

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

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

(a) Mr. K. F. Henrich, Ticket Clerk at Marysville, California was senior qualified regular assigned employee available, and should have been called each day for vacancy on position of Baggage man at Marysville, hours 12:00 Midnight to 8:00 A.M. October 16 to November 22, 1944, inclusive and November 25, 1944 to January 4, 1945, inclusive.

(b) Mr. Henrich be compensated at the rate of time and one-half for 8 hours on each of the days involved in this claim.

EMPLOYEES' STATEMENT OF FACTS: During the period October 16, 1944 to January 4, 1945, inclusive, Mr. K. F. Henrich was the occupant of the position of Ticket Clerk at Marysville, California with assigned hours of 4:00 P.M. to 12:00 Midnight, working 7 days each week. He worked each and every day during this period with the exception of November 23rd and 24th.

On the days involved in this claim the position in question was filled by the use of soldiers stationed at Camp Beale (a military establishment located a few miles south-east of Marysville). The soldiers held no seniority rights under the provisions of the Clerks' Agreement, whereas Mr. Henrich did hold such rights, having a seniority date of October 4, 1913.

POSITION OF EMPLOYEES: The following rules are cited from the current Agreement bearing effective date of December 16, 1943:

RULE 1. SCOPE.

"These rules shall govern the hours of service and working conditions of all of the following class of employees, subject to the exceptions noted below:

(1) Clerks.

(2) Other office, store and station employees, such as office boys, messengers, chore boys, train announcers, gate-men, baggage and parcel room employees, train and engine crew callers, operators of certain office or station appliance devices, telephone switchboard operators, elevator operators,

It is the contention of the Carrier that Schedule Rule 40 (d) clearly gave it the right to hire Arnn and Nelson for the performance of extra work. Even if that right had not been accorded to the Carrier by the schedule, there is nothing to warrant paying Henrich at overtime rates of pay. The overtime rule (Rule 20 of Current Clerks Schedule), reads:

"OVERTIME

Rule 20. Except where changing assignments in the exercise of seniority rights, or where furloughed employees are used on more than one shift, time in excess of 8 hours, exclusive of the meal period, in any 24-hour period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half.

Employees shall not be required to suspend work during regular hours to absorb overtime.

In working overtime before or after assigned hours, employees regularly assigned to class of work for which overtime is necessary shall be given preference. In working overtime on Sundays and Holidays, the same principle shall apply."

This requires the payment of overtime only when employees are used in excess of eight hours in any twenty-four-hour period. Henrich was not used, therefore, the overtime rule is not applicable to him.

You are urged to deny the claim of the employees because:

(1) The extra work as baggageman at Marysville, California, 12:00 Midnight to 8:00 A. M., from October 16, 1944 to January 4, 1945, inclusive, was performed by employees hired for the performance of extra work as specifically set forth in the last sentence of Rule 40 (d).

(2) There is nothing in the schedule contemplating or requiring the payment of time and one-half except when an employee is used, and Henrich was not used.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was assigned as Ticket Clerk, 4:00 P. M. to 12:00 midnight, working seven days per week. He worked each day from October 16, 1944 to January 4, 1945, except November 23rd and 24th. Between the aforesaid dates, the position of Baggage-man-Janitor, assigned 12:00 midnight to 8:00 A. M., became vacant and no bids were received when it was bulletined. The position was not filled by appointment in accordance with Rule 36. The Carrier used two soldiers from Camp Beale to perform the work of this position. Claimant contends that he should have been doubled over and used at the overtime rate, there being no extra or furloughed employees available.

It is the contention of the Carrier that the two soldiers were new employees and that it was proper to use them when no extra or furloughed employees were available. The two soldiers did make applications for employment in the usual manner. We think the evidence shows that they did not become such. Consequently, they accumulated no seniority. If they were new employees, they should have been assigned to the Baggage-man-Janitor position under Rule 36, current Agreement, which states:

"New positions or vacancies may be filled temporarily during the 10 days pending assignment. In the event bulletin fails to develop an applicant, the position may be filled by appointment, except as otherwise provided in Rule 40. Regular notice of assignment shall state no qualified bids received, and show name of employee assigned."

The failure of the Carrier to comply with the foregoing rule in filling the position with the two soldiers, is a clear indication that the soldiers were not considered as new employees. The fact that they were in the army and

not subject to use except for limited hours, and then only by permission of their commanding officer, substantiates this conclusion. The two soldiers never having become employees in the sense used in the collective Agreement, they could gain no rights under the Agreement. Consequently, Claimant had a valid claim to the work.

The rate to be paid for work lost under the circumstances here shown is the pro rata rate of the position. Award 4244.

The two soldiers who performed the work had no rights under the current Agreement. There being no extra or furloughed employees to perform the work, Claimant by virtue of the rules of the Agreement, had a superior right to the work. A sustaining award is in order.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 the Agreement was violated.

AWARD

Claim sustained at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 29th day of July, 1949.