

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

(a) The carrier violated the provisions of the Agreement signed November 16, 1947, governing the apportionment of positions and vacancies between the employees of the two carriers at the joint agency at Lathrop, subsequent to November 15, 1948.

(b) The Western Pacific employees adversely affected by reason of failure of the carrier to bulletin the two positions to Western Pacific employees, in accordance with the Agreement of November 16, 1947, shall now be compensated for a day's pay for each day of the violation.

EMPLOYEES' STATEMENT OF FACTS: Clerks' Circular WP No. 117/48 (Employees' Exhibit 1) advertised position No. 32, O.S. & D. Clerk at Lathrop Joint Agency, and this position was assigned to R. E. Timberman (W. P. Employee) through Clerks' Circular W. P. No. 123/48, dated August 16, 1948, (Employees' Exhibit 2) making two W. P. Employees holding assignment at the joint agency.

Mr. Timberman, on or about November 1, 1948, left position No. 32, O.S.&D. Clerk at Lathrop Joint Agency and it was readvertised for bid in Clerks' Circular No. 172/48 (W.P.R.R.) dated November 1, 1948 (Employees' Exhibit 3).

Agent Wheeler's letter of November 12, 1948, addressed to Southern Pacific Superintendent E. D. Moody (Employees' Exhibit 4) advised: "Effective close of business November 15, 1948, position No. 32 OS&D Clerk, Lathrop Joint Agency, abolished."

An agreement concerning the establishment of the Lathrop Joint Agency and the apportionment of clerical employees between the two carriers had been signed on November 12, 1947 (Employees' Exhibit 5).

Under date of November 18, 1948, the General Chairman addressed a letter (Employees' Exhibit 6) to the agent at the Lathrop Joint Agency re-

ployee or he might be a Western Pacific employee, depending upon his seniority with his parent line. It could very easily happen that the senior qualified applicant would be a Southern Pacific employee and his assignment to the vacancy or new position would result in Southern Pacific employees having a disproportionate number of the positions at the joint agency. The purpose of Section 4 is to rectify this situation and to reestablish the proper proration of positions between employees of the two Carriers, selecting as a standard upon which the positions must be prorated the percentage of total carload freight handled by each Carrier during the previous month. Thus, as in the above example, if the Southern Pacific employee who was the senior employee bidding on the position was assigned to the position with the result that Southern Pacific employees held a disproportionate number of positions at the joint agency, Section 4 provides that the junior assigned Southern Pacific employee will be cut off and his position filled by a Western Pacific employee, thereby reestablishing the proper proration of positions between the two Carriers.

Section 4 was not intended to mean nor does it provide that monthly reviews of the statistics on carload freight handled by the two Carriers should be made and monthly readjustments in the number of positions held by employees of the two Carriers made if the statistics so surveyed warranted such a change. The only purpose of Section 4 is to reestablish a proper proration of positions in the event that an assignment made under Section 3 disturbs this proper proration of positions. The purpose was to provide a special remedy for special situations and not to set up a general procedure providing for monthly reapportionment of positions between the two Carriers.

This claim, as originally presented in General Chairman James' letter dated February 28, 1949 was in behalf of all Western Pacific employees allegedly adversely affected. The position of OS&D Clerk at the Lathrop Joint Agency had been advertised on August 16 and September 16, 1948 without success in obtaining a Western Pacific employee. Because no specific Western Pacific employee was affected in any manner, the General Chairman in his letter of March 5, 1952 then cites the "senior Western Pacific employee is entitled to be compensated for a day's pay at the rate of time and one-half . . .". The record clearly shows no Western Pacific employees were affected because none desired to avail themselves of the opportunity of filling the position. Further, the claim for "the rate of time and one-half" is improper as no work was performed by any employee so as to entitle him to a "penalty" rate.

In summary, Carrier asserts that the instant claim should be dismissed unless and until due notice is given by the Board to all parties involved in this dispute. In the event that your Board decides to accept jurisdiction of this case despite the fact that all interested parties have not received notice of the hearing, it is Carrier's position the claim alleging a violation of Section 4 of the Lathrop Joint Agency Agreement is without merit. Carrier strongly urges that the claim be denied.

All of the above has been presented to the Organization.

(Exhibits not reproduced).

OPINION OF BOARD: In September, 1942, the Southern Pacific and the Western Pacific Railroads established a joint agency at Lathrop, California. In November of 1947, a joint agreement was reached among the two Carriers and the two general chairmen for the Brotherhood of Railway Clerks covering the apportionment of the clerical positions in the joint agency between the employees of the two Carriers. The provisions of that agreement which are pertinent to this dispute are as follows:

"2. Positions and vacancies in the joint agency shall be apportioned between employees of the Southern Pacific and Western Pacific on the basis of carload freight (destined to and departing from the depot at Lathrop) handled by the Southern Pacific and the Western

Pacific. As of April 1, 1947, the percentage of positions to Southern Pacific and Western Pacific employees on the foregoing basis would be — **Example** — Southern Pacific 65%
Western Pacific 35%

"3. Except as provided in Section 4, all new positions and vacancies in the joint agency will be advertised to both Southern Pacific and Western Pacific employees and assignments shall be made within ten (10) days (from date of circular advertising positions) to the senior qualified applicant based upon his seniority, on his parent line seniority roster.

"4. In event a Western Pacific employee is assigned to a position when the Southern Pacific quota is low, or vice versa (based upon percentage of carload freight handled as provided for in Section 2 during the previous month), the position of the junior assigned employee of the Carrier whose quota is above the number of positions entitled to shall be abolished and said position shall be readvertised to employees of the Carrier whose quota is low.

"7. In the event a position is abolished at the joint agency the principle as to the quota of positions allocated to each of the Carriers will be maintained."

According to Carrier's statement of facts, which we accept, Position No. 32, O. S. & D. Clerk at Lathrop, was advertised for bids on August 1, 1948. The position was assigned to a Western Pacific employee on August 16, 1948. This employee relinquished the position without working on it. The position was again advertised on September 16, 1948 and was assigned to another Western Pacific employee on October 1, 1948. This employee also relinquished the position without ever having worked on it. The position was advertised for a third time to Western Pacific and Southern Pacific employees on November 1, 1948 but no bids were received. The position was abolished effective November 15, 1948. The record does not show whether Position No. 32 was a new position or whether it was a vacancy. Assuming the latter, it appears that as of August, 1948, there were seven clerical positions at the joint agency, five occupied by Southern Pacific employees and two occupied by Western Pacific employees. After the position was abolished, there were five Southern Pacific employees and one Western Pacific employee.

The record shows that the carload freight figures at the joint agency for October, 1948, were 243 cars or 61.36% for Southern Pacific, and 153 cars or 38.64% for Western Pacific. The figures for January, 1949 were 158 cars or 57.07% for Southern Pacific and 123 cars or 42.03% for Western Pacific. The employment figures remained at 5 for Southern Pacific and 1 for Western Pacific from the time Position No. 32 was abolished until April 16, 1949.

On February 28, 1949, the Western Pacific Clerks' general chairman filed a written claim with the Agent at Lathrop claiming that the Carrier had been in violation of the joint agreement since November 15, 1948 and requesting that 2 positions then assigned to junior Southern Pacific employees be bulletined to Western Pacific employees. Carrier subsequently abolished Position No. 9, then filled by the junior employee of Southern Pacific, and under date of April 1, 1949 bulletined it to Western Pacific employees only. It was assigned to a Western Pacific employee effective April 16, 1949. The claim was handled on the property in the usual manner and was denied by the Carrier's highest official on June 9, 1953. Notice of intent to file an ex parte submission was served on November 3, 1954.

Carrier contends that the claim should be dismissed for lack of jurisdiction because no notice was given to the other parties to the joint agreement—the Southern Pacific and the Clerks' Organization on that Carrier. It is urged that this case may be distinguished from Award 7387 and other similar

awards in that here the parties to whom it is asserted notice should have been given are actually parties to the very agreement under which the dispute arises. In our view, the rationale of Award 7387 — that it is not the function of the Referee to decide such questions — is equally applicable here. Carrier also asserts laches as a ground for dismissal of the claim. While we deplore the fact that the claim was allowed to lie dormant for 17 months between its final denial on the property and the notice of intent to file a submission with this Board, we will not dismiss it in the absence of an agreement rule limiting the time within which such submissions may be filed.

Turning to the merits of the controversy, it appears clear — in fact it is agreed to by Carrier's statements in the record — that when a position at the joint agency is abolished, there is a disturbance of the apportionment of employees under the joint agreement; and in order to reestablish the apportionment, the parties are required to look to the previous month's freight handling statistics to determine the proper ratio. Position No. 32 was abolished in November. The figures for October, the preceding month, established the correct apportionment as four Southern Pacific employees to two Western Pacific employees. Therefore, under the joint agreement, the Carrier was required at that time to abolish the position of the junior Southern Pacific employee and advertise it to Western Pacific employees. Carrier eventually recognized this duty on its part in April, 1949, but denies that it had the same obligation in November on the basis that Position No. 32 had been advertised three times without any Western Pacific employee bidding and accepting appointment thereto. The fallacy in this argument is that had Carrier fulfilled its obligation after the abolition of Position No. 32, a different position would have been available — that of the junior Southern Pacific employee — and Carrier had no right to assume that Western Pacific employees would not bid on that position.

We find therefore that the failure of Carrier to abolish the position of the junior Southern Pacific employee and to advertise it to Western Pacific employees in November was a violation of the Agreement. On the other hand, we do not agree with claimant's contention that two positions should have been bulletined as a result of the figure for January, 1949. Had Carrier done what the agreement required, it would have acted in November; at that time there was one position to be bulletined to Western Pacific employees under the ratio established by the agreement. By holding that Carrier violated the agreement by not doing so, and sustaining a claim on behalf of Western Pacific employees adversely affected by reason of the failure of the Carrier to bulletin that position in November, the violation is rectified. There would have been no reason for consideration of any monthly figures after November unless and until there was a disturbance of the apportionment of employees between the two Carriers occasioned by appointment of an employee to a vacancy or new position under paragraph 3 of the joint agreement or the abolition of a position under paragraph 7 of the joint agreement. Since this award remedies the violation as of November we do not consider that there was any further violation after that time.

In summary we hold that Carrier violated the agreement by not abolishing the junior Southern Pacific position in November and advertising that position to Western Pacific employees. We sustain the claim for compensation to those Western Pacific employees, if any, who were adversely affected by reason of the failure of the Carrier to bulletin this position from November 15, 1948, until April 1, 1949, the date on which it was finally bulletined. Who such employees were must be determined by the parties. We deny the claim insofar as it relates to any other position.

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

That the parties waived hearing on this dispute; and

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 in part and denied in part as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1956.

DISSENT TO AWARD NO. 7487 — DOCKET NO. CL-7445

For the reasons outlined in our Dissents to Award No. 7311, Docket No. CL-7214 and Award No. 7372, Docket No. CL-7519, and in our Special Concurrence to Award No. 7387, Docket No. MW-5883, on the question of third-party notice —

We likewise dissent here.

/s/ J. E. Kemp
/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. F. Mullen