Award Number 17323
Docket Number CL-17901

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

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

ERIE-LACKAWANNA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6478) that:

1. Carrier violated the rules of the Clerks' Agreement, particularly Rule 34, when on November 7, 1966 and subsequent dates, it failed to properly compensate W. R. Bergold for overtime work performed.

2. Carrier shall now be required to compensate Mr. Bergold for the difference in rates of pay due him from November 6, 1966 until the violation is corrected. (Claim 1897)

EMPLOYES' STATEMENT OF FACTS: On November 7, 1966, W. R. Bergold was regularly assigned to position of Chief Clerk at 28th Street Station, New York City, rate $553.38 per month, overtime rate $4.751 per hour. On the above date, Carrier required overtime on position of General Clerk-Xerox Operator, rate $22.6704 per day, overtime rate $4.2507 per hour. Subsequent to that date, both positions were subject to general wage increases.

Under the provisions of the rules agreement, employe Bergold, after completing his tour of duty as Chief Clerk, worked three (3) hours overtime on the General Clerk-Xerox Operator's position on November 7, 1966 and various other dates when the regular assigned employe elected not to work overtime. Carrier compensated him on the basis of time and one-half at rate of the position worked, namely $4.2507 per hour instead of on the basis of his Chief Clerk's rate of $4.751 per hour. The fact that the claimant was entitled to the overtime work and was authorized by the Carrier to work overtime on the General Clerk-Xerox Operator's position is not in dispute. Dates on which claimant worked overtime on the General Clerk-Xerox Operator's position and hours worked are shown below:

November 7, 1966-3 Hrs.	November 15, 1966- 30 Min.
November 8, 1966-3 Hrs.	November 16, 1966-3 Hrs.
November 9, 1966-3 Hrs. 30 Min.	November 17, 1966-3 Hrs.
November 10, 1966-3 Hrs. 30 Min.	November 18, 1966-3 Hrs.
November 11, 1966-3 Hrs.	November 21, 1966-3 Hrs.
November 14, 1966-3 Hrs.	November 22, 1966-3 Hrs.

matters where it was discussed in conference and denied with denial confirmed under date of January 5, 1968 (Carrier Exhibit E). Subsequent correspondence is evidenced by Carrier's Exhibits "F" and "G" the latter listing specific "subsequent dates" of alleged violations as follows:

Nov. 8, 1966-3 Hrs.	Nov. 22, 1966-3 Hrs.
Nov. 9, 1966-3 Hrs. 30 min.	Dec. 9, 1966-2 Hrs. 30 min.
Nov. 10, 1966-3 Hrs. 30 min.	Dec. 14, 1966-2 Hrs.
Nov. 11, 1966-3 Hrs.	Dec. 15, 1966-5 Hrs. 30 min.
Nov. 14, 1966-3 Hrs.	Feb. 14, 1967-3 Hrs.
Nov. 15, 1966- 30 min.	Mar. 17, 1967-5 Hrs.
Nov. 16, 1966-3 Hrs.	May 19, 1967-3 Hrs.
Nov. 17, 1966-3 Hrs.	Sep. 21, 1967-5 Hrs. 30 min.
Nov. 18, 1966-3 Hrs.	Sep. 22, 1967-6 Hrs. 30 min.
Nov. 21, 1966-3 Hrs.	Mar. 15, 1968-3 Hrs.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant is regularly assigned to position of Chief Clerk at 28th Street Station, New York City; hours 8:00 A.M. to 4:30 P.M., Monday to Friday, inclusive; rest days on Saturday and Sunday. On November 7, 1966, and subsequent dates, Claimant, after completing work on his own position, worked on other positions on an overtime basis because of absence of regularly assigned employes or because incumbents of such other positions did not work overtime.

For overtime worked on such other positions Claimant was paid at the overtime rate of the position he filled rather than at the higher rate of his own regularly assigned position. Claim is made that the Claimant be compensated for the difference between what he was paid and what he would have received had he been paid at the rate of his own position. The Employes claim a violation of Rule 34, which insofar as is here pertinent, reads as follows:

> "Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such position. The temporary assignee, if worked four (4) hours or more on a higher rated position, will be paid the higher rate for the day. Employes temporarily assigned to lower rated positions shall not have their rates reduced."

The Employes contend thet the Rule applies in all circumstances and specifically provides that employes temporarily assigned to lower rated positions shall not have their rates reduced; and that under the rules and practice in effect on the property the Carrier was obligated to utilize the services of the senior, qualified and available employe.

Carrier contends that Claimant was not assigned by Carrier to perform the required work, but to the contrary the Claimant was in the capacity of a "volunteer" through exercise of his seniority rights. Carrier further contends that the practice in effect has been to compensate employes in similar circumstances at the rate of the position filled rather than at the higher rate.

Unfortunately the Board's holdings have not been consistent on the question of whether the employe in circumstances such as exist in this case

was temporarily assigned to the lower-rated position within the meaning of the Rule. We have carefully considered the prior awards that have been cited by the parties and in the light of the record before us we are not prepared to hold that the Claimant was a "volunteer" rather than being "assigned." Had Carrier presented a record of consistently having paid the overtime rate of the position filled instead of the higher rate we may well have reached a different conclusion. However, only one prior instance was presented and the parties were in dispute as to the basis on which the lower rate was paid in that instance. One prior payment, of course, is insufficient evidence to show a consistent past practice.

The parties are also in dispute as to whether or not the claim involved covers only one specific date or whether it also includes subsequent dates. The record reveals that the initial claim included "subsequent dates" and that both parties referred to the claim as including "subsequent dates" in correspondence exchanged on the property. The record does not reveal any amendment or change having been made in the claim during the handling on appeal. Accordingly, we hold that the claim for "subsequent dates" is properly included.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1969.

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