

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee.

PARTIES TO DISPUTE:

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

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Northern Pacific Terminal Company of Oregon violated the Clerks' Agreement:

(1) When it used employees of other crafts to call crews and handle the crew board on the second and third shifts at the Roundhouse, and

(2) That employees A. A. Farley and Blair F. Martin be compensated at the rate of time and one-half for each day October 16 to December 26, 1945, both dates, inclusive.

EMPLOYEES' STATEMENT OF FACTS: Mr. A. A. Farley, who was the incumbent, and regularly assigned to Job No. 703, hours 8 A. M. to 5:00 P. M., one hour for lunch, and who was available for and qualified to do this work and should have been used on the dates October 16th to December 28th, 1945, inclusive, hours 11:59 P. M. to 7:59 A. M., including rest days, in calling crews, dispatching Enginemen and Firemen, as a Boardman Clerk, when this work was performed by employees outside the scope of the current Clerks Agreement.

Mr. Blair F. Martin, who was the incumbent and regularly assigned to Job No. 412, hours 7:59 A. M. to 3:59 P. M., and who was available for and qualified to do this work and should have been used on the dates of October 16th to December 22nd, 1945, including rest days, hours 3:59 P. M. to 11:59 P. M., in calling crews, dispatching Enginemen and Firemen, as a Boardman Clerk, when this work was performed by employees outside the scope of the current Clerks' Agreement.

POSITION OF EMPLOYEES: Effective July 16th, 1945, an agreement was entered into by the Northern Pacific Terminal Company of Oregon and the Brotherhood of Railway and Steamship Clerks, Freight handlers, Express and Station Employees, setting forth the rules governing the hours of service and working conditions of the following employees of the Northern Pacific Terminal Company of Oregon.

SCOPE

Rule 1—These rules shall govern the hours of service and working conditions of the following employees of the Northern Pacific Terminal Company of Oregon:

1—Clerks,

the Clerks' Agreement, but has acted in good faith in establishing the two positions in question, and in subsequently attempting to reach a fair settlement of this dispute, Carrier believes that under no circumstances should penalty payments accrue prior to November 19, 1945, when the rate of \$7.88 per day had apparently been agreed to by Petitioner and Carrier as the proper rate to be applied to the contemplated new positions.

Carrier points out that the pro-rata rate of \$7.88 per day could be the only proper rate to be so paid in such circumstances. Awards 2346, 2695, 2823, 3049, 3193, 3222, and 3376 of this Division have stated that work lost is paid for at the rate which the employe regularly assigned thereto would have received, had he performed the work. There is, therefore, no basis for Petitioner's claim for time and one-half rate, as outlined in Paragraph 2 of Statement of Claim.

The Division's attention is directed to the fact that two of these claimants were absent from their regular assignments on certain dates within the period of claim:

Claimant Farley was absent from his regular assignment October 21, November 4, 18, 27, 28, 29, December 9, and 16, 1945.

E. M. Spengler was absent October 28 and December 23, 1945.

Attention is again directed to the date of December 22, 1945, when D. B. Woodworth, a qualified unassigned clerk, who had just returned from military service, was properly placed on the second shift at the Carrier's roundhouse, under Rule 11 (b), while that position was bulletined for seniority choice, thus terminating all claims for the second shift to and including December 21, 1945.

MOTION AND REQUEST OF CARRIER: For the reasons previously stated herein, Carrier moves and requests that E. M. Spengler be notified of these proceedings and be made a party thereto.

CONCLUSION: Carrier has felt from the first that these claims were most unfair, and, in the circumstances, without merit; therefore, respectfully requests they be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: In this case the Carrier admits that persons not within the Agreement were used to perform work covered by the Scope Rule of the Agreement. This practice had prevailed for many years prior to October 2, 1945, when the Brotherhood in writing called the violation of the Agreement to the attention of the Carrier by a letter which specified the particular positions involved and the employes who were doing the work. The letter requested that the duties be assigned to employes covered by the Clerks' Agreement.

The parties thereafter exchanged other letters, held conferences and telephone conversations until in December, 1945, the Carrier established two positions as requested and filled them with employes covered by the Agreement.

In the meantime the two Claimants herein each filed time cards claiming eight hours at time and one-half for October 16, 1945 "and each day thereafter until corrected, on engineers and firemans' board. Account of employes working not under Clerks agreement."

These claims were dated October 16, 1945, but were not actually delivered to the Carrier until some time thereafter. They were both denied by the Carrier. In a letter by the Carrier, dated March 29, 1946, it indicated a willingness to make a penalty payment of \$7.88 per day for each day in question to two claimants available but asked the opinion of the Brotherhood as to the claim of E. M. Spengler filed personally March 22, 1946, for pay the same hours claimed by one of these claimants.

This Division held in Award No. 3275 that when there are employes available who are entitled by the Agreement to perform work within the scope of

the Agreement it is a violation of the Agreement for the Carrier to use employees of another class or craft for such work.

In Award No. 1518 we held that continuing violation of a rule does not change the rule or serve to diminish its binding effect. This sound statement of principle is not affected by awards, such as No. 2326, in which we have held that long continued practice of the parties may be resorted to in an effort to interpret an ambiguity in a rule.

The Carrier insists that these claims as presented to this Board are not the same claims as those originally filed by the Claimants and as handled on the property. The notice of October 2, 1945, by the Brotherhood to the Carrier complained of the same violation as presented by the claims as filed here. The slight variations in the details is immaterial. The statement on that question in Award 3256 is equally pertinent here.

The Carrier also insists that the monetary claims as presented by Item (2) of the claim were not timely filed. It was not necessary to include the claim for compensation or penalty in the first protest by the Brotherhood of the violation of the Agreement. Award No. 2611. There was no improper delay here in filing the monetary claims. There is no provision of the applicable Agreement nor any principle of law which requires us to limit these claims for compensation to the date they were actually filed. We have many times held that the penalty for violation of the Agreement is the important thing; that the claim on behalf of a particular individual is merely an incident which is of no concern of the Carrier. See Awards 1646, 2282 and 3376.

The parties agree that the violation of the Agreement terminated as to the second trick position December 21, 1945, and as to the third trick position on December 26, 1945.

It was also agreed that Farley was not available for service and is therefore not entitled to compensation for seven days of the period claimed and that Martin for the same reason is not entitled to compensation for six days of the period claimed.

Pursuant to our holdings in former awards the compensation under circumstances such as here for time not worked must be limited to the straight time rate.

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 employees 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 Carrier violated the Agreement as claimed.

AWARD

Claim (1) sustained. Claim (2) sustained for compensation at straight time rate for the days Claimants were available for service during the periods of the violation of the Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division.

ATTEST: H. A. Johnson
Secretary.

Dated at Chicago, Illinois, this 30th day of April, 1948.