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AWARD NO. 29
NRAB DOCKET NO. CL-8564
CASE NO. 28
SSW FILE R-51-1031-7
BRC FILE NR-27-32

SPECIAL BOARD OF ADJUSTMENT NO. 169

PARTIES) The Brotherhood of Railway and Steamship Clerks
TO)
DISPUTE) St. Louis Southwestern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That Carrier violated the Clerks' current Agreement when it required certain employees in the Recheck Bureau of the Freight Accounting Department, Tyler, Texas, to suspend work on their regular assigned positions and perform work of an entirely different character than covered by their assignment.

(2) That the following employees each be paid an additional three days at the straight time rate of their regular position on April 12, 13 and 16, 1951; John J. Wallis, H. M. Griffies, Dan O'Connor, C. J. Stocker, Ralph Pool and E. T. Edwards.

(3) That the following employees in the Interline Department each be reimbursed at penalty rate for three days: S. C. Boynton, W. Seydler, T. B. Sword, H. D. Speaks, John L. Bailey and E. R. Williams.

FINDINGS: Claim is made that Recheck Clerks were taken off of their regular assignments and used to assist the Interline Clerks in getting out their monthly report. Allegation was made by the employees that there was a deadline that the reports had to be gotten out by the 16th of the month and that when these Recheck Clerks were moved over to assist the Interline Clerks on the 12th, 13th and 16th in getting out the report that it was done for the purpose of absorbing overtime.

At first glance it looked as if the statement of the employees might be correct. Evidence was submitted to the Board showing that getting the reports out by the 16th of each month was not compulsory and that if they had not been gotten out on the 16th no overtime would have been worked but the work carried over until they could have completed it.

It appears from all the Board has been able to ascertain that the 16th of the month was not an absolute deadline that the reports had to be mailed out on that date; also that no overtime was ever employed in getting out these reports, that if they were not gotten out by the 16th they were gotten out some days later but it was the desire of the Carrier to get them out by the 16th and in most instances Interline Clerks get them out by that date.

There are numerous Awards which have been submitted to the National Railroad Adjustment Board dealing with the language contained in current agreement Rule No. 32-10, reading:

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

Many Awards have held that taking an employee off of his regular assignment to assist another is an indication that overtime would have been worked had that not been done, but later awards have held that the absence of proof that overtime would have been worked rebuts any presumption to that effect. We think the evidence in this case indicates, regardless of whether or not the Recheck Clerks had been used in this instance, that no overtime would have been worked by the Interline Clerks had they not been assisted to get it out on the desired date; the Interline Clerks would not have worked overtime but would have done it on the following days. To be consistent with that line of awards, we would be driven to the conclusion that no overtime would have been worked and no overtime as such was absorbed. We are driven to the conclusion from the facts in this case that no overtime would have been worked had this not been done, and under a long and consistent line of holdings we cannot presume that overtime was absorbed as apparently none would have been worked in this instance. Therefore, there is only one conclusion that we can reach in this case and that is that there was no violation of the agreement in this instance.

AWARD: Claim denied.

/s/ Frank P. Douglass
Frank P. Douglass, Chairman

/s/ W. E. Straubinger
W. E. Straubinger, Employee Member
DISSSENT ATTACHED

/s/ L. C. Albert
L. C. Albert, Carrier Member

Tyler, Texas
April 15, 1957.

EMPLOYEE MEMBER'S DISSENT TO AWARD NO. 29

The Award states:

"At first glance it looked as if the statement of the employees might be correct. Evidence was submitted to the Board showing that getting the reports out by the 16th of each month was not compulsory and that if they had not been gotten out on the 16th no overtime would have been worked but the work carried over until they could have completed it."

It is assumed the evidence referred to is that shown in Carrier's Submission on pages 20 and 21, stating:

"Without prejudice to its position that Rule 32-10 applies only when there is an actual suspension of work during assigned hours, the fact remains that no overtime would have been worked if the assistance in question had not been rendered. Overtime was not necessary to get out the work."

From page 2 of Carrier's Oral Argument:

"In view of the foregoing, it is readily apparent that the 16th of each month was by no means a 'deadline date' for the forwarding of interline accounts. Carrier was reasonably certain that if they were mailed on this date, then even the most distant carriers would receive their interline settlements by the 20th, and there would be no necessity of wiring the figures to any of them. Thus, the 16th was not a 'deadline date' but was set as the date the interline settlements should be forwarded, not from necessity, but as the most desirable 'due out' date for these interline accounts." (Emphasis supplied)

From page 9 of Carrier's Brief dated October 12, 1956:

"The conclusion that it was not necessary to use the recheck clerks is correct. This was only one of several methods available as pointed out above.

"The assistance given helped the interline clerks through a heavy peak in the work, and was the common, practical method of keeping the work current in event the interline clerks began falling behind in such peak period." (Emphasis supplied)

During the course of the hearing before the Board on April 15, 1957, Mr. Sterling Baker, General Auditor, gave testimony which corroborated Carrier's above quoted statements.

Carrier's evidence shows that the 16th of the month was the date it desired its Interline Clerks to complete and mail out the Interline Accounts since it stated the 16th was not a deadline date "but was set as the date the interline settlements should be forwarded, not from necessity, but as the most desirable 'due out' date for these interline accounts."

Employee Member's Dissent to
Award No. 29

On page 2 of Employees' Brief dated October 1, 1956, we stated:

"If Carrier did not have to mail out the accounts and summaries on the 16th; why were the six Recheck Clerks taken from their regular assignments to perform Interline Department work? The obvious answer is that the Interline Department Clerks could not perform the work by April 16th, without working overtime, which overtime was absorbed by using the six Recheck Clerks."

During the course of the hearing, the above quoted question was repeatedly asked of Carrier Representatives, and at no time did they attempt to answer same. The work involved could not be left to accumulate, but as stated by Carrier:

"The assistance given helped the interline clerks through a heavy peak in the work, ***."

On April 15, 1957, Mr. Joseph Griser, Head Clerk, Interline Bureau, testified before the Board he had worked in that Bureau for thirty-eight years and had been Head Clerk for about sixteen years. He stated the 16th of the month was the date his men were expected to complete and mail the Interline Accounts, and that it was very unusual when the work was not completed on the 16th.

The Employees presented information to the Board to the effect that during the year 1955, Interline Bureau Summaries were mailed to foreign roads as follows:

<u>Month Reporting</u>	<u>Date Mailed</u>
January	February 15th
February	March 17th (Thursday)
March	April 18th (Monday)
April	May 13th
May	June 15th
June	July 15th
July	August 15th
August	September 16th
September	October 17th (Monday)
October	November 16th
November	December 14th
December	January 17th (Tuesday)

The above indicates that in eight months the Summaries were mailed on or before the 16th of the month; that in three months they were mailed on the 17th, and in one month on the 18th. These figures indicate that Carrier had instructed its employees to make every effort to have the Summaries completed and mailed on or before the 16th.

On the date involved in our claim the work could not have been completed by April 16, 1951, without the aid of the six Recheck Clerks.

The final paragraph of the Award contains this statement:

"We think the evidence in this case indicates, regardless of whether or not the Recheck Clerks had been used in this instance, that no overtime would have been worked by the Interline Clerks had they not been assisted to get it out on the desired date; The Interline Clerks would not have worked overtime but would have done it on the following days."

The above is a presumption on the part of the Board. Carrier has admitted that the 16th of the month was the desired date for mailing the Interline Summaries. Evidence by the Employees, which was not contradicted by Carrier, showed that the Interline Department for many years has consistently completed and mailed Interline Summaries on or before the 16th of the month. It should not be open to debate that in April, 1951, the month involved in our claim, Carrier desired the work completed by April 16th, and used the six Recheck Clerks in order "to get it out on the desired date."

Numerous Third Division Awards were cited by the Employees in support of our claim, and the following are quoted as being particularly pertinent:

Award 5625, Referee Francis J. Robertson:

"*** In the absence of any evidence to the contrary, prior awards of this Board appear to raise a presumption that overtime is absorbed by suspending an employe from his regular assignment to work another over an extended period. However, the presumption disappears in the light of evidence and in this instance Carrier shows by affirmative evidence that the work of Claimant's position, or of the position he worked during the period involved in the claim, could have been permitted to accumulate for a month or more without prejudice to Carrier's business; and that it would not have been necessary to have ordered overtime if Claimant had not been temporarily assigned to the lower rated position. It follows that in this instance the effect of the temporary assignment was not to absorb overtime and therefore, a denial award is required."

(Emphasis supplied)

Award 7094, Referee Edward F. Carter:

"This evidence clearly indicates that a condition existed which required that certain work be done as soon as possible and that the Bureau did not desire it to be accumulated for processing at some future time. This is clear evidence that overtime would have been required to get this work done promptly. We think, therefore, that the use of the Traveling Agents, when all the evidence is considered, was to absorb the overtime work of the City Auditors. Awards 4499, 4500, 4646, 4690, 4692, 6153. The last cited award is particularly in point with the present case."

Employee Member's Dissent to
Award No. 29

Award 6153, Referee Mortimer Stone:

"Accordingly we think Carroll could not properly be assigned to perform the work at the Tea Company warehouse. Before the Board the Bureau no longer relies on Rule 43, the Preservation of Rate rule, but insists that Carroll's assistance at the Tea Company warehouse was not for the purpose of avoiding overtime. It is admitted that the work had fallen behind and that the help was given so that it could be brought up to date. We can only say, as this Board has repeatedly said before, that we must ascribe to parties the intent to do that which normally and logically results from their acts."

This Award is clearly in error. For all of the reasons shown, I dissent from an erroneous conclusion.

/s/ W. E. Straubinger
W. E. Straubinger, Employee Member