

**Award No. 5879**

**Docket No. CL-5862**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**John W. Yeager, Referee**

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**PARTIES TO DISPUTE:**

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

**CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY  
COMPANY**

**STATEMENT OF CLAIM:** (1) Claim of the System Committee of the Brotherhood that the Carrier violated its Agreement with the Brotherhood at South Hammond, Indiana, when during the period October 6 through November 3, 1950 (except October 7 and 8 when claimant was off duty by permission), it used one James F. Smith, a person without seniority rights, to work the Night Yard Clerk position with hours 3:45 P. M. to 7:45 P. M. and 8:15 P. M. to 12:15 A. M., Friday through Tuesday with Wednesday and Thursday as assigned rest days, while denying Yark Clerk C. A. Meadows his seniority rights to occupy the position for which he bid September 30, 1950, and which was awarded to him by Bulletin 178-A of October 5, 1950, and retaining him on position from which he bid with hours 6 P. M. to 10:30 P. M. and 11 P. M. to 2:30 A. M., Wednesday through Sunday with Monday and Tuesday as assigned rest days, and

(2) That by reason of the violation the Carrier shall now be required to compensate Clerk C. A. Meadows, in addition to what he received, at the pro rata rate while working the 6 P. M. assignment during the period October 6 through November 3, 1950, except for October 7 and 8, for the hours and days of rest of the position from which withheld, namely the 3:45 P. M. assignment, amounting to 2 hours and 15 minutes (3:45 P. M. to 6 P. M.) each day Friday through Tuesday and 8 hours each rest day (8 days) of Wednesday and Thursday, and

(3) That by reason of the violation the Carrier shall now be required to compensate Clerk C. A. Meadows, in addition to what he received, at the rate of time and one-half while working the 6 P. M. assignment during the period October 6 through November 3, 1950, except for October 7 and 8, for the hours and days of rest of the position to which held, namely the 6 P. M. assignment, amounting to 2 hours and 15 minutes (12:15 A. M. to 2:30 A. M.) each day Wednesday through Sunday and 8 hours each rest day (8 days) of Monday and Tuesday.

**EMPLOYES' STATEMENT OF FACTS:** There is an Agreement in effect between the parties bearing effective date of November 1, 1944, with subsequent amendments, governing the hours of service and working conditions of employes of the Carrier represented by the Brotherhood, copies of which have been furnished the Board. This Agreement, as to certain rules was revised effective September 1, 1949, to conform to the Agreement entered into by the parties at Chicago on March 19, 1949, which

parties. The rule as it stands was negotiated and agreed upon by the Carrier and employe representatives. During its existence it has been applied as contended by the Carrier. To sustain the claim as presented by the employes would be in effect, to revise paragraph (c) of Rule 9.

In support of our position we respectfully refer you to National Railroad Adjustment Board Third Division Award No. 3561. In this Award an employe was not transferred within the five days provided in the rule. The employes claimed an additional day's pay for each day the claimant was held from the new position he had been awarded. The Carrier contended that the rule provided its own penalty which was the employe be paid for all losses sustained, and which payment they had made. The Board ruled the Carrier's contention correct and denied the claim of the employes.

In Third Division Award No. 3633, in which the claim of the employes was denied, in the Opinion of the Board they say, "Rule 19 (c) of the agreement required that the claimant be placed on the bid-in position within thirty days from the date of the assignment. Since this was not done, Carrier paid claimant the amount of compensation he was entitled to on the assigned position, the exaction fixed by said rule." (Underscoring applied.)

In conclusion the Carrier requests that the claim be denied for the following reasons:

(1) That paragraph (c) of Rule 9 governs, and provides its own specific penalty in case of violation, and

(2) That the Carrier has conformed to the specific penalty provision of the governing rule, and

(3) That the claim of the employes for additional monetary payment beyond the penalty provisions of the rule is in effect a request for a new rule in lieu of the present penalty provisions of Rule 9, paragraph (c) which must be a matter of negotiation between the parties, and

(4) That the Railway Labor Act does not authorize nor confer upon the National Railroad Adjustment Board the right to write or prescribe a new rule for the parties.  
(Exhibits not reproduced.)

**OPINION OF BOARD:** A yard clerk position with hours 3:45 P. M. to 7:45 P. M., 8:15 P. M. to 12:15 A. M., with rest days Friday and Saturday was bulletined and bid in by Clerk C. A. Meadows in whose behalf the claim is made. The effective date of his bid was October 5, 1950. At the time Meadows occupied a position with assigned hours 6:00 P. M. to 10:30 P. M., 11:00 P. M. to 2:30 A. M. with rest days Monday and Tuesday. The rate of pay for the two positions was the same. Meadows was not allowed to occupy this bulletined and bid position until November 5, 1950. He says that the Agreement was violated and that because thereof he is entitled to be compensated at the pro rata rate for the time daily between the starting time of the bid position and that of the position actually occupied, or 2 hours and 15 minutes on each such day, and also for 8 hours for the rest days of the bid position which he worked.

Of particular importance in the determination here is Rule 9 (c) of the controlling Agreement as follows:

"Employes awarded bulletined positions will be transferred promptly to such assignment after issuance of assignment bulletin. Employes not transferred within six (6) calendar days after issuance of assignment bulletin will be paid the higher rate of the positions involved."

It is clear that in this instance this provision and right of Meadows were violated by the Carrier. The violation however did not extend over the entire

period covered by the claim. It is to be observed that the provision requires prompt assignment after issuance of assignment bulletin. The language defines promptly as within 6 calendar days. The violation therefore occurred 6 calendar days after issuance of the bulletin notifying Meadows of the acceptance of his bid.

The difficulty arises with regard to the appropriate penalty, if any, to be applied to the violation. The penalty for a violation such as this is specified in the provision itself, namely, the higher rate of the positions involved. Here the rate of one was not higher than the other.

In Award 3551 of this Division wherein a violation such as the one here, under a similar rule, was being considered it was said:

"Under the provisions of the cited rule, Claimant is entitled only to the difference between his earnings as Yard Clerk and what he would have earned as Check Clerk, there being no items of loss claimed other than compensation. \* \* \*"

The decision there was that the measure of the penalty was the difference between the two rates of pay. There was a difference there whereas there is none here. The controlling principle however is not different. It was pointed out that, as to the agreement provision there involved, there had been a past like mutual construction given to the Rule by the parties. This mutual construction it was said:

"\* \* \* affords convincing proof as to what the parties intended the rule to mean."

There was no such mutual construction here, but this is not a sufficient basis upon which to attribute a different meaning to the Rule on this property. The Rule in neither instance is ambiguous. It carries its own penalty and the Division may not add thereto. The Division in Award 3633 said:

"Where the agreement fixes one penalty this Board may not add an additional nor different one."

The claim therefore for a penalty for time between starting time of the position bid and the one occupied cannot be sustained.

The Claimant however is entitled to be compensated under Rule 43 (e) of the Forty-Hour Week Agreement and Rule 44 (the Notified or Called Rule) on account of having worked the rest days of the position bid. Rule 43 (e) is in part as follows:

"(e) Service on Rest Days. Service rendered by employes on assigned rest days (other than Sunday) shall be paid for under the call rule unless relieving an employe assigned to such day \* \* \*."

Rule 44, without quoting it, provides for time and one-half for the time worked, with a minimum of 3 hours pay for 2 hours work or less.

These rest days belong to Meadows under his bid and the Agreement. When he worked on those days he was not relieving an employe assigned to such days. Under the provisions of Rule 43 (e) and Rule 44 he was entitled to be compensated for each such day at the time and one-half rate instead of the straight time rate which he was paid.

**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

The Agreement has been violated and Claimant is entitled to be compensated for the rest days of the bid position worked after six days from date of notification of acceptance of bid.

AWARD

Claim sustained per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of July, 1952.