

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerks' Agreement when it compensated clerical employes, Mahoney, Messineo, Geerinck, Domico, Ameer, Whalen and others at pro rata rate for services performed at Jersey City, New Jersey outside their regular hours of assignment, and

That Carrier shall now compensate employes for service performed as freight handlers on Milk Platform at Jersey City, N. J. on September 1, 1943, and all subsequent dates at rate of time and one-half.

EMPLOYEES' STATEMENT OF FACTS. Prior to September 1, 1943 the Carrier solicited the services of its clerical employes in and about Jersey City to perform service as freight handlers after they had completed their tour of duty as clerks. After some solicitation several employes volunteered to assist in handling the volume of freight that had accumulated for which service they were paid at pro rata rate of position worked. Claim was filed with the carrier on August 28, 1943 at which time carrier was notified that employes should be paid for all time worked in excess of eight on any day at time and one-half rate.

POSITION OF EMPLOYEES: There is in effect between the parties an agreement bearing effective date of September 1, 1936 which contains the following rules:

Rule 23 (Overtime) reads as follows:

"(a) Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half.

"(b) Where positions are now assigned in excess of eight (8) hours per day, and monthly rates are now in effect on such positions covered by this agreement to cover all service performed, such monthly rates will continue in effect until positions become vacant when they will be properly rated and filled as provided in these rules, unless otherwise agreed to between the Management and the General Chairman or their representatives.

"Where no qualified employe is available for relief service on a seven (7) day position or none can be furnished by the Committee, the incumbent of the seven (7) day position may be worked on his rest day at pro rata rate; in all other cases Rule 32 will apply."

Obviously this is a broad claim and different than handled on the property. Carrier is not in position to file a complete reply until we are furnished with a copy of the Brotherhood's statement and we know just what claim is to be filed and basis of their claim. Carrier protests acceptance by the Third Division of any claim that has not been handled in accord with regular procedure on the property.

17. There is no justification for the claim of the six clerks in whose behalf the original claim was filed and listed in the joint statement of facts dated March 23, 1944.

18. A similar situation exists at Akron, Ohio and a claim was filed in behalf of Clerk A. A. Hilk who works as a volunteer part-time worker. This claim has been progressed by the Brotherhood to the Third Division, Docket CL-2966, and their only claim now in that docket is for adjustment on basis of the time limit rule 42(c). Hilk is still working as a volunteer part-time worker and no further claims are being made. No change has been made in his basis of pay. In Docket CL-2966 the Brotherhood said

"The merits or demerits of the claim presented are not before this Board."

19. There is no merit to this claim filed in behalf of the six clerks at Jersey City, N. J. who volunteered as part-time truckers during present emergency, and if sustained would establish new rule. Request for change in basis of pay is one for negotiation under Railway Labor Act.

OPINION OF BOARD: Prior to September 1, 1943, certain clerical employees working in Jersey City were permitted to work as freight handlers after completing their assigned tours of duty as clerks because of a labor shortage, emergent in character. For this service they were paid the pro rata rate of the positions worked. It is the position of the Organization that they should be paid the overtime rate of time and one-half.

There is much evidence in the record concerning the question whether the Carrier solicited the Claimants to perform this work or whether they volunteered to perform it. As we view it, the question is not a material one as the result must be the same in either event.

There is also evidence in the record that Claimants, or some of them, agreed to perform this work at the pro rata rate of the position and that Carrier's Superintendent required them to contact their Organization for approval of the assignments. No written approval was obtained and it does not appear that the Organization ever agreed upon the rate of pay of the positions. In any event, the Organization lodged a complaint on August 28, 1943, a date subsequent to the employment of the Claimants, in which they asserted the proper rate to be the overtime rate. No claim is made for any time worked prior to September 1, 1943. Conceding that the Carrier might have been lulled into a sense of security in paying the pro rata rate prior to that date, it had full opportunity to correct the situation upon the receipt of the protest of August 28, 1943. For this reason, the discussions had prior thereto do not appear to be of primary importance.

It is fundamental, and has been many times held, that a collective agreement is between the employer and the organization representing the employees and an employee cannot by agreement, conduct or acquiescence vary the terms of the collective agreement. Awards 946, 1214 and 2784. Rule 23 of the Agreement applicable on September 1, 1943, provides:

"Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

Subsequent revisions of this rule bearing upon the instant case are to the same effect.

It appears clear to us that the Carrier, in the absence of an agreement with the Organization, is required to compensate Claimants at the overtime rate of the position worked under the foregoing rule. It will be observed that the claim is for the overtime rate of the position worked, it being the lesser rated position, which eliminates any question as to the proper rate.

Carrier relies upon Awards 2670 and 2672. We do not share the views of the Carrier that these two awards are in point on the issue presently before us. Those awards hold that employes volunteering to perform work belonging to employes of another roster because of a labor shortage, in addition to their regular assignment, are not entitled to be paid at the time and one-half rate of their regularly assigned position. There is a strong inference in these awards that the overtime rate of the position worked is the correct rate under such circumstances. In Award No. 2672, the employes were compensated at the overtime rate of the position worked. It is clearly the correct application of the rule.

The Carrier urges that the claim originally made is not the same claim that is now before this Board. It is a fact established by the record that variances in the form of the claim occurred from time to time until the claim reached this Board. In this respect, it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes. The subject matter of the claim,—the claimed violation of the Agreement,—has been the same throughout its handling. The fact that the reparations asked for because of the alleged violation may have been amended from time to time, does not result in a change in the identity of the subject of the claim. The relief demanded is ordinarily treated as no part of the claim and consequently may be amended from time to time without bringing about a variance that would deprive this Board of authority to hear and determine it. No prejudice to the Carrier appears to have resulted in the present case and the claim of variance is without merit.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 12th day of July, 1946.