

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Ogden Union Railway and Depot Company and/or its Officers violated the terms of the agreement

(a) By failing or refusing to call Mr. K. Goff to work position 8:00 A. M. Ice House Yard Clerk on December 25 1949; and

(b) The Company shall now compensate Mr. Goff for 8 hours' time at the established yard clerk rate at time and one-half for the above referred to shift.

EMPLOYEES' STATEMENT OF FACTS: The Ogden Union Railway and Depot Company is a joint terminal facility of the Union Pacific and the Southern Pacific Railroad Companies which terminal company operates only at Ogden, Utah, where this dispute and claim arose.

At the 28th street location of this terminal yard are located three clerical positions known as the 28th street Ice House Yard Clerk positions, which positions are worked around the clock on shifts beginning at 8:00 A. M., 4:00 P. M. and 12 o'clock midnight, these positions are worked 7 days of every week including all Sundays and holidays, the employees of course work a regular 40-hour weekly assignment with relief clerks covering. The duties of all named clerks are those of checking inbound trains from the Southern Pacific and outbound trains departing to the Union Pacific, tagging cars and such incidentals ordinarily attached to such outside yard clerk work.

On December 25, 1949, a vacancy existed on the 8:00 A. M. Ice House Yard Clerk position, no furloughed or extra employees were available to fill the position and it was necessary for the company to use a regularly assigned employe from other work who had performed his day's work.

Mr. K. Goff was regularly assigned to the 28th Street Ice House Yard Clerk position and worked from 4:00 P. M. to 12 midnight on December 25, 1949. Mr. J. C. Drew was regularly assigned to the 28th Street Ice House Yard Clerk position and worked from 12 o'clock midnight to 8:00 A. M. on

vacancy. That Goff had no desire to fill the vacancy is evident by the fact that he did not make application for it. Not having made application for it, he cannot now properly assert a claim because it was filled by someone else.

We turn now to the claim for payment of the punitive rate. There are no provisions of contract which stipulate that an employee exercising his seniority onto a vacant position will be paid the punitive rate. The carrier is expressly relieved from payment of the punitive rate by Rule 53 of the effective agreement, reading:

"53. **EXPENSE TO THE COMPANY:** The company shall not be penalized by the payment of punitive time in the exercise of seniority rights or for personal convenience of employees."

Moreover, the Board has held in many awards that an employee may not claim a right to a position on an exercise of seniority basis and at the same time be paid the punitive rate. The Board held in Award 4571:

"The organization claims pay at the premium rate. We have consistently held that the penalty rate for work lost because it was given to one not entitled to it under the agreement is the rate which the regular occupant of the position would have received if he had performed the work."

Application of Rule 53 and the principles announced by the Board prescribe the payment of the punitive rate.

The claim by the employees for 8 hours at the punitive rate to Mr. Kay Goff is, therefore, without merit or support, and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue in this case is whether seniority should govern a temporary vacancy of one day.

Three clerical positions known as the 28th Street Ice House Yard Clerks position are worked around the clock on shifts beginning at 8:00 A. M., 4:00 P. M. and 12:00 o'clock midnight, 7 days a week including all Sundays and holidays. The regular employees work a 40-hour week from Monday to Friday. Regular relief is furnished each of them by three relief clerks: Goff, assigned the 4 P. M.-12 midnight shift on Saturdays and Sundays; Drew, assigned 12 midnight-8 A. M. shift Sundays and Mondays; and Arbon assigned 8 A. M.-4 P. M. shift on Sundays and Mondays; Arbon relieved regular clerk Clifton. On Saturday, December 24, 1949, Arbon was assigned to another position which had been advertised and on which he was the senior qualified applicant. On that day, the relief clerk position which he vacated was bulletined, and on December 26th it was assigned to the senior qualified applicant Frandsen.

On December 25, 1949, the day in issue in this case the relief clerk position of Arbon was vacant. The position remained unfilled and was unassigned on that date. There were no extra or furloughed clerks available. The position was performed by Relief Clerk J. C. Drew who, after completing the work of his assignment, 12 midnight to 8 A. M. on his relief clerk position, continued in service on the same position 8 A. M. to 4 P. M., working a total of 16 hours, for which he was paid 8 hours at pro rata rate and 8 hours at the punitive rate of time and one-half.

The Organization claims that Goff should have been used in place of Drew to work the position 8:00 A. M. to 4 P. M. because he was senior to Drew in the service.

In our opinion this case falls clearly within the operation of Rule 5 (d) of the Supplemental Agreement between the parties concerning the 40-hour week. This rule reads as follows:

"RULE 5: OVERTIME

(d) **Work on Unassigned Days**—Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

The day in question, December 25, 1949, which was both Sunday and Christmas, and a rest day of Clifton's regular position, became an unassigned day when Relief Clerk Arbon was assigned to another position. Since there were no extra or unassigned employees available, Rule 5 (d) required that the work be assigned to the regular employee, Clifton. The Carrier violated the Agreement in using Drew instead of Clifton, the regular employee.

The fact that Clifton did not file a claim for this violation does not bar Goff from making the claim. There is nothing in the rules of the parties that permits or authorizes work to be done by one with lesser seniority when there are those with greater seniority available and willing to do the work, except as provided in Rule 5 (d). 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 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of September, 1951.