

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**

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier (Northern Pacific Terminal Company of Oregon) be required to compensate Mr. R. H. Furbee one additional day's pay at his own rate on a time and one-half basis for each of the days enumerated in Employees' Statement of Facts on which days the Carrier failed to call him to perform service on Position No. 412, Crew Caller, located at Depot Yard Office, Portland, Oregon.

EMPLOYEES' STATEMENT OF FACTS: Mr. R. H. Furbee is the regularly assigned incumbent of Position No. 450, Assistant Chief Clerk, Depot Yard Office, rate \$8.27 per day with assigned hours daily 4:00 P. M. to 12:00 M., with Sunday as rest day.

On the following dates: June 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30. July 1, 3, 21, 25, 31. August 1, 2, 3, 7, 8, 9, 11, 15, 31. September 1, 2, 4, 5, 6, 7, 8, 9, 11, 23, 29, 30. October 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, 21, 23, 24, 25, 26, 27, 28. December 8, 22, 1944. January 27. February —. March 1, 16, 20, 21, 24, 26, 27, 28, 29, 30, 31. April 2, 3, 4, 5, 6, 25, 26. May 15, 30. June 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 1945.

Position No. 412, Crew Caller, Depot Yard Office, Rate \$7.88 per day, with assigned hours daily 8:00 A. M. to 4:00 P. M., with Sunday as rest day, was blanked by the Carrier due to the absence of the regularly assigned incumbent, Mr. Blair Martin on vacation, sick leave, and/or for other reasons. Position No. 412, Crew Caller is a position necessary to the continuous operation of the Carrier and Mr. Blair Martin has been working the position seven days per week due to a shortage of help making it impossible for the Carrier to provide a regular relief clerk. As a result of the Carrier failing to fill position No. 412 on the dates shown above, this continuous operation position was blanked.

Depot Yard Office is a part of the yard facilities of the Carrier and all employees there employed are carried on a common seniority roster which includes all employees covered by the Clerks' Agreement on the Carrier's property. Carrier was requested to join us in presenting this claim to your honorable Board, but declined to do so, hence this ex parte submission.

POSITION OF EMPLOYEES: There was in effect an agreement between the parties bearing the effective date of June 1, 1926, which has been superseded by the present agreement effective July 16, 1945. Only the agreement

4. General Chairman's charge that General Yardmaster was assuming the duties of Job No. 412 during the absence of the regular incumbent on any of the dates already mentioned in connection with this claim, was unjust, unfounded, and unproven.

5. Petitioner's claim is wholly without merit, and should, therefore, be declined in its entirety by this Board.

All emphasis appearing in this submission is that of Carrier.

OPINION OF BOARD: Position No. 412, Crew Caller, rate \$7.88 per day, hours 8:00 A. M. to 4:00 P. M. with assigned day of rest Sunday, was blanked on certain dates enumerated in Employees' Statement of Facts commencing June 16, 1944 and ending June 30, 1945. This position is necessary to the continuous operation of the Carrier and is, therefore, a seven day assignment.

In the defense of this claim, the Carrier separates the dates in two distinct parts. First, the two vacation periods, June 16 to 30, inclusive, 1944, and June 16 to 30, inclusive, 1945. During these two periods the regular assigned employee to this position was on vacation and the Carrier contends that under Rule 44 of the 1926 Agreement when construed in connection with the National Vacation Agreement of 1941, it had a right to blank this position during these vacation periods.

Rule 44 of the Agreement grants vacations "with pay provided the work is kept up by other clerks and there is no expense to the Carrier involved in granting the vacations". The National Vacation Agreement of December 17, 1941 provides vacations even where there is an additional expense to the carrier; it supersedes Rule 44. Carrier contends that under Article 6 of the National Vacation Agreement it has the right to blank this position on the dates in question, and Referee Morse's Interpretation of this Rule. Award No. 2340 rules adversely to Carrier's contention in the following language:

"It seems clear, therefore, that all rules agreements remain as before the execution of the Vacation Agreement, and that, in the absence of a negotiated change, they are to be enforced according to their terms."

In this claim no change was negotiated with reference to the blanking of a position and Rule 41 of the Agreement controls.

In reference to the dates in Employees' Statement of Facts other than the two vacation periods, the Carrier contends on each of these dates Clerk H. S. Fisher, who is considerable senior to the Claimant, was used to fill Position No. 412. Fisher was the Chief Clerk and his assigned hours were the same as that of Position No. 412. The only inference to be drawn from this record is that Fisher did his own work as Chief Clerk and also performed the work of Position No. 412. This is nothing but a subterfuge. As contemplated by Rule 41 the position was blank on the dates in question. This position is necessary for the continuous operation of the Carrier and this Board has consistently held such positions must be filled for all calendar days of the year, and if they are blanked on certain days, such as shown in this case, the Carrier violates the Agreement. See Awards Nos. 1635, 2536, with Interpretation No. 1, 3049, 3054, 3101, 3193, 3222 and 3223.

The Carrier makes the further contention that the Claimant was junior in service to W. H. Nelson who was working the second shift and was available for the work, and further states that the Claimant had indicated that he did not wish to "double on two shifts except on infrequent occasions". However, the fact remains that neither he nor Nelson were offered this work. But this claim is for a penalty and this Board has ruled that the Petitioner may make the claim for compensation in the name of any employee, as it is only incident to the violation of the Agreement. See Awards Nos. 1646 and 2282.

Under Awards 3193 and 3271, this claim cannot be allowed in full as it is a penalty payment. The rule is that the Claimant will be allowed "the rate which the employe to whom it was regularly assigned would receive if he had performed the work". The regular occupant of the position had Sunday as his assigned day of rest. Had he worked on any Sunday, he would have received the rate of time and one-half. The same is true as to holidays specified in Rule 41. The Claimant therefore is entitled to the overtime rate for Sundays and holidays, the straight time rate of \$7.88 for week days named in the Employees' Statement of Facts, which is in addition to what he has received on his own position.

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 in accordance with the 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.