

Award No. 2735
Docket No. CL-2649

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

HARBOR BELT LINE RAILROAD

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

(a) The carrier violated the rules of our current agreement when, in lieu of calling and using Mr. J. L. Mello, Gang Timekeeper, to perform his usual duties of timekeeping and clerical work, it required and permitted employees not coming within the scope of our agreement to perform clerical work that should have been performed by the Gang Timekeeper, a position coming within the scope of our agreement with the carrier.

(b) Mr. J. L. Mello be reimbursed at the rate of his position, as follows:

April 7, 1942—	9 hrs. at time and one-half				
" 8, 1942—	3 " " " " "				
" 9, 1942—	9 " " " " "				
" 10, 1942—	7 " " " " "				
May 13, 1942—	10 " " " " "				
" 15, 1942—	8 " " " " "				

EMPLOYEES' STATEMENT OF FACTS: There is in effect between the parties an agreement as to rules and working conditions, and bearing effective date of August 16, 1935; claimant involved herein is covered by that agreement.

On January 28, 1941, position of Gang Timekeeper was established by the Harbor Belt Line Railroad for the purpose of keeping time for Maintenance of Way extra gang, and position was assigned to Mr. J. L. Mello (claimant), by bulletin dated February 14, 1941.

Mr. Mello worked his position regularly, performing overtime service when such service was required of the gang, and continued to do so until, commencing with April 7, 1942, and on subsequent dates, namely, April 8, 9 and 10, May 13 and 15 (see Statement of Claim) he was not used to perform overtime service with the gang to which he was attached, his work being performed by employees not coming within the scope of our current agreement with the carrier.

Dates, hours worked and employees performing this work, are designated as follows:

April 7—	10:00 P.M. to 7:00 A.M.—	9 hrs.—	Asst. Sect. Foreman
" 8—	10:00 P.M. to 1:00 A.M.—	3 " —	" " " "
" 9—	10:00 P.M. to 7:00 A.M.—	9 " —	" " " "
" 10—	4:00 P.M. to 11:00 P.M.—	7 " —	Track Walker
May 13—	9:30 P.M. to 7:30 A.M.—	10 " —	Laborer
" 15—	11:00 P.M. to 7:00 A.M.—	8 " —	Asst. Sect. Foreman

The Belt Line takes the same position also as taken by the carrier in Award 1694, that the keeping of a record of the time worked by laborers in the gangs on a railroad is not a function of a timekeeper (clerical worker), nor is there any prohibition against the foreman or the assistant foreman (if there be an assistant foreman) recording the time and/or the number of hours members of the gang worked each day.

It is the position of the Belt Line also, that the scope rule of the Current Agreement with the organization on the Belt Line is not more restrictive than the scope rule cited as in effect on the Missouri Pacific Railroad Company under Award 1694. To this extent the restrictions placed upon the Belt Line should not be greater than those placed upon the carrier under Award 1694. This result is of necessity a requirement for declination of the present claim.

We have heretofore pointed out that for many years foremen have performed the clerical work of keeping the time of Maintenance of Way gangs on the Belt Line. That whenever in the judgment of the management conditions demanded that a foreman be relieved of keeping the time, the work would be assigned by the carrier to a clerk to the extent necessary. Further, that when the necessity for this assistance to the foreman had passed, the Extra Gang Timekeeper would be no longer necessary and the work returned to the foreman.

In the present case, the claimant was regularly assigned to a temporary position of Extra Gang Timekeeper, and while in many instances the nature of the duties were such as not to require performance of duties by him during the entire tour of duty, he was nevertheless paid for a full day's work each day in conformity with schedule rules. The claimant did not suffer any reduction in time or compensation from that contemplated and set up in the assignment to which he was directed as the incumbent. We submit, therefore, that the employee's claim for additional time is not warranted under assignment rules and if any claim exists, it must be by virtue of designation of work within Rule 1 of the Clerks' Agreement.

We are definitely of the opinion that Award 1694, when taken into consideration on a comparative basis with existing facts of the instant case, can result in nothing different than the declination of the claim now presented by the organization.

In view of the record and the controlling facts, the Board is respectfully requested to deny the claim in full.

OPINION OF BOARD: Early in 1941 the Carrier established the position of gang timekeeper for a maintenance of way extra gang and assigned the same by bulletin to the claimant. During the sixteen months immediately following, said extra gang, and the claimant as timekeeper thereof, worked a total of 125 days overtime. On April 7, 1942, however, the Carrier discontinued the practice of calling the claimant to perform timekeeping for said extra gang after its regular hours and assigned said overtime work to employees without the Agreement. The claim seeks reimbursement on behalf of the claimant for the overtime subsequently worked by such other employees.

The Agreement does not contain any express rule to the effect that employees regularly assigned to the class of work for which overtime is necessary shall be given preference in the performance thereof; nor does it appear that the particular class of work with which we are here concerned is specifically referred to in the scope rule of the Agreement. The petitioner urges, however, that inasmuch as the Carrier established the position under the Agreement, assigned the same to the claimant, and permitted him to perform the overtime work incident thereto for sixteen months, it could not thereafter arbitrarily remove the work involved from the operation of the Agreement.

In practical effect, the petitioner undertakes to invoke against the Carrier an application of the doctrine of estoppel by conduct. It is usually true that the voluntary action of a Carrier in treating certain work as within the terms

of an Agreement is highly persuasive as to the proper construction of the Agreement in that regard. Ordinarily, therefore, a Carrier will not be heard to say that work which it has placed under an Agreement is no longer within the scope thereof. Awards Nos. 2569 and 2553. To this general rule there is an exception in favor of the Carrier, however, when the position brought under the Agreement was not exclusively within the scope thereof, was of a temporary character, was placed on a non-permanent basis, and the necessity for its continuance no longer exists. Awards Nos. 931 and 1694.

The petitioner concedes that on most railroads, including that of Carrier herein, the time of maintenance of way gangs is ordinarily kept by the section foreman, except when the gangs are large. This is an admission that, in actual practice, the keeping of the time of the members of such gangs is not normally regarded as an exclusively clerical function. The Carrier says that the position occupied by the claimant was initially established January 11th, to expire on February 3, 1940, to meet an emergency when its maintenance of way force was increased approximately 100% to carry out certain major construction. It further appears that the life of the claimant's position was extended on seven different occasions, before it was finally discontinued on August 6, 1942. Finally, it is asserted by the Carrier that the position was terminated because the assignment had served its purpose and there was no longer any necessity for a timekeeper. These facts are not successfully refuted by the petitioner and the case therefore falls within the exception noted above.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1944.