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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23952  
Docket Number CL-23849

John B. LaRocco, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,  
                                  { Freight Handlers, Express and Station Employees  
                                  { Galveston, Houston and Henderson Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-9355) that:

"1. Carrier violated the Agreement between the parties when it removed Clerk David Abraham from his regular assignment of Demurrage Clerk on April 10, 11 and 19, 1979, and required him to work an entirely different position (Carrier File 29-BRAC).

"2. Carrier shall now be required to compensate Clerk Abraham for eight (8) hours pay at straight time rate of his regular assignment for April 10, 11 and 19, 1979, which were days he was not permitted to work his regular assignment and his position was blanked.

"3. Carrier shall now be required to compensate Clerk Abraham for the difference between punitive rate of pay and pro rata rate of pay allowed for April 10, 11 and 19, 1979, account being required to work hours outside of the hours of his regular assignment."

OPINION OF BOARD: The critical facts are uncontested. Claimant is regularly assigned to the position of Demurrage Clerk at the Galveston Freight Office with assigned hours of 8:00 AM to 5:00 PM, Monday through Friday. On April 10, 1979 and April 11, 1979, the Carrier temporarily assigned Claimant to work the position of Night Chief Clerk-Dispatcher at a nearby office with hours from 4:00 PM to 12:00 midnight. The employee regularly assigned to this position had marked off. On April 19, 1979, the Carrier temporarily assigned Claimant to work the position of Chief Clerk-Dispatcher during the hours of 8:00 AM to 5:00 PM which was vacant due to the incumbent's illness. On each of the three dates in controversy, Claimant was not permitted to work his regularly assigned position which the Carrier blanked. For each of the temporary assignments, the Carrier compensated Claimant at the straight time rate of pay. The parties do not maintain an extra board for filling temporary vacancies arising in clerical positions.

Claimant seeks eight hours of straight time pay for each day he was not permitted to occupy his regular assignment and the difference between the premium rate and the straight time rate for the hours he was required to work the temporary assignments. The Organization argues that the Carrier arbitrarily removed Claimant from his regular assignment in violation of Rules 3 (Seniority Datum), 7 (Promotions, Assignments and Displacements), 8 (Assignments and Displacements), 9 (Bulletins), 12 (More Than One Vacancy), 14 (Declining Promotion), and 43 (Absorbing Overtime) of the applicable Agreement. To support the portion of this claim requesting pay at the time and one-half rate for the time Claimant

worked the three temporary assignments, the Organization relies on Rule 42 (Notified or Called). On the other hand, the Carrier contends Rules 49 (Preservation of Rates), 11 (Short Vacancies), and 57(e) impliedly permitted the temporary assignments and that Rule 49 provided for the proper level of compensation due Claimant when he temporarily filled in for the absent employees on the dates in question.

This case presents two issues for this Board to decide. First, when the Carrier temporarily assigned Claimant to other positions and when it blanked Claimant's regular assignment, is the Carrier also obligated to pay Claimant eight hours of pay at the pro rata rate for his regular assignment. Second, what is the proper compensation due Claimant for filling the three temporary vacancies.

As to the first issue, this Board has carefully perused the record, the applicable Agreement and the prior awards cited by both parties. We conclude that, at least on this property, none of the rules raised by the Organization specifically barred the Carrier from making the three temporary assignments. Most of the prior awards, on which the Organization relies, interpreted agreements substantially different from the Agreement on this property. These prior awards sustained claims for eight hours' pay for each day an employee was prohibited from working his regular assignment because the agreement contained guarantee provisions or outright prohibitions against the practices. Compare: Third Division Awards No. 11044 (Dolnick); No. 21578 (Caples) and No. 22186 (Twomey) with Third Division Awards No. 16611 (Dorsey); No. 18155 (Quinn) and No. 18623 (Rimer). Also, in this case, the Organization has not denied the Carrier's contention that Claimant was the only qualified employee to work the temporary assignments. Thus, on this property, Claimant was not entitled to be compensated for his regular position on the dates in question. See also, Third Division Award No. 20025 (Sickles).

As to the second issue in dispute, Rule 42 expressly provides that if Claimant was "...called to perform work not continuous with, before or after the regular work period...", he was entitled to be paid at the time and one-half rate. On April 10, 1979, and on April 11, 1979, the Carrier required the Claimant to perform work totally outside the hours of his regular assignment. Rule 49, which preserves rates, provides the basic or minimum rate of pay and must be integrated with the clear and unambiguous language of Rule 42. Third Division Awards No. 16563 (Dorsey) and No. 21338 (Blackwell). Since Claimant worked a temporary assignment on April 19, 1979 which precisely coincided with the hours of his regular position, only Rule 49 governs the amount of compensation due to Claimant. However, on the other two dates, Claimant should have been paid at the time and one-half rate (with the basic straight time rate computed in accord with Rule 49).

The Carrier defends this portion of the claim by alleging a past practice of paying the straight time rate in similar situations but the Carrier has not offered any evidence to demonstrate the existence of a past practice. Thus, Claimant is entitled to receive the difference between the time and one-half rate and the straight time rate for the hours he worked the temporary assignments on April 10 and 11, 1979.

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

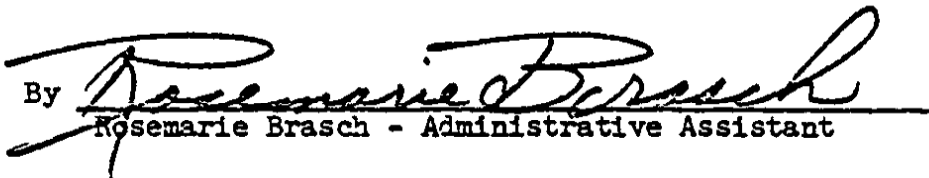
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of July 1982.

LABOR MEMBER'S DISSENT  
to  
AWARD 23952, DOCKET CL-23849  
(Referee LaRocco)

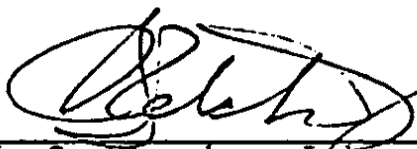
Award 23952, while sustaining a part of the claim, is, none-the-less, in error and requires dissent. (Award 23952 incidentally, was adopted by the Carrier Members and the Referee joining to make a majority. The Labor Members felt that the Award was in error.) Award 23952 ignores the basic fact that the structure of Clerks' Agreements in the railroad industry is such that Employees are assigned to and work the jobs of their choice on the basis of bulletin and assignment rules. Such rules have been consistently interpreted to restrict the Carrier's right to remove an employe from his own job, and require him to work a different job. When a Carrier moves an employe off his own assignment, and requires him to perform service on some other assignment, the rules require that he be paid for his own job plus being paid for the job he is required to work. When the hours of assignment of the two jobs are different, payment for the second job is to be at time and one-half rates.

The logic for this arrangement is quite basic. With regard to the payment for one's own job, i.e., the job one is not allowed to work because of the force assignment to a different position, the Galveston, Houston and Henderson Railroad Company's Agreement guarantees an individual eight hours' pay

per day for the job he is assigned to by bulletin. (Rule 9 and pages 31, 32, 33, 34 and 35 of the Agreement.) Such pay is to be earned between established assigned hours. The functions of work (duties) to be performed are those assigned by bulletin. An employe is entitled to work his own job and if the Carrier refuses to let him work his own job, he must be paid therefore. With regard to the additional payment at time and one-half rates for the job to which an employe is force assigned; service was performed outside an employe's own bulletined hours, and such service is required to be paid for at time and one-half rates. (See Rule 42.) One could, and often times does perform service in addition to his own job for which he receives time and one-half payments. In the Galveston, Houston and Henderson Agreement, there is only one rate that can be applied for service occurring outside of regular work periods, and that is the time and one-half rate. (See Awards 21338 (Blackwell) and 16563 (Dorsey).)

The claimant involved herein had ought to have been paid eight hours at straight time for his own assignment on each and every day he was denied the opportunity to work it and also been paid eight hours at either straight rates or time and one-half rates (depending upon the hours involved) for the job force assigned to work. Anything less is in violation of the Agreement and is just plain wrong.



  
J. C. Fletcher, Labor Member

Date: 8-2-82