

Award No. 6855

Docket No. CL-6728

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**

HARRIMAN AND NORTHEASTERN RAILROAD COMPANY

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

- (a) The Carrier violated the Agreement when effective September 1, 1949, it improperly relieved Clerk C. J. Cooper, Harriman, Tennessee, on Saturdays and
- (b) That Claimant C. J. Cooper be properly compensated at time and one-half rate for each Saturday improperly relieved since thirty days prior to December 15, 1949, and continuing until properly relieved or position blanked on Saturdays.

EMPLOYEES' STATEMENT OF FACTS: Claimant Cooper is employed by the respondent Carrier as Clerk with a seniority date as of December 1, 1927. The only other employee holding clerical seniority in the seniority district is Mr. W. R. Hudson, who has a seniority date of September 1, 1916. Mr. Hudson is assigned to the position of Chief Clerk, a position claimed by the Carrier to be "excepted" from the scope of the Clerical Agreement.

Claimant Cooper occupies a position which was, prior to September 1949, assigned to work six (6) days a week, Monday through Saturday. Effective September 1, 1949, pursuant to the 40-Hour Week Agreement, Claimant Cooper was assigned to work Monday through Friday with Saturday and Sunday as his rest days.

Effective September 1, 1949, one R. H. Cate, an individual employed by and holding seniority on another Carrier (Southern Railway Company, Knoxville Division) was used on Claimant's position to relieve Claimant on Saturdays. Effective December 3, 1949, one W. F. Newcomb, an individual having seniority with the Carrier as Fireman as of April 16, 1933, and seniority as Engineer as of August 22, 1951 has, when not working as Fireman or Engineer for the Carrier, been utilized to fill Claimant Cooper's position on Saturdays.

"This does not apply to a furloughed employe who may secure a position, subject to the agreement covering clerical and other employes specified therein, but off his home seniority district, which is provided for in the agreement, and governed thereby."

Similar understandings have been entered into with employes of other classes or crafts. What is sauce for the goose is sauce for the gander. There is no more justification for protecting the rights of employes in the clerical class or craft who are employed in other crafts or classes than in protecting the rights of employes of the other classes or crafts when employed in the clerical class or craft. If it is improper in one instance to do so, it is improper to do so in all instances. Conversely, if it is proper that rights of employes be protected in one instance, it is proper that they be protected in all similar situations. Submission of the instant claim to the Adjustment Board clearly demonstrates selfishness on the part of the Brotherhood. It would protect the rights of clerical employes when employed in another class or craft but would require that employes of other classes or crafts forfeit all seniority rights simply to work as extra clerk without establishing any seniority rights whatsoever. The Brotherhood would deny Mr. Newcomb the right to perform extra clerical work, yet at the same time have to acknowledge that under the effective agreement the company could have gone outside and employed some one else to perform clerical work on Saturdays (unassigned days), rather than utilize Clerk Cooper on an overtime basis, also that some other person could have been employed to perform vacation relief work.

CONCLUSION

In conclusion, it is evident that there has **not** been any violation of the clerical agreement and that it was entirely proper that Extra Clerk Newcomb be utilized on unassigned days and to perform vacation relief work; also that he could be used in the filling of temporary vacancies if, as and when such vacancies occur, although he has not established seniority rights, and under agreement rules cannot do so until assigned by bulletin.

It is also evident that the monetary claim here involved cannot be valid. Furthermore, the files on the case were agreed to be closed in conference November 3, 1950.

Under the circumstances, the Board cannot do other than make a denial award and Carrier again respectfully requests that such an award be made.

All relevant facts and arguments involved in this dispute have heretofore been made known to employe representatives.

(Exhibits not reproduced).

OPINION OF BOARD: Prior to September 1, 1949, Claimant was employed as a Clerk on a six day position, Monday through Saturday. After the effective date of the Forty Hour Week Agreement, he was assigned Monday through Friday, with Saturday and Sunday as rest days. The Saturday work was not regularly assigned. Until December 3, 1949, the Saturday work was performed by R. H. Cate, an employe of another carrier holding no rights on the Harriman and Northeastern Railroad. Commencing on December 3, 1949, Carrier used one W. F. Newcomb to do the Saturday work of Claimant's position. Claimant contends that Newcomb was improperly used and that Claimant was entitled to the work on an overtime basis.

The record shows that Newcomb was working for the Carrier as an extra fireman, he having a seniority date as such as of April 16, 1933. He was not a furloughed fireman. The record shows that Newcomb was unable

to fill the Saturday Clerk's relief position many times because he was used as a Fireman, Brakeman or Engineer. Such instances occurred nine times in 1950, 11 times in 1951, 18 times in 1952, and 11 times in 1953. It is clear, therefore, that Carrier used an extra man of another craft to perform Clerk's work on the sixth day of Claimant's position. This is a violation of the controlling Agreement. This Board is committed to the view that an employe in another craft or class may not be used to relieve a Clerk on his assigned day of rest. Awards 2052, 2469, 5240, 5501. It is not a case where a furloughed employe of another craft worked under the Clerks' Agreement. Under the circumstances, it is not necessary to discuss whether Newcomb had actual or potential seniority, or was a bona fide employe, under the Clerks' Agreement. See Award 6853. The Agreement was violated irrespective of those issues.

The claim in the instant case was filed on December 15, 1949. After conferences between the Organization and the Carrier, an agreement was reached on November 3, 1950 to close the file on this claim. The Organization concedes that this was true, but now asserts that it was done on a misunderstanding of the facts. The Claimant is in no position to assert such an excuse for the closing of the case. He was the occupant of the assigned five-day position and was, or should have been cognizant of the facts. No claim can be allowed for time prior to the reopening of the claim on January 2, 1952. Penalties may not be imposed on a carrier which result from the negligence of the Claimant in processing his claim and which by his own conduct he has estopped himself to assert.

The claim cannot be sustained at the punitive rate as a penalty. The penalty for work lost is the pro rata rate under many recent Awards of this Division; except as to holidays lost which shall be at the time and one-half 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 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 Agreement was violated.

AWARD

Claim sustained on and after January 2, 1952 in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of January, 1955.