the Carriers and the Employe Organizations, and (3) the diminishment of causes for disputes between them. To overrule our prior decisions, which uniformly interpreted the no suspension of work to absorb overtime rule, would be subversive of those fundamental purposes. Under such circumstances, if a change is proper and desirable we think it should be obtained through the amendment of the rules by the parties rather than by overturning our prior Awards."

We next refer to what Referee A. Langley Coffey stated in Award 7346, to wit:

"Carrier's contention in this docket that no overtime was worked or needed only begs the question. Overtime results primarily from the needs of the service it is true, but some need has been demonstrated when a position is worked by one regularly and normally assigned to another position."

Referee Nathan Engelstein held in Award 12227:

"When regular Signal Maintainer McKay was required to perform work other than that accruing to a signal maintainer, Carrier eliminated the need to employ another construction worker to execute this work. This action had the effect of depriving another employe of the opportunity of doing work he might normally perform on an overtime basis. Thus, we find a violation of Rule No. 312, which states 'Employes will not be required to suspend work during regular work hours to absorb overtime'."

We direct further attention to the following Third Division Awards in support of the Employes' claim in this dispute:

| Award | Referee |
|---|---|
| 2859 | Luther W. Youngdahl |
| 2884 | Henry J. Tilford |
| 3416 | Bruce Blake |
| 4690 | Charles S. Connell |
| 5315 | Francis J. Robertson |
| 5331 | Francis J. Robertson |
| 5640 | Hubert Wyckoff |
| 5876 | John W. Yeager |
| 6015 | Fred W. Messmore |
| 6308 | Adolph E. Wenke |
| 6661 | Hubert Wyckoff |
| 6732 | Jay S. Parker |
| 8205 | Sidney A. Wolff |
| 9582 | Howard A. Johnson |

Rule 17 contains the phrase "by proper authority." But neither that rule nor any other rule in the Clerks' Agreement defines "proper authority." Lacking such definition, the Majority provided one: a Carrier officer or, as the Award holds, "managerial prerogative."

The dissenter would like to submit that "proper authority" is the authority vested in all the rules which were negotiated and consummated between the parties signatory to the collectively bargained Agreement. Carriers steadfastly hold to the proposition that any action taken, which has not been specifically bargained away in the rules of the agreement, is "managerial prerogative." Here we find the Majority leaping to the conclusion that the language used in Rule 17, i.e., "by proper authority" gives Carrier the right, at its whim and fancy, to disregard and abrogate any and all other rules. By so holding, the seniority of an employe is rendered null and void; bulletining of a position become a mockery since, after having been declared the successful applicant to a titled specific position, with described preponderating duties to perform thereon for which he is held personally responsible, the "proper authority" (a supervisor, for example) removes him from his contractually secured position and requires him to work another titled specific position which, likewise, has been secured by another employe through the contractual provisions of the collectively bargained Agreement. And so the snowball rolls down a steep hill, gathering momentum and becoming impossible to stop, except by "managerial prerogative."

Such abortive power, that of elminating all other rules, was never vested in Carrier through the provisions of Rule 17. The Referee, in this Award 16611, should have stopped the snowball which was started by the decisions rendered in Awards 10625 (Levinson) and 14480 (Dugan) to which he has referred and in which he erroneously concurred.

The decision rendered is not supported by the language of the Agreement and the consistent line of Awards rejecting such construction.

For the foregoing reasons, I dissent.

**C. E. Kief**
Labor Member
10-17-68

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