

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19651
Docket Number CL-18857

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline & Steamship Clerks,
(Freight Handlers, Express & Station Employees
(
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6801)
that:

1. The Carrier violated the rules of the Clerks' Agreement at MK Yards when, beginning July 29, 1968, it required and/or permitted employees not covered by the Clerks' Agreement to perform routine yard clerical work that is covered by the Clerks' Agreement, on an overtime basis.

2. Carrier shall now be required to compensate Clerk R. L. Austin, at pro-rata rate of pay, for all overtime worked by employees not covered by the Clerks' Agreement, performing routine yard clerical work as follows:

<u>DATE</u>	<u>OVERTIME WORKED</u>
July 29, 1968	6 hours
July 30, 1968	6 hours
July 31, 1968	6 hours
August 1, 1968	6 hours
August 2, 1968	6 hours
August 5, 1968	2 hours
August 6, 1968	3 hours
August 7, 1968	6 hours
August 8, 1968	5 hours
August 9, 1968	6 hours
August 10, 1968	1 hour
August 11, 1968	3 hours
August 12, 1968	4 hours
August 13, 1968	2 hours
August 14, 1968	2 hours
August 15, 1968	2 hours
August 16, 1968	2 hours
August 18, 1968	1 hour
August 19, 1968	1 hour
August 20, 1968	2 hours
August 21, 1968	3 hours
August 22, 1968	2 hours
August 23, 1968	3 hours

<u>DATE</u>	<u>OVERTIME WORKED</u>
August 24, 1968	2 hours 30 minutes
August 26, 1968	2 hours
August 27, 1968	2 hours
August 28, 1968	1 hour
August 29, 1968	1 hour 30 minutes
August 30, 1968	1 hour 30 minutes
September 1, 1968	3 hours
September 2, 1968	1 hour
September 3, 1968	1 hour 30 minutes
September 4, 1968	3 hours
September 5, 1968	1 hour 30 minutes
September 6, 1968	3 hours
September 8, 1968	3 hours
September 9, 1968	3 hours
September 10, 1968	3 hours
September 11, 1968	2 hours 30 minutes
September 12, 1968	3 hours
September 16, 1968	1 hour
September 17, 1968	1 hour
September 18, 1968	1 hour 30 minutes
September 19, 1968	2 hours
September 22, 1968	1 hour 30 minutes
September 23, 1968	30 minutes
September 24, 1968	2 hours
September 25, 1968	1 hour 30 minutes
September 26, 1968	1 hour 30 minutes
September 27, 1968	1 hour
September 29, 1968	2 hours
September 30, 1968	1 hour 30 minutes

OPINION OF BOARD: This dispute arises under Agreement between the parties effective September 1, 1949. Third party notice has been given to the Transportation-Communication Division of the Brotherhood of Railway, Airline and Steamship Clerks; however, the T-C Division has not filed a submission.

When this dispute arose the Agent-Telegrapher and the General Clerk (claimant herein) were the only employees at Carrier's MK Yard, near Houston, Texas. With Saturday and Sunday rest days, their regularly assigned hours were respectively 8 am to 5 pm and 11 pm to 8 am. Normally the agent's daily duties consisted of about four (4) hours of communication work and about four (4) hours of station clerical work.

On July 29, 1968 and subsequently the agent performed clerical work on an overtime basis continuous with the end of his assigned hours at 5 pm. This work consisted of checking yards and tracks, preparing switch list of such tracks for switching purposes, and preparing outbound train list. It is alleged by Petitioner that this work was work assigned to the claimant clerk during his regular assigned working hours.

It is not disputed that the Agreement permitted the agent to perform clerical work during his regularly assigned hours. The dispute is raised by Petitioner's contention that the regularly assigned General Clerk had a preferential right to the clerical work which was performed by the Agent on an overtime basis after 5 pm.

The Carrier's position is that the dispute is governed by paragraph (b) (1) of the Memorandum of Agreement effective November 1, 1940, and that, thereunder, the agent, being the only employee on duty, was entitled to perform any amount of clerical work, including clerical work on an overtime basis. Carrier also states that because the disputed work is of the same nature and kind performed by the agent during his regular assignment, Carrier was obligated to use the agent for the authorized overtime continuous with the ending of his regular tour of duty at 5 pm.

Petitioner's position is that Rules 1, 2, and 45, and the 1940 Memorandum Agreement, when read together, limit the agent's performance of clerical work to his regularly assigned tour of duty and that, as between an available clerk and the agent, the clerk had a preferential right to clerical work performed on an overtime basis.

The pertinent Agreement provisions are Rule 45(b) and paragraphs (a) and (b) of the 1940 Memorandum Agreement which read as follows:

"RULE 45. AUTHORIZING OVERTIME

* * * * *

(b) In working overtime before or after assigned hours, employees regularly assigned to class of work for which overtime is necessary shall be given preference."

"MEMORANDUM AGREEMENT

(a) It is recognized and agreed that all of the work referred to in Rule 1 of the Agreement dated November 1, 1940, between the Carrier and the Brotherhood belongs to and will be assigned to employees holding seniority rights and working under the Clerk's Agreement, except as provided below:

"(b) Due to the peculiar conditions existing in station service it is agreed that:

(1) Where an Agent covered by an agreement other than the Clerks' Agreement is the only employe on duty not covered by the Clerks' Agreement the Carrier may assign such Agent any work covered by the Clerks' Agreement.

(2) At stations where two employes not covered by the Clerks' Agreement are on duty at the same time and the work covered by the Clerks' Agreement is less than five hours the Carrier may assign such work to those two positions.

(3) In all instances other than those set out in Items (1) and (2) above, it is agreed that where the work covered by the Clerks' Agreement is less than three hours on any shift of eight hours the Carrier may assign such work to station employes not covered by the Clerks' Agreement."

We find on the whole record that the disputed overtime clerical work was work assigned to General Clerk Austin during his regular assigned working hours. It is of no consequence that the work may have been of the "same nature and kind" performed by the agent during his regular tour. Such work was expressly authorized by the Agreement provisions and there is no dispute concerning the agent's right to perform clerical work during his regular tour. Further, from our study of the pertinent Awards and applicable Agreement provisions, we conclude that the claimant had a right of preference to the disputed overtime clerical work under Rule 45(b) of the Agreement.

In Awards 3360 (Tipton) and 3761 (Wenke) this Board dealt with this same Memorandum of Agreement, effective November 1, 1940, and a clerks' preference rule which covered both overtime and extra time work on Sundays and holidays. In each of these Awards this Board rejected Carrier's reasons for permitting clerical work to be performed on Sundays and/or holidays by an employee not covered by the Clerks' Agreement. In Award 3360 we stated that:

"This Board has repeatedly held that work covered by agreements cannot be removed from the scope and operation of the agreements arbitrarily. We have consistently held that work contemplated by the agreements, Rule 1 and 2, and the Memorandum Agreement, must be assigned to employes within the agreements, and for whose benefit the agreements were made, and this applies to Sunday, holiday and overtime work as well as regular week day work. See Awards Nos. 2071, 2549, 3191 and 3192. See Also Rule 45(b).

"Stephens had only the right to perform on Sunday and holidays the same work he performed on week days. He had no right to perform on Sundays and holidays the work that Mitchell, the Military Transportation Clerk, performed on week days. * * *"

In Award 3761 we again ruled that Carrier had violated a preference rule by actions which it contended were justified by the exception in the paragraph (b) (2) provision of the Memorandum of Agreement. In speaking about the application of the paragraph (b) (2) provision, we pointed out that:

"Carrier seeks to justify its action by provision (b) 2 of their effective Memorandum Agreement. This provides as follows:

'At stations where two employes not covered by the Clerks' Agreement are on duty at the same time and the work covered by the Clerks' Agreement is less than five hours the Carrier may assign such work to those two positions.'

This provision has application only when the conditions referred to regularly exist. It does not apply to a situation, such as here, where the work is regularly done on week days by employes under the agreement. If, under the latter situation, part of the same class of work exists on Sundays it must be assigned to and performed by employes entitled to it thereunder. This provision does not permit the Carrier to do otherwise."

Also see Award 17844 (Devine) wherein this Board rejected a contention by Carrier which was similar to Carrier's contention herein concerning paragraph (b) (1) of the Memorandum of Agreement effective November 1, 1940.

These Awards make it clear that the paragraph (b) exceptions of the Memorandum Agreement apply only where the requisite circumstances regularly exist and that the exceptions do not apply to a situation where, as in the instant dispute, a class of work, which is regularly assigned to employees covered by the Clerks' Agreement, needs to be performed on an overtime basis. And while the Awards dealt with clerical work performed on Sundays and/or holidays by non-clerical employees, as compared with overtime work in the instant dispute, the underlying principle of the Awards has equal application here. Thus, while paragraph (b) (1) permitted the agent herein to perform clerical work during his regular tour, the question of clerical overtime work is controlled by Rule 45(b), and not by paragraph (b) (1) of the Memorandum Agreement.

Moreover, the structure and text of the Memorandum of Agreement make it clear that the paragraph (b) exceptions must be carefully confined to certain, qualifying circumstances and that the exceptions cease to apply when the qualifying circumstances cease to obtain. The exceptions in paragraphs (b) (2) and (b) (3) are structured so as to become automatically inapplicable when the subject clerical work reaches the number of hours specified in the exceptions. The structure of

paragraph (b) (1) is slightly different in that it contains no express prohibition against clerical overtime by the agent and, hence, automatic inapplicability is not built into the text of paragraph (b) (1) itself. In this instance the point at which the exception ceases to apply is prescribed by Rule 45 (b) which becomes the controlling provision, if a clerk is available, as soon as clerical overtime comes into existence under paragraph (b) (1). Furthermore, and contrary to Carrier's position, it is not significant that the agent performed the overtime clerical work continuous with the ending of his regular assignment. Rule 45(b) covers overtime "before or after assigned hours" and the record contains no showing of an emergency or any other reason why the work could not have been performed by the claimant General Clerk.

We note in conclusion that, in the settlement of Award 2256, the parties themselves reached an understanding on the property which is in conformity with our rulings herein. In a January 1, 1948 letter to Mr. J. L. Dyer, Southwestern Representative, Brotherhood of Railway Clerks, the Carrier's Chief Personnel Officer, Mr. M. T. Short stated the following:

"NO. 14 - ROBSTOWN (AWARD 2256)

We will advertise General Clerk's position, rate \$10.84 per day, on the basis of 365 days per year. You advised that there would be no objection to Telegrapher-Clerk No. 3 selling tickets and also to make Train No. 61's waybills, if the latter is necessary during his tour of duty." (Emphasis supplied)

For the foregoing reasons we shall sustain 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 Employees involved in this dispute are respectively Carrier and Employees 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

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That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of March 1973.