

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

James M. Douglas, Referee.

PARTIES TO DISPUTE:

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

**MISSOURI PACIFIC RAILROAD COMPANY
(GUY A. THOMPSON, TRUSTEE)**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When it utilized Mrs. A. Shoup who had not established seniority on the Group 2 Clerks' Seniority Roster—Western District—General Superintendent, to relieve the Crew Caller on his designated "rest day" at Council Grove, Kansas, on April 6, 1946 and on the dates subsequent thereto listed in Statement of Claim made a part hereof, and failed and refused to permit the claimant who was available, ready and willing and who had established seniority on the roster entitling him to perform the work on his rest day and be paid for same; and

2. When it utilized Mrs. A. Shoup in the same manner as stated in Stipulation No. 1 hereof, to fill temporary vacancy on position of Crew Caller at Council Grove on June 7 and other subsequent dates listed in Statement of Claim and designated by asterisk in Claim Summary Sheet, made a part hereof, and failed and refused to permit the claimant who was available, ready and willing and who had established seniority on the roster entitling the claimant to perform the work and be paid for same to fill the vacancy;

3. That the claimants shall be compensated for eight hours at time and one half time each day claimed as listed on Claim Statements and on Claim Summary Sheet, which claims shall continue on each subsequent "rest day" that employees are relieved by Mrs. A. Shoup or by any employee who has not established seniority on the seniority roster in violation of Agreement provisions until this dispute is disposed of and the claims satisfied; and

4. That claimants shall be compensated for eight hours at time and one half time for each date as shown on Claim Statement and designated by asterisk on Claim Summary Sheet, that Mrs. A. Shoup or any employee who has not established seniority on the roster was utilized to fill temporary vacancies on position of Crew Caller when the claimant who was available, ready and willing and who had established seniority on the roster entitling him to work and be paid for same was not used, and which claim shall continue on each day subsequent to the date stipulated in Statement of Claim

and Claim Summary Sheet, that temporary vacancies are so filled in violation of Agreement provisions.

EMPLOYEES' STATEMENT OF FACTS: The seniority roster of employees subject to the scope and operation of the Clerks' Agreement on the Western District of the Missouri Pacific Railroad—General Superintendent's jurisdiction—is divided into two groups, namely:

Group 1—Clerks and those coming within the purview of (a) and (b) of Rule 1;

Group 2—Other office and station employees such as those coming within the purview of Group 2, Rule 1, page 3 of the Clerks' Agreement.

The Group 2 seniority roster lists among others the names of Leslie D. Toothaker, seniority date of October 10, 1917; Milton F. Lowe, seniority date of December 4, 1941 and Lewis M. Marks, seniority date of January 26, 1943. The Group 2 seniority roster, Western District, General Superintendent, or any other seniority roster covered by the Clerks' Agreement does not list the name of Mrs. Adelia Shoup, who we understand was last employed by the Carrier on a date not presently available to the Employees, who, of her own option, elected not to establish seniority because she on different occasions refused regular assignment, a requisite necessary to provisions of Rule 3 (d) of the current Agreement, as we shall hereinafter in this submission show.

Council Grove, Kansas, is a main line terminal point for train and engine crews on the Council Grove sub-division of the Central Kansas-Colorado operating division of the Missouri Pacific Railroad and is under the jurisdiction of the Division Superintendent located at Osawatomie, Kansas, 92 miles east of Council Grove.

The Missouri Pacific Railroad employs yard, train and engine crew callers at Council Grove, Kansas, consisting of three positions working in a "wheel" covering the 24-hour period, which positions are those that come within the purview of the "exception to" or the "second part" of Rule 26 of the Clerks' Agreement, that is, they are positions necessary to the continuous operation of the Carrier.

Prior to July 1, 1943, the Clerks' Agreement on the Missouri Pacific Railroad contained a rule—Sunday and Holiday Rule 60—the provisions of which rule were:

"Work performed on Sundays and the following legal holidays: namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or by Proclamation shall be considered the holiday) shall be paid for at the rate of time and one half, except that employees regularly assigned to work full time on Sundays and the seven designated holidays, and men called to fill their places on such regular assignment, will be compensated at the pro rata rate of the position."

and, as will be noted, the rule provided among other things that employees regularly assigned to work full time on Sundays and the seven designated holidays, and men called to fill their places on such regular assignment were compensated for such services at the pro rata rate of the position.

On May 8, 1943, growing out of negotiations between the Employees and the Carrier in Mediation, an Agreement was mutually reached and signed effective July 1, 1943, which contained a rule captioned SUNDAY AND HOLIDAY WORK, Rule 26, which rule provides:

"Work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day ob-

to hire new employees. Such an interpretation is untenable and contrary to the purpose and intent of the rule. The Board may readily visualize the restrictions imposed upon the Carrier in hiring new employees to supplement its clerical forces to accomodate seasonable and normal fluctuating needs in filling temporary vacancies due to illness and other causes, vacations, etc., when such needs cannot be accommodated by available extra or furloughed employees who have established seniority, if the Employees' interpretation of Rule 3 (e) be adopted. Carrier submits that the rule is susceptible of no such interpretation. Certainly, the rule does not stipulate that it is mandatory upon employees holding regular assignments to additionally fill all temporary vacancies or to perform all relief work when no extra or furloughed employees having established seniority on the seniority roster are available, neither does the language contained in the rule recite or imply that employees holding regular assignments have the exclusive right to additionally fill temporary vacancies or to perform relief service over extra employees having an employment date but who have not established seniority on the seniority roster.

The claimants in this case were filling regular assignment as Crew Callers at Council Grove and they fulfilled such assignment, being denied no work opportunity thereon. Moreover the claim here presented in behalf of the named claimants for time and one-half rate for service it is contended they should have performed but were not permitted to do so, amounts to the equivalent of a double penalty which certainly is beyond the comprehension of any rules contained in the agreement and is contrary to prior decisions of your Honorable Board in which the Board has consistently denied such claims when rules of agreement have imposed no specific penalty. In Award 2695 the Board said:

"We are of the opinion that there is no basis for an affirmative award as to claim (b). In Award 2346 the Board said: 'Neither can we find that assignment without actual work is equivalent to work when the overtime rule is to be construed and applied.' We think the reasoning of the foregoing award is sound that overtime cannot be allowed when the regular assignment is not worked. To hold otherwise would inflict a double penalty upon the Carrier. . . . We adhere to the holding on this issue in Award 2346 which requires a denial of Claim (b)."

The Board also said in Award 2859:

"We do not believe, however, that there is any basis for an affirmation award as to Claim (a). This Division has frowned upon infliction of a double penalty as would result if the entire claim were allowed."

The claim here presented in behalf of the claimants named, as recited in the Employees' Statement of Claim, is not supported by rules of the existing working agreement between the Carrier and the Clerks' organization, and for reasons stated in this submission, Carrier believes same should be denied by your Honorable Board.

(Exhibits not reproduced.)

OPINION OF BOARD: In this case Carrier used an employe having no established seniority on the Clerks' Seniority Roster to perform Claimant's work on their seven-day positions. Claimants contend they were improperly relieved by such employe who had no established seniority, and this claim resulted.

The facts and issues are similar, the same rules apply, the same principle controls, and we reach the same conclusion as we did in the companion case, Award No. 3860.

The claim will be sustained.

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 violated the Agreement.

AWARD

Claim (1, 2, 3, and 4) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of April, 1948.

DISSENT TO AWARDS 3860, 3861 AND 3862

Here is error: An Agreement applied to give it the meaning that an employer cannot hire a new employe unless and until, contrary to the intent of the rule providing for an employe's day of rest and to any provisions of the Agreement, the Carrier takes either of the following actions:

(a). Commands a present employe to work on his rest day, i.e., additional to the six days of eight hours only guaranteed by the Agreement,

or

(b). In each and every situation which requires additional man-hours of service each employe who considers himself eligible to perform such work, in addition to his guaranteed six days of eight hours, must be consulted either individually or through the Brotherhood, and his or their privileged acceptance declination of the additional work secured, before the employer could proceed to hire a new employe.

The error of such application of the Agreement and of this Award is evident in the following facts:

(1). The Agreement does not contain prohibition upon the Carrier in respect to its action in this case.

(2). The parties, with practical knowledge of railroad operations, could not in reason enter into a contract with intent giving either of the results above stated.

(3). This Carrier, one party to the contract, in its knowledge of the utter impossibility of retaining any semblance of possession of control of its property and its operation under such an application, would not become party to an Agreement with such intent or meaning.

/s/ C. C. Cook