

Award No. 5562
Docket No. CL-5258

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

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

(1) Carrier violated provisions of Memorandum Agreement of June 2, 1941 when during the period August 1 to August 5, 1949 and on certain other specific dates Management engaged a "straggler" or unassigned employe as a Freight Handler between the hours of 5:30 P. M. and 9:30 P. M. to assist members of the regular assigned warehouse force in handling of freight that could have and should have been handled by regular forces.

(2) That C. N. Garner, senior Stower, who was ready and available to perform the work handled by the "straggler" or unassigned employe, be compensated for wage loss sustained equalling the number of hours at punitive overtime rate that was paid to the "straggler" or unassigned employe during period August 1 to August 5, 1949, and

(3) That the senior available Stower who was ready and available for service be likewise compensated for time lost on the overtime basis for the equivalent number of hours worked by a "straggler" or unassigned employe on dates other than during period August 1 to August 5, 1949, claims to cover which have been filed by said employes with the Management and pending awaiting final decision in the instant case.

EMPLOYES' STATEMENT OF FACTS: There is employed in the Carrier's Pueblo Freight Station a regular force of Freight Handlers with designated hours of service assignment to wit:

Shift	MEAL PERIOD
8:00 AM to 5:00 PM	12 Noon to 1:00 PM
8:30 AM to 5:30 PM	12:30 PM to 1:30 PM
1:00 PM to 9:30 PM	5:00 PM to 5:30 PM

Provision is made by Agreement to augment this force under conditions expressly provided for therein. (Employes' Exhibit No. 1.)

"January 11, 1950
CL-60-49

Mr. F. H. Donlon, Acting General Chairman,
Brotherhood of Railway Clerks,
Denver, Colorado.

Dear Sir:

Please be referred to your letter of November 8, 1949, appealing from declination by the Superintendent of the Salt Lake Division of claim stated by you as follows:

'Claim of the Local Committee of the Brotherhood that E. H. Kilgore shall be paid time and one-half rate instead of straight time allowed for eight hours service as stower, Salt Lake City Freight Station, Sunday, October 23, 1949, in accordance with the provisions of Rule 37.'

It developed in our conference with you today that the claimant was an extra or unassigned employee who performed service on a Sunday. Therefore, in conformity with Article VII, Rule 37, of the current agreement, the claim will be allowed.

Yours truly,

(s) E. B. HERDMAN,
(E. B. Herdman) Manager of Personnel.

ALJ:ha."

Mr. Samon was merely used to assist (augment) the regular freight warehouse force at Pueblo which was in accordance with the agreement between Carrier and the Clerks Organization dated June 2, 1941.

CONCLUSION

Carrier has shown that:

1. It would have been a physical impossibility for C. H. Garner to have worked in place of Mr. Samon August 1 through 5, 1949 from 5:30 P. M. to 9:30 P. M. as Mr. Garner, except for August 4, 1949, when he laid off to see a baseball game worked from 1:00 P. M. to 9:30 P. M.
2. That Mr. Samon was worked in accordance with the provisions of the Agreement dated June 2, 1941 and settlements under said agreement.
3. This claim has no merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This case involves the right of the Carrier to work a "straggler" or unassigned stower to assist the regular warehouse force during regular working hours. There is no dispute about the facts.

During the period from Monday, August 1, 1949, to Friday, August 5, 1949, the Carrier employed two regular shifts of warehousemen at its freight house at Pueblo, Colorado. The first shift was assigned to work from 8:30 A. M. to 5:30 P. M.; the second shift from 1:30 P. M. to 9:30 P. M. On each of the five days from August 1-5, 1949, inclusive, the "straggler" worked four hours each day from 5:30 P. M. to 9:30 P. M. At the time of his employment with the Carrier the "straggler" was employed in other industry not connected with the railroad.

The Carrier justifies the employment of the "straggler" under the provisions of a special memorandum agreement dated June 2, 1941. This agreement amends Rule 33. Rule 33 reads as follows:

"Employees required to report for work at regular starting time and prevented from performing service by conditions beyond control of the carrier, will be paid for actual time held, with a minimum of two (2) hours.

If worked any portion of the day, under such conditions, up to a total of four (4) hours, a minimum of four (4) hours shall be allowed. If worked in excess of four (4) hours, a minimum of eight (8) hours shall apply.

All time under this rule shall be at pro rata."

The modification of Rule 33 effected by the agreement of 1941 reads as follows:

"Where and to the extent that their services can be utilized for substantially a full-time period, there shall be a regular force of full-time stowers and/or callers and/or truckers established at freight stations, at transfers and at other similar locations. That part of the work at such places which cannot be handled by this regular force without periods of idleness because the total work to be handled is not uniform as to occurrence, volume or duration, over any period of time, shall be handled by unassigned stowers and/or callers and/or truckers. These unassigned stowers and/or callers and/or truckers shall be paid a minimum of four (4) hours for four (4) hours or less of continuous service, and a minimum of eight (8) hours for more than four (4) hours of continuous service, exclusive of meal period."

The relevant facts on the use of the "straggler" during the period in question are as follows:

On August 1, all regularly assigned men on both shifts worked full time. The carrier claims that the "straggler" was necessary on that day because of the accumulation of freight to be loaded on the last half of the second shift. On each of the other days in question, one of the regular force laid off. During the five-day period there were no employees on the seniority roster for the Pueblo Freight Station Yard Office who were furloughed. The Claimant was regularly assigned as a stower second shift, 1:30 P. M. to 9:30 P. M. He worked each of the days in question except August 4, when he laid off from 5:30 P. M. to 9:30 P. M. to attend a night baseball game.

It will be noted from the examination of the agreement that the Carrier cannot use unassigned stowers or callers unless the work to be done "cannot be handled by the regular force without periods of idleness because the total work to be handled is not uniform as to occurrence, volume or duration, over any period of time."

The Organization contends that the work in question could have been done in this case without the employment of the "straggler" by working one of the members of the regular force on the first shift overtime on the days in question. The Organization claims that the Carrier must afford such work opportunities to the regular force before it may resort to the hiring of "stragglers" under Rule 33 as modified by the agreement in question.

The language of the agreement clearly supports the contention of the Organization. The qualification that the only work which may be given to unassigned employees is that which cannot be handled by the regular force is without exception. As a matter of fact, the right to use unassigned employees is limited to the situation where the regular force could not do the work "without periods of idleness".

The Carrier seeks to avoid what is the clear language of the agreement by reliance on several settlements made between the Organization and the

Carrier in connection with several matters arising on the Salt Lake Division. We have carefully considered these settlements. It is unnecessary to go into the facts in any detail. There are a number of distinguishing characteristics. These settlements do not by any means establish that the regular force may be denied overtime work by the use of unassigned workers. In any case, this Board cannot set aside the plain provisions of the agreement on the basis of the record in connection with these settlements. Many factors enter into the making of the settlements, and the process of compromising claims should not be impeded by the claim that a compromise amounts to a rewriting of the agreement. Collective bargaining rights fixed by an agreement may not be waived in this fashion. See Awards 2784, 3416, 5174 and 5371.

Rule 40, second paragraph, reads as follows:

Consistent with service requirements efforts will be made to distribute overtime, as far as possible, to employes ordinarily performing class of work for which overtime is necessary."

If the work had not been performed by the "straggler", it would have been performed by the employes on an overtime basis. The employes on the first shift, whose quitting time was 5:30 P. M., were available for overtime work when the "straggler" was used. Under Rule 40, they were entitled to this work.

We come now to the claims which are submitted. The first claim is for senior stower, Garner. On the four days in question, this Claimant worked his regular shift, which included the same 4 hours as that worked by the "straggler". On one day, he laid off for the 4 hours that the "straggler" worked for his own convenience and pleasure. The theory of the claim for compensation for the Claimant is that the Carrier having violated the agreement, must as a penalty therefor, compensate the employe in whose name the Organization makes claim for compensation, since the violation is between the parties and the claim for compensation is only an incident thereto. This theory is based on Awards 685, 1646, 2282, 4370, 4539, 5078 and 5348, and others.

The awards cited clearly establish that this Board accepts this theory. However, it does seem highly artificial for the Board to sustain the claim as presented in view of the fact that the Claimant was present and working side by side with the "straggler" throughout the period in question. We do not accept the Carrier's citation of the Awards of the First Division (Awards 377, 4765, 5120 and 6197). However, the facts in this case are such that we regard it as highly incongruous to sustain the claim in the name of the present Claimant. Because the Carrier did violate the agreement claim (1) will be sustained. We will sustain claim (2) on behalf of the senior available stower, other than Claimant Garner, who was ready and available for service in lieu of the "straggler" on the days in question. This claim will be sustained on a pro rata basis. This disposition of claim (2) shall be regarded as a precedent only for this case.

Part (3) of the claim is for the senior available stower for dates other than the period here in question. The record is devoid of any facts with reference to such claim. On the record before us, this Board is not in a position to determine that the regular force could do the work in question. At this time part (3) of this claim will be dismissed without prejudice to the right of the Organization to further process the claim.

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 to the extent indicated in the Opinion.

AWARD

Claim sustained in part and dismissed in part in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of November, 1951.