# Award No. 4292
# Docket No. CL-4093

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Le Roy A. Rader, Referee**

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## PARTIES TO DISPUTE:

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

## THE PENNSYLVANIA RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the scope and other rules of the Clerks' Rules Agreement, effective May 1, 1942, when it assigned work covered by that Agreement to employes of the Pilot Contracting Company, who are not subject to its terms.

(b) Albert Farrior and other employes adversely affected, Philadelphia Transfer and South Philadelphia, Pa., Freight Station, who are designated by the Brotherhood to participate in this claim, holding positions covered by the scope of the Clerks' Rule Agreement, effective May 1, 1942, be compensated for the difference in the rate of pay provided by agreements and the rates paid the employes of the contractor, including punitive rate for all time worked beyond forty hours per week, beginning March 17, 1944. (Dockets E-348, E-349, and E-350.)

**EMPLOYES' STATEMENT OF FACTS:** There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

Some of these claims date back to ninety days prior to June 17, 1944, others date back to ninety days prior to June 26, 1945 and are made in behalf of a number of claimants who are employed as General Foremen, Foremen, Assistant Foremen, Tallymen, Loaders, Freight Truckers, Stowers, Station Cleaners, Coopers, and Warehousemen at Philadelphia Transfer Freight Station and South Philadelphia Freight Station, Philadelphia, Pennsylvania. Beginning ninety days prior to June 17, 1944, employes of the Pilot Contracting Company were employed by the Pennsylvania Railroad Company at these two and other freight stations in Philadelphia, Pa., and paid a differential of approximately 14½¢ per hour more than the employes covered by the Scope of the Clerks' Rules Agreement. This differential applied to truckers and loaders. Foremen employed under the Contractor received a differential of approximately $20.00 per month. This differential continued until January 1, 1946 at which time the rates of pay of the posi-

fixed by the Agreement. All of the Claimants worked continuously during the period in which the Contractor's forces were used, and worked excess hours insofar as they desired to do so. Therefore, Rule 4-F-1 provides no support for the claim.

The Carrier submits, therefore, that there is no basis in the Agreement upon which the Claimants can be compensated at the rates paid by the Contractor to his force, or under any of the overtime conditions applicable to them. The record shows that the Claimants were properly paid in accordance with the applicable Agreement.

**III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreements between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

**CONCLUSION**

The Carrier has shown that under the applicable Agreement between the parties to this dispute the Claimants are not entitled to the rate of pay of the Contractor's force, as claimed.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

(Exhibit not Reproduced.)

**OPINION OF BOARD:** Petitioners contend that the Scope Rule of the Agreement was violated by the Carrier under the facts in this case. Also, claim is made on behalf of Albert Farrior and other employes adversely affected to be compensated for difference in the rate of pay provided in the Agreement and rates paid employes of a contractor, for work of this type or nature, including punitive rate for all time worked beyond forty hours per week beginning March 17, 1944.

The defense presented by the Carrier is threefold. First, that war emergency conditions, congestion of freight, and need for speedy handling of the same, made necessary the action taken; second, that petitioners were paid overtime and therefore suffered no monetary loss during the time in question; also, that Carrier has no control over the rate a contractor pays such extra, part time employes; and, third, that this Board does not have the authority to change the rates covered by the effective Agreement between the parties. A great number of awards are cited by the parties in support of their respective positions.

The Scope Rule of the Agreement is considered to have been violated under the facts in this case. The difficult question presented for determination is as to whether or not the violation is more than technical in its nature.

Award No. 3587, with Judge Herbert B. Rudolph sitting with this Division of the Board as Referee, rules that there was a violation of the Scope

Rule in a similar fact situation, under the terms of the same Agreement, between the same parties. However, a distinction is made relating to the amount of penalty, stating:

> "We think the penalty should be the rate the positions carried when finally established and not the punitive rate as claimed by Petitioners. Time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides. Awards 2346, 2695, 2823, 3049, 3193."

Award 2983 is cited and provides in part as follows:

> "Here our only difficulty is that Section (b) of the claim requests that the rate of pay used by the contractor be used as a basis of an award in this case. This Board cannot create new rates for the employes coming under the contract of the Signalmen, nor can it make an award on a subject not processed as provided under the law.
>
> "Therefore, this claim must be sustained as to Claim (a) and dismissed as to Claim (b)."

A dissent was filed on this award as to reasons advanced for sustaining Claim (a).

The work here involved is what generally may be termed common labor, in that it does not require any great degree of skill in performance, nor is any great degree of training necessary.

It is alleged that the contractor paid a higher rate to employes and it is not contemplated that there are to be two rates of pay for work of like nature or in the same kind of positions. It is contended, also, that the Carrier should not be permitted to increase rates of pay indirectly through a contractor and thus circumvent the spirit and intent of the collective Agreement in not giving its senior or regular employes opportunity to receive such higher rates, and that this principle applies equally to the forty-hour week and increased overtime earnings paid by the contractor.

The difficulty with this situation would seem to be that there is no direct showing made by the Employes that the Carrier had control over the wage rates and overtime payments made by the contractor. To sustain the claim on this ground there would have to be direct and specific evidence introduced proving that the Carrier was a direct party to an agreement to pay a higher wage rate. While it may well be true that the contractor did pay a higher rate than that listed in the Agreement as between the parties, yet the burden of proof would be on the Petitioners to show that the Carrier was a party to such a plan of payment, with the employes so working, by direct agreement. Under the record in this case this burden of proof does not seem to have been met.

The Carrier here violated the Scope Rule of the Agreement and there is no doubt in the furtherance of good labor relations that Carrier should have conferred and made every effort to negotiate prior to turning this work over to a private contractor. Such practice should not be condoned. Item (a) will be sustained.

On Item (b) of the claim, the legal rule involved is construed to be that this Board does not have the authority under the Railway Labor Act to award a rate of pay which has not been fixed by the collective bargaining process. This would be an invasion on the legal rights of the parties not authorized or contemplated under the applicable law involved. Relative to that part of this item of the claim, as follows:

> "* * * including punitive rate for all time worked beyond forty hours per week, beginning March 17, 1944."

the record seems to indicate that Petitioners worked overtime hours to a considerable extent. If this part of Item (b) of the Claim relates to a

higher rate being paid than that provided for in the Agreement, it fails for the reasons above stated. If on a proper showing it can be proven that employes covered by the Agreement were defeated in their desire and ability, based on availability to perform overtime work, then they are to be compensated at the rate of pay covered in their collective Agreement with the Carrier. On this division of Item (b) of the claim, the same is to be remanded for further proof on the property. Under the record herein, it is considered to be too indefinite to warrant a sustaining award; however, additional proof could show the true and actual situation with respect thereto.

**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 Item (a) of Claim is sustained. Item (b) of Claim is denied as to request for a higher rate of pay than that covered by the wage rates in the Agreement. On the question of overtime payments, the same to be remanded for additional consideration in keeping with the Opinion herein.

AWARD

Item (a) sustained.

Item (b) denied, with the exception of that part of the same to be remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of January, 1949.