

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

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

**SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA
(TEXAS AND NEW ORLEANS RAILROAD COMPANY)**

STATEMENT OF CLAIM: *Claim of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Southern Pacific Lines in Texas and Louisiana, Texas and New Orleans Railroad Company, that R. P. Brown, Utility Clerk, Algiers, (New Orleans) Louisiana, be paid on call basis on days between December 22, 1937 and April 30, 1940, when R. J. Williams, Assistant Agent, an employe not covered by the Clerk's Agreement, was used to handle live stock and perform clerical work incident thereto either before or after Utility Clerk Brown, regularly assigned to such work, had begun or completed his tour of duty, and on Sundays and holidays.*

EMPLOYEES' STATEMENT OF FACTS: R. P. Brown has been employed as Utility Clerk on the Algiers Wharf (New Orleans) for many years. Among other things, it was his duty to supervise the loading of stock during his tour of duty, and it was the custom and practice over a long period of years to call him, and pay him for the call, for supervising the loading of stock outside of his regular hours of assignment, and on Sundays and holidays. This custom and practice continued until December 19, 1937. Instructions were issued, effective as of that date, that Mr. R. J. Williams, Assistant Agent, would supervise the loading of all stock loaded both before and after Brown's regularly assigned hours, and that Brown would not be called for such service thereafter.

Pursuant to those instructions, Clerk Brown was not called to supervise the loading of stock outside his regular hours of assignment on December 19, 20 and 22, 1937, Assistant Agent Williams being used in his stead. Assistant Agent Williams occupies an excepted position, one not within the scope of the agreement. Brown filed claim for wage losses sustained December 19, 20 and 22, 1937 because work to which he was entitled by seniority had been assigned to the occupant of an excepted position. After an extended and too long drawn out course of handling, Mr. T. C. Montgomery, Assistant General Manager, allowed and authorized the payment of the claim April 23, 1940.

Exactly one week subsequent to the date of the allowance of this claim, April 30, 1940, Agent McCluskey issued the following instructions to R. J. Williams, Assistant Agent;

Every effort has been made to set out all known relevant argumentative facts including documentary evidence in exhibit form.

Wherefore, premises considered, the Carrier respectfully requests that the contentions and claims be in all things denied.

OPINION OF BOARD: This is a claim for a continuing violation of the scope rule. The violations extend over a long period of time from December 22, 1937 to April 30, 1940. There are involved two agreements one effective July 1, 1922, the other which superseded the first effective November 1, 1939. The allegation is that work belonging to the claimant under the agreement had been given to R. J. Williams, Assistant Agent, and an employee not covered by the agreement. The claimant seeks to be paid on a call basis for all the days on which Williams worked during the period in question. There are involved about three hundred days.

For the purposes of this case we shall assume without deciding that this was work which came within the scope of the agreements involved.

The first alleged violation took place on December 19, 1937. The latter part of December a claim was promptly filed with the Carrier covering violations on December 19th, 20th and 22nd, 1937. The claim was declined on December 27th and was submitted by Division Chairman McWhirter to Superintendent Stover who also held that it was without foundation. March 8th, 1938, H. W. Harper, General Chairman, appealed from this decision to T. C. Montgomery, Asst. General Manager. Mr. Montgomery likewise declined the claim on March 23, 1938. The matter was discussed in conferences in July and August of that year. December 28, 1937 an additional claim was filed for December 23rd, 24th and 26th but nothing further seems to have been done to prosecute it. In October 1938 there was an interchange of letters from which it appeared that with respect to the original claim the Carrier adhered to its position and Mr. Harper asserted that it was the intention to submit the matter to the National Railroad Adjustment Board. From then on nothing further seems to have been done for a year and a half. The practice which had been the subject-matter of complaint seems to have continued. During this time it is obvious that the parties were in frequent conferences, for a new agreement between the Brotherhood and the Carrier was negotiated which was executed October 6, 1939 and became effective November 1, 1939. It is worthy of note that this was signed among others by H. W. Harper, General Chairman for the employees, and by T. C. Montgomery for the Carrier, the two men who had charge of the final negotiations on the claim now before this Board. The old claim seems to have been discussed again on April 23, 1940 and after the conference Mr. Montgomery wrote to Mr. Harper the following letter:

"Claim of Utility Clerk R. P. Brown for overtime for service not rendered, Algiers, December 19th, 20th and 22nd, 1937:

Mr. H. W. Harper,
General Chairman, B. of R. C.,
711 M. & M. Building,
Houston, Texas.

Dear Sir:

The above case was discussed at our conference today, at which time I stated to you that while I did not agree with the contention you made in this case, as it could not be supported under the agreement rules, the amount involved was so small that, in order to clear our docket of as many cases as possible, this claim has been ordered paid.

Yours truly,

/s/ T. C. Montgomery"

Thereafter the claimant was called to handle the live stock shipments and the practice complained of stopped. On May 3, 1940 Brown filed a claim for all the violations between December 19, 1937 and April 30, 1940 with the exception of the dates December 19th, 20th and 22nd, 1937.

On the facts shown by the record we do not feel that the present claim is a just one or that it should be allowed. It is clear from the record that the officials of the Carrier were given no intimation over a long period of time that a claim was to be filed for violations extending over two years and a half. During this period but one claim was discussed, that for the three days in December, and during all this time the parties were in frequent conferences involving among other things the negotiation of a new agreement. When the matter was discussed on April 23, 1940 and the claim was settled, it is apparent that nothing was said then about any other outstanding claim. The settlement of that claim was made by the Carrier on the basis that there was no other, and Mr. Harper of course knew that the Carrier made its offer of settlement on that assumption. It was then his duty to inform the Carrier that violations for the whole period were involved. Having failed to do so he is now estopped to bring forward this claim.

It is contended in argument that the Carrier knew that the original claim, not only covered violations for the three days mentioned, but was intended to include also all violations from December 19, 1937 "to the date of settlement of his claim", and attention is called to the use of this language in a letter from Chairman McWhirter to Superintendent Stover of January 17, 1938. If there is anything in the contention of the Committee on this point and if there could be regarded as included within that first claim a blanket complaint for all subsequent violations, it must be true that when the original claim was settled April 23, 1940 the entire matter was disposed of. It is fundamental that, in proceedings both at law and before such a body as this, *claims involving the same subject-matter should not be split where it is practical to dispose of them as a whole*. The settlement of any part of a claim, which should be one and indivisible, is a settlement of all of it unless the parties clearly indicate a contrary intent. Particularly should this be true where as here one of the parties knows that the other believes that a settlement is intended of the entire controversy.

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 claimant is estopped to prosecute the claim here presented.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.