

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

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

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated the Clerks' Agreement:

(1) When, on December 6, 1953, it used a non-bona fide employe, a Mr. W. L. Heater, to perform relief service on a regular position at Pasco, Washington.

(2) That the Carrier now be required to compensate the regular assignee, Mr. J. R. Woodhead, for a day's pay at penalty rate on December 6, 1953, January 3, 10, 17, 24 and 31, February 7, 14, 21 and 28, March 21 and 28, and April 4 and 11, 1954.

EMPLOYEES' STATEMENT OF FACTS: The claimant, Mr. Woodhead, is regularly assigned to a 7-day-per-week position of Baggage and Mail Helper at Pasco, Washington. His assigned hours are 10:30 p.m. to 6:30 a.m. with Sunday and Monday as designated rest days.

Commencing Sunday, December 6, 1953, Carrier engaged the services of Mr. W. L. Heater, a student in the local high school at Pasco at that time, primarily to relieve Mr. Woodhead on Sundays, one of his designated rest days each week. This situation was called to the attention of the Carrier's Local Agent, Mr. H. V. Custer, and Mr. Woodhead filed claim for the day as time lost account not called for service on his designated rest day, Sunday, December 6, 1953, in the absence of a regular relief employe or an extra or unassigned employe pursuant to provisions of Rule 30-1 of our General Rules Agreement reading:

WORK WEEK

Rule 30-1. Note: The expressions "positions" and "work" used in this Rule 30-1 refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes.

4. Mr. Heater had established an antecedent employment relation prior to performing rest day relief service on Sunday, December 6, 1953, on the position of mail and baggage helper.

5. Mr. Heater while in the status of a bona fide employe had acquired a right under the provisions of Rule 30-1 (j) to perform service on Sundays on the position of mail and baggage helper.

6. Inasmuch as Mr. Heater was a bona fide employe when used to perform rest day relief service on Sunday on the position of mail and baggage helper, the claim of Mr. Woodhead is untenable.

This claim should be denied in its entirety.

All data in support of the Carrier's position in connection with this claim has been presented to the duly authorized representative of the Employees and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The claimant is regularly assigned to the seven day per week position of baggage and mail helper at Pasco, Washington, with assigned hours and days from 10:30 p.m. to 6:30 a.m., Tuesday through Saturday. The rest days are Sunday and Monday. The position is filled on Mondays with a regular relief assignment, under Rule 30-1 (e) and no one is actually assigned to the job on Sunday as a regular relief.

Rule 30-1 (j) of the contract between the parties which is in evidence herein reads:

"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 employe who will otherwise not have forty hours of work that week; in all other cases by the regular employe."

Facts presented were that on the Sundays complained of W. L. Heater, a clerk, was assigned to work.

The Organization makes claims that W. L. Heater was not "an available extra, or unassigned employe who would otherwise not have forty hours of work that week." He had no seniority and was not a "furloughed" employe, and that therefore the claimant under Rule 30-1 (j) should have been assigned to this regular work.

There is some conflict in the record regarding the status of W. L. Heater. Unrefuted facts, however, are that he was a student at the High School at Pasco. During the summer season in 1953 he made application to the Carrier for a position and was employed as a Clerk as of June 1, 1953, resigning that position on August 31, 1953 in order to return to school. This act severed his employe status. He graduated from Pasco High School on May 29, 1954.

During the interval from December 3, 1953 to July, 1954, he was again employed and performed service for the Carrier, being assigned to work

on Saturdays, some evenings and during the Christmas holidays. These assignments did not interfere with his school schedule.

The record shows that during this period several vacancies were posted for bid in Pasco and other points on the division but he made no bid for any of the openings. He did bid on a vacancy on July 14, 1954, and then acquired seniority status. He later left that position to enter college.

It is the opinion of this Board that Mr. Heater, having not acquired seniority rights on August 31, 1953, when he left the Company employ, did not acquire any seniority rights until he became a regular employe of the Company on July 14, 1954, because his main purpose during that interval was the attendance at school as a student and not his work with the Company. Mr. Heater was not a "furloughed employe" and therefore the claim of the Carrier of its right to assign Mr. W. L. Heater to perform this work on the Sundays in question cannot be maintained. (Awards 5558, 6262, 6999, and others.)

Numerous cases have been cited in which the awards have held that the penalty sustained against the Carrier should be at the pro rata and not at the penalty rate. (Awards 8204, 8205, 8303, 8304, 8305 and others.) It is therefore the opinion of the Board that the claim be sustained at pro rata not penalty 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 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 pro rata not penalty rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July, 1958.