

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21411  
Docket Number CL-21368

Irwin M. Lieberman, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (   
(Missouri-Kansas-Texas Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7976,  
that:

1. The Carrier violated the Agreement between the parties at Durant, Oklahoma, June 13, 19 and 20, 1974, when it required Mr. J. R. Sullivan to suspend work and pay on his regular assigned relief position on these dates and required him to work another position at that location outside the hours of his regular assignment, then failed and refused to properly compensate him for his service in accordance with Agreement provisions.

2. Carrier shall now be required to compensate Mr. J. R. Sullivan eight (8) hours' pay at the pro rata rate of Third Trick Telegrapher-Clerk Position No. 004 and the difference in pay between the pro rata rate allowed and the time and one-half rate of Second Trick Telegrapher-Clerk Position No. 2680 at Durant, Oklahoma, for each date June 13, 19 and 20, 1974.

OPINION OF BOARD: Claimant was regularly assigned to a Relief Telegrapher-Clerk position which included a first trick assignment on Sundays, a second trick assignment on Mondays and Tuesdays, and a third trick assignment on Wednesdays and Thursdays. On the three claim dates, Thursday, June 13, Wednesday June 19 and Thursday June 20, 1974, Claimant was required to suspend work on his regular position and was assigned to a second trick Telegrapher-Clerk position which was temporarily vacant on those dates.

It must be noted initially that both parties to this dispute have raised new issues and submitted new material in their submissions which were not discussed or presented during the handling of this dispute on the property. In accordance with well established practice (and Circular No. 1 dated October 10, 1934) such material cannot be considered by this Board.

The most pertinent Rule cited by Petitioner is Rule 48, Absorbing Overtime, which provides in part:

"Employees will not be required to suspend work during regular hours to absorb overtime.

NOTE: Under the provisions of this rule, an employee may not be requested to suspend work and pay during his tour of duty to absorb overtime previously earned or in anticipation of overtime to be earned by him."

Petitioner argues that there was no emergency implicit in the situation and further that Claimant "stood to be called for overtime had he been allowed to work his regular assignment." Petitioner cites a number of other Rules and a series of Awards in support of its basic position. In essence these Awards held that Carrier violated the Agreement, in particular the Absorption of Overtime Rule, when there was no emergency and further when it was established that Carrier's assignment deprived the Claimant of either overtime or the anticipation of overtime (c.f. Award 6732).

Carrier points out that the emergency was brought about because the Extra Board was exhausted and there was no other alternative to have the work performed on the dates in question but to assign Claimant due to the restrictive provision of the Federal Hours of Service Law. It is argued further that Claimant suffered no loss of pay on the days in question and also it was a well established practice to use employees under circumstances such as this.

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The fundamental flaw in the Organization's position in this dispute relates to whether or not Claimant actually was deprived of overtime or the anticipation of overtime. The record is quite clear in that Carrier was precluded by law from working Claimant on both positions; this was the essential reason for the exhaustion of the Extra Board as well. It must be concluded that under the interpretation of Rule 48 set forth in the Note limiting the Rule's application to suspension from work to absorb "overtime previously earned or in anticipation of overtime to be earned by him" there has been no violation in this dispute. In view of our conclusion on this essential element of the Claim it is not necessary to consider the many other issues raised; further, it is quite evident from the facts of record, that there was indeed an emergency. For the foregoing reasons, the Claim must be denied.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1977.

LABOR MEMBER'S DISSENT  
TO  
AWARD 21411 (Docket CL-21368)  
(Referee Lieberman)

Award 21411 is in palpable error. This Board and the rules of the parties' agreement have long been dedicated to the proposition that an employee cannot properly be removed from his position in order to work on another position. See Awards 4499, 3416, 5578, 8013, 6732, 13158, 11860, 12227.

Moreover, the parties have a specific Memorandum of Agreement covering the performance of extra and vacation relief work. Section VII of that Agreement provides:

"An extra board will be considered as exhausted when there are no qualified extra employees available to work at the straight time rate.

"When an extra board is exhausted and it is necessary to use a regular employee to work a position at the overtime rate, the senior, qualified and available regular employee at the location involved, shall have the right to work the position on an overtime basis, except that when the vacancy is on the rest day of an employee who is the regular occupant of the position, such employee will have prior right to the vacancy. In such cases, when no regular assigned employee is available or desires to work the vacancy, the senior, qualified, available extra employee will be used to work the vacancy and paid the time and one-half rate." (Underscoring added.)

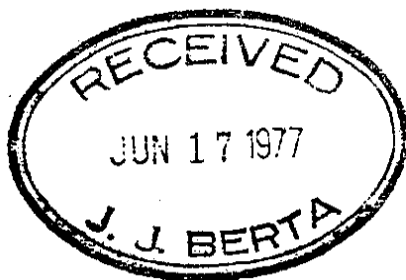
The Majority in Award 21411 recognizes that the extra board was exhausted. Section VII quoted above sets forth the procedure to be followed when the extra board is exhausted. It was not followed in the instant case and we can discuss "fundamental flaws" and "suffered no loss of pay," ad infinitum, but this does not change the fact that the parties

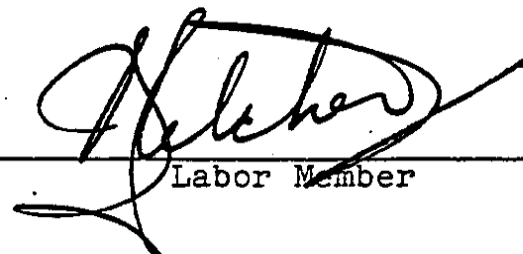
provided for just this contingency, which contingency the Board chose to ignore.

Moreover, we have held in our Award 7403 (Larkin):

"As to the merits of the instant claim, this Board has repeatedly held that where an employe has regularly assigned hours and is directed to work a different trick, thus losing his regular assignment because of the limitations of the Hours of Service Law, he is entitled to pay for the hours lost on his regular assignment. Awards 2742; 3097; and 6340. Even though Claimant has lost nothing in the way of compensation, or in number of hours worked, he has suffered a 'loss of time on account of the hours of service law . . . in changing positions . . . by the direction of proper authority. . .'. As this language has been previously interpreted and applied by the Board, such claims have been sustained. Awards 2742; 3097."

The award is in error and I dissent.



  
Labor Member