Award No. 3371
Docket No. CL-3109

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

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

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Wilson McCarthy and Henry Swan, Trustees)

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

(1) That schedule is being violated by permitting others than those covered by the Clerks' Agreement to perform the handling of Store Department material and further claim that the senior available employes holding seniority rights on the Store Department roster be paid for loss of compensation account not being permitted to handle such work on overtime basis before or after their regular tour of duty. This claim is based on the provisions of Rules 1, 3, 36 and 37, covering work performed by employes of the Car Department, November 23, 30 and December 1, 1943.

(2) That Store Helper W. H. Rodeback and Sectional Storekeeper L. W. Johnson be paid two and one-half hours' pay at time and one-half of their respective rates account Mechanical Department employes, not having seniority rights under the scope of the Clerks' Agreement, being used to unload wheels 11:00 A. M. to 2:00 P. M., exclusive of meal period 12 noon to 12:30 P. M., Saturday, May 6, 1944. This claim is based on the provisions of Rules 1, 3, 36, 37 and 50.

(3) That Store Helper W. H. Rodeback, Helper, Utah, with assigned hours 8:00 A. M. to 4:00 P. M., be allowed six (6) hours overtime at time and one-half rate account an employe of the Car Department being used to load two cars of wheels working with Store Helper J. W. Binch during period 8:00 A. M. to 11:00 A. M. and 12:30 P. M. to 3:30 P. M., October 20, 1944.

EMPLOYES' STATEMENT OF FACTS: Item 1—On November 23, 30 and December 1, 1943, employes other than those covered by the Clerks' Agreement were used to load and unload car wheels and handle other Store Department material at Helper, Utah.

On November 23, nine Car Department employes were worked from 12:30 P. M. to 2:30 P. M. loading and unloading wheels; two Car Department employes were worked from 12:30 P. M. to 3:00 P. M., November 30 loading wheels; one Car Department employe was worked from 12:30 P. M. to 3:30 P. M., December 1 handling Store Department material shipped to Helper as LCL freight and by baggage.

per cent of the material received is Mechanical Department material, shipped from Mechanical Department at Salt Lake City to Mechanical Department at Helper, material which is not taken into Store stocks or accounts at Helper. Due to shortage of Mechanical Department force at Helper, and not through "past practice" or schedule requirements, much of this material of necessity has been handled by Store Department employes.

The Carrier might also explain, under present conditions it has difficulty in maintaining its force requirements at Helper, Utah, not only in the Mechanical Department, but all departments, including the Store Department, are confronted with absenteeism and refusal of certain employes to protect service requirements on an overtime basis. Regardless of these handicaps, the fact that only five alleged schedule violations occurred during the years 1943 and 1944 (none since October, 1944) is ample evidence that the Carrier is not willfully depriving Store Department employes of any work of compensation. Again the Carrier asserts under its present heavy and important traffic situation, coupled with the manpower shortage at Helper, Utah, it cannot and should not be forced to delay war materials.

OPINION OF BOARD: The Petitioner relies upon Rules 1, 3, 36, 37 and 50 of the Agreement effective June 1, 1941. Rule 1 is the Scope Rule, and it is contended by Petitioner that on the dates named in the claim that employes other than those covered by Groups 2 and 3 of the Scope Rule did work covered by this Rule.

It has been repeatedly held by this Board that work embraced within the scope of an agreement cannot be removed therefrom and assigned to employes not subject to its terms. This is true even if in performing the work it is necessary for the employe subject to the terms of the agreement to work overtime in order to perform the work.

Was the work performed by employes of the Carrier work that came under the Clerks' Agreement? To answer this question it will require a brief review of the facts involved in this claim.

In the claim of November 23, 1943, the facts are that the employes of the Store Department were unloading a car of reconditioned mounted wheels. They were assisted by some Car Repairmen who were temporarily idle while the repair track was being switched. The Storekeeper states this was done without his knowledge while the employes state otherwise as protest was made at the time Car Department employes were working. This work came within the Clerks' Agreement and the inference is that it prevented these employes from doing this work on an overtime basis.

In reference to the claim of November 30, 1943, the record shows that one Storehelper on duty was instructed to load a car of defective wheels for shipment and another Storehelper was called about 9:00 A. M. to assist in this work. The latter did not appear and about noon the Storekeeper used a Mechanical Laborer to assist the day Storehelper. These facts show that Petitioner recognized this work came within the Agreement and Carrier should have called another Storehelper.

The facts in the claim of December 1, 1943, are that a Store employe was sent to the freight house and depot baggage room for Store Department material and was accompanied by a Mechanical Department truck operated by a Mechanical Department employe for the purpose of transporting this material. The Mechanical Department employe helped place on and take off this material. The work performed by the Mechanical Department employe was work under the Clerks' Agreement.

Carrier intended to have Storehelpers Atwood and Richards unload wheels on May 6, 1944, but when Richards failed to report for work on that day the Carrier used a Mechanical Department employe and defends its action on account of an emergency that existed. If this is true the work still belonged to the employes covered by the Clerks' Agreement. See Award No.

2506. However, the Board finds that only one Mechanical Department employe was used on May 6, 1944, and, therefore, the claim can be sustained for only one of the named claimants.

The Storekeeper requested Helper Haycock, whose regular assignment was from 4:00 P. M. to 12:00 midnight to report on October 20, 1944. to help load defective mounted wheels. This he refused to do. Instead of calling another Storehelper he had the work performed by a Storehelper assisted by a Mechanical Department employe. These facts show that the Carrier recognized that this work came within the Clerks' Agreement and, therefore, violated the Agreement.

It may be that between W. H. Rodeback and other Storehelpers Rodeback was not entitled to present this claim, but the claim made by the Petitioner is for a violation of the Agreement. The claim on behalf of W. H. Rodeback is merely an incident. These facts do not relieve the Carrier of the obligation to pay the penalty. The Petitioner has elected to make the claim in his name. "The others are making no claim; and if they should the Carrier would not be required to pay more than once." Award No. 1646. See also Award No. 2282.

Should the penalties be on a pro rata basis or should the penalties be for time and one-half for the work that was performed by employes outside of the agreement? The Carrier contends that it was not required to postpone the work until after the employes had completed their tour of duty so that the employes covered by the Clerks' Agreement could perform this work. We agree with the Carrier as to this fact; nevertheless, if the employes had performed this work when it came up, the regular work of these employes would have had to be postponed and then done on an overtime basis.

After a review of many awards of this Board as to the correct penalty to be assessed for a contract violation, we have concluded that the correct rule is stated in Award No. 3277 in the following language: "The penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193, 3271." This rule is supported by legal authority. See the case of Steinberg v. Gebhardt, 41 Mo. 519.

Applying this rule to the facts in these claims, it follows that the penalties should be assessed at time and one-half for the time lost.

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 by Petitioner.

AWARD

Claim (1, 2 and 3) sustained in conformity with opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of January, 1947.