

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**

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Wilson McCarthy and Henry Swan, Trustees

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that weighmasters, head carders and carders, Roper Yard Office, be compensated on overtime basis for dates and time listed in Attachment "A", account not being worked when City Freight and Passenger Agent D. P. Heiner was used to perform the duties of carder from 8:00 A.M. to 4:00 P.M., October 13, 14, 16, 17, 18 and 19, 1944 and City Freight Agent H. R. Starr was used to perform the duties of carder October 16, 17, 18, 19, 20 and 21, 1944 from 8:00 A.M. to 4:00 P.M., in violation of Rules 1, 3, 37, second paragraph of Rule 40 and Rule 64.

EMPLOYEES' STATEMENT OF FACTS: On the dates mentioned in the above claim, Messrs. Heiner and Starr were used to perform the work of carding and other analogous work at Roper Yard Office.

The employees mentioned in Attachment "A" turned in time slips covering time worked by Messrs. Heiner and Starr, Traffic Department employees of the Denver and Rio Grande Western Railroad Company, who hold no seniority in the Roper Yard Office seniority district. Such time slips were declined by the carrier and the organization filed grievances for the employees involved. Claim was handled to the court of last resort on the property and same was declined.

Carrier refused joint submission of this dispute; therefore, same is being submitted ex-parte.

POSITION OF EMPLOYEES: Rule 1 of the Clerks' Agreement clearly establishes the right of employees in the Roper seniority district to perform the work of carding cars and other analogous work in the Roper Yard Office.

Rule 3 of the Clerks' Agreement also sets out the right of employees in the Roper seniority district to perform such work.

Rule 37 provides, as follows:

"Except as provided in Rule 38, employees notified or called to perform work not continuous with, before or after the regular work period, or on Sundays and the following holidays, viz.:

New Year's Day
Decoration Day

On October 17, E. I. Fitches, weighmaster, worked his rest day and in addition worked 8 hours overtime, C. I. Jeanotte, carder, worked his rest day, George Jones, carder, worked his rest day. In addition three (3) clerks worked their rest day.

On October 18, A. G. Hilton, head carder, worked 8 hours overtime as carder, D. R. King was laying off, A. R. Kartchner, weighmaster, worked his rest day, H. E. White, carder, worked his rest day and G. W. Brim, carder, worked 45 minutes overtime. In addition three (3) clerks worked their rest day and two (2) worked 8 hours overtime.

On October 19, George Swenson, head carder, worked 1½ hours overtime, Keith Wooley, carder, worked 4½ hours overtime, Vernal Tippetts, carder, worked his rest day. In addition five (5) clerks worked their rest day and one (1) clerk worked 8 hours overtime.

On October 20, F. S. Payne, weighmaster, worked his rest day, A. G. Hilton, head carder, worked ½ hour overtime. In addition five (5) clerks worked their rest day and one (1) clerk worked 8 hours overtime.

On October 21, R. P. Maloney, head carder, worked 8 hours overtime, carder Vernal Tippetts was laying off, A. R. Kartchner, weighmaster worked his rest day, C. I. Jeanotte, carder, worked 8 hours overtime, G. W. Brim, carder, worked one (1) hour overtime. In addition three (3) clerks worked their rest day and one (1) clerk worked 8 hours overtime.

As can be seen, the weighmaster, head carders and carders were used on their rest day and on an overtime basis during this period to the extent they were willing to work. In addition, clerks were worked on their day off and on an overtime basis to also help over this peak business period. As soon as Carrier could obtain additional employees, two carders were hired, J. S. Fidian was employed November 27, 1944, and William Robinson on December 11, 1944. It is Carrier's position that D. P. Heiner and E. R. Starr were used in an emergency brought about by manpower shortages and an unexpected and unforceable influx of freight traffic which blocked Carrier's Roper Yard. The only thing to do was to immediately straighten out this congestion so that important war traffic could again move to its destination. In view of these facts claim should be declined.

OPINION OF BOARD: City Freight and Passenger Agent D. P. Heiner and City Freight Agent E. R. Starr at Salt Lake City, Utah, assisted in making a complete check of Carrier's yards at Roper (Salt Lake City) Utah, and helped in carding of all cars in the Roper Yard. D. P. Heiner aided in this work October 13, 14, 16, 17, 18, and 19, 1944 from 8 A. M. to 4 P. M. and E. R. Starr assisted in making the check on October 16, 17, 18, 19, 20, and 21, 1944 from 8 A. M. to 4 P. M. During this period there were no relief clerks available. The yard at Roper was in a congested condition. Carrier contends that D. P. Heiner and E. R. Starr were used on account of an emergency that existed in that yard. The Employees deny that an emergency existed.

Petitioner contends that Heiner and Starr were not covered by the applicable agreement and that the carrier violated Rule 1 (Scope Rule), Rule 3 (Seniority Rule), Rule 37 (Overtime and Calls Rule), Rule 40 (Distribution of Overtime Rule) and Rule 64.

The work done by Heiner and Starr is covered by the Clerks' agreement. This fact is not denied by the carrier but its defense is that there was a congestion of cars in the Roper Yard; that the clerical force was working considerably overtime.

The carrier has not shown that the claimant employees were not available for work on the days in question. If these claimants did this work on these days they would have had to do it on an overtime basis, but this is contemplated by the rules relied upon by the petitioner.

This Board has repeatedly held that work belonging to those under an agreement cannot be given to those not covered by the agreement. Awards Nos. 1771, 2506 and 3220.

To accept the Carrier's justification for what is clearly a violation would mean that agreements are to be disregarded when, under stress of conditions it is more convenient to do so. That we cannot do. Award No. 2506.

The claims here before us are in the nature of penalties against the Carrier for having violated the agreement. Under these circumstances these claims could be made in the name of any employe the Petitioner elected, provided the claims did not make any additional penalty on the Carrier. It would only have to pay the penalty once. Awards Nos. 1646 and 2282.

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 Employees 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 violated the agreement as contended by the Petitioner.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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