

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Arthur Stark, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope of the Agreement, and Rule 5-E-1 (e), when it assigned duties formerly performed by a Relief Store Attendant to M. of E. employes at the Enginehouse, Toledo, Ohio, Lake Region, effective Sunday, February 19, 1956.

(b) H. O. Lessentin, Store Attendant, should be allowed eight hours pay at the punitive rate, as a penalty, for Sunday, February 19, 1956, and all subsequent Sundays on which the violation occurs.

(Docket 82)

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

5978 — "The general rule is that the right to work is not the equivalent of work performed, so far as overtime is concerned. Consequently time not actually worked cannot be treated as overtime unless the Agreement specifically so provides."

See also Third Division Awards 6241, 6217, 6216, 6212, 6095, 6019, 6016, 5638, 5620, 5579, 5558, 5240, 5195, 5117, 4815, 3587 and 3467.

The Carrier submits, therefore, that even assuming a violation of the applicable Agreement in the instant case, which the Carrier denies, the Claimant would only be entitled to the compensation claimed at the straight time rate of pay.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that the practice of M. of E. Department employees obtaining material from the Storeroom at times when the Claimant is not on duty represents no violation whatsoever of the applicable Rules Agreement and that the Employees have produced no valid evidence to the contrary.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employees in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employees, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all of the same.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier asserts that this Board should decline to consider this matter since the "Company has not received due and proper notice of the claim . . ." A chronological summary of the relevant facts shows:

February 20, 1956. Claim filed by BRC's Division Chairman at Toledo on behalf of Store Attendant H. O. Lessentin on the basis that employes not covered by the Clerical Rules Agreement were permitted to obtain material from the Storehouse at times when the Claimant was not on duty. This claim was denied.

Subsequently, BRC's Division Chairman submitted a written claim to Carrier's Lake Region Superintendent of Personnel. This claim later formed the basis of a Stipulation.

June 26, 1956. In a Stipulation entered into by Superintendent of Personnel P. N. Mansfield and Division Chairman L. E. Bowman, the "Subject" of the dispute was set forth as follows:

"(a) The Management violated the Rules Agreement, effective May 1, 1942, except as otherwise specified reprinted as of August 1, 1953, particularly the 'Scope' when other than employes covered by the Rules Agreement, enters Store Room and gets material on Sundays and other times after the incumbent of Store Attendant position, Toledo Engine House, tour of duty on rest days at which time he is not on duty.

"(b) That L. O. Lessentin, Store Attendant, Toledo Engine House, Toledo, Ohio be paid one day at rate of time and one-half for Sunday February 19, 1956, retroactive each Sunday for ninety days and all subsequent Sundays and dates this violation continues, as a penalty for the violation."

The Stipulation contained a "Joint Statement of Agreed Upon Facts," including (1) Claimant Lessentin was first trick Store Attendant at Toledo Engine house with Saturday and Sunday rest days; (2) On Sunday no assigned employe performed Store Attendant duties; (3) On Sunday M. of E. Department employes obtained needed materials from the store room; (4) The claim was presented because no Store Attendant was "on duty when M. of E. Department employes enter the store room and obtain needed material."

The "Position of Employes", as expressed in the Stipulation, was essentially this:

1. The question here is whether an employe of another craft or class can perform duties of a regular assigned employe to which the position and work accrue.
2. Lessentin's position (Store Attendant) requires him to furnish material, take proper requisition, and account for material taken from Stores Department. He does this Monday through Friday.
3. Rule 5-E-1 (e) requires that all possible regular relief assignments with five days of work will be established to do the work necessary on certain specified days.
4. Proper records and inventories of materials received or taken from Stores (the Store Attendant's job) cannot be maintained if no one is on duty to perform this work.

5. Management violated the "Scope" Rule each time an employee of another craft entered the Store Room for materials in the absence of a Store Attendant.

The "Position of Company", as expressed in the Stipulation included these contentions:

1. At the Toledo Enginehouse there has been only one (first trick) Store Attendant position, with Saturday-Sunday rest days. This position has not been protected by rest day relief assignments.
2. When Lessentin was not on duty, M. of E. employees obtained needed materials from the store room. A M. of E. Gang Foreman prepared appropriate forms to indicate what materials had been taken. Lessentin did not charge out these materials since that task was performed by a Car Shop Clerk.
3. The work of procuring and handling supplies does not accrue exclusively to clerical employees when it is incidental and necessary to the work of others.

Subsequently, the Brotherhood's claim was denied by Carrier's Superintendent of Personnel.

August 14, 1956. At a system conference, final dispute step on the property, BRC's General Chairman presented the claim to Carrier's Manager-Labor Relations, contending that the Scope Rule had been violated when M. of E. employees obtained materials from the store room on Sundays when Lessentin was not on duty.

August 31, 1956. Manager of Labor Relations C. E. Alexander, in a letter to General Chairman S. V. W. Loehr, denied the claim which, as he understood it, was based "on an alleged violation of the Scope Rule because Mechanics enter the Storehouse on Sunday, when Claimant is not on duty, and procure material for their own use." Alexander maintained that when a Mechanic procured his own material, in the absence of Claimant Lessentin, he was not violating the Clerk's Scope Rule since this task did not constitute "work which belongs exclusively to Group 2 employees." In support of this position the Manager of Labor Relations noted:

1. Only one Group 2 employe (covered by the Clerks' Scope Rule) had been assigned to the Storehouse — a Store Attendant on the first trick.
2. For the preceding fifteen years no Store Attendant had been assigned to this location on Saturday or Sunday or on the second and third tricks of weekdays.
3. During this fifteen year period it had been the practice when the regularly assigned Store Attendant was not on duty, for Mechanics to obtain an order form (M.P. 151) from their immediate supervisor, to procure the needed material from the Storehouse, and leave the order form at the Storehouse.

August 26, 1957. The Brotherhood notified this Board and the Carrier of its intention to file an ex parte submission covering the following claim:

“(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope of the Agreement, and Rule 5-E-1(e), when it assigned duties formerly performed by a Relief Store Attendant to M. of E. employees at the Enginehouse, Toledo, Ohio, Lake Region effective Sunday, February 19, 1956.

“(b) H. O. Lessentin, Store Attendant, should be allowed eight hours pay at the punitive rate, as a penalty, for Sunday, February 19, 1956, and all subsequent Sundays on which the violation occurs.”

September 26, 1957. The Brotherhood submitted the claim set forth immediately above. It is this claim which is presently before us.

Among the allegations in the BRC's Ex Parte Brief, the following are worthy of note:

1. There was at least one Store Attendant on duty at the Enginehouse seven days a week prior to February 15, 1956. Thereafter, no Store Attendants were on duty Saturdays or Sundays.
2. Work that had formerly been performed by the Relief Store Attendant (J. Guerin) on Saturdays and Sundays was assigned to and performed by M. of E. employees after February 15.
3. Prior to February 15 all materials and supplies were furnished to M. of E. Department employees on first trick Saturdays and Sundays by the Relief Store Attendant.
4. The Carrier violated 5-E-1(e) when it changed the rest days of Relief Store Attendant Guerin, “abolished” the position of Store Attendant A. Fuire, and assigned remaining clerical work to M. of E. employees.

Was the Brotherhood's September 26, 1957 claim a new one? Had it been considered on the property?

Comparing it with the June 26, 1956 claim (as set forth in the mutually agreed-on Stipulation) it is clear that the relief requested is the same: punitive pay for Store Attendant Lessentin for all Sundays commencing February 19, 1956. (While the 1957 claim failed to request retroactivity, we do not consider this an important discrepancy.)

But, when we compare the two Brotherhood claims with respect to substantive matters, significant differences appear. Discussions on the property centered about the Brotherhood's charge that it was improper for M. of E. employees to obtain material from the Enginehouse Store Room. The basis for this charge was that Store Attendant Lessentin was not assigned Saturdays or Sundays, thus leaving duties of his position to be performed by someone else. The Brotherhood's principal contention was this: since under its Scope Rule (as well as Rule 5-E-1) a Store Attendant should have been assigned, management had violated the Agreement by permitting M. of E. employees to do the specified work.

The Carrier defended its position by pointing out that no Store Attendant had been assigned to Sunday or Saturday work at the Enginehouse for many years, and therefore the practice of permitting Mechanics to obtain materials on these days was accepted and should be regarded as evidence of the fact that this task did not accrue exclusively to clerks.

In sum, all discussions on the property, up to and including the final denial, (insofar as the record reveals) were concerned with (1) Lessentin, (2) The Enginehouse Store Room, (3) The propriety of permitting Mechanics to obtain materials when Lessentin was off duty.

In its submission to this Board, however, the Brotherhood added a completely new dimension. It charged that Management had violated the Scope Rule and Rule 5-E-1 by assigning **duties performed by a Relief Store Attendant** (J. Guerin) to M. of E. employees. To justify this claim it offered information concerning work performed not only by Lessentin, but by Store Attendants Wandtke and Fuire, as well as Relief Store Attendant Guerin. It also proffered information regarding Store Attendant work at the Car Shop and the Oil House, in addition to the Enginehouse.

The Carrier was not presented with these allegations prior to September 1957; it did not respond to them on the course of proceedings on the property. Presumably, therefore, it had no real opportunity to fully investigate the claims against it or evaluate these claims in light of known facts or circumstances. More importantly, it had no opportunity to adjust or settle the dispute on the property (had it so desired) or, for that matter, to convince the Brotherhood its charge was without merit and should be withdrawn.

Also illustrative of the fact that significant new allegations were presented in support of the 1957 claim is this: the crucial part of Petitioner's 1957 claim concerns "duties formerly performed by Relief Store Attendant" Guerin. General statements appear in Petitioner's Ex Parte Submission concerning Guerin's relief work on Saturdays and Sundays. These are denied, also in general terms, by the Carrier in its submission. Not until its Sur-Rebuttal Brief (submitted April 2, 1958) does Petitioner specifically affirm that "Guerin spent the greater portion of his tour of duty in the Storeroom on Sundays, where he dispensed materials and supplies to M. of E. employees and others".

In its own Rebuttal Brief (dated April 11, 1958) the Carrier reiterates its general statement that for fifteen years no Store Attendant was on duty Sundays at the Enginehouse Storeroom. But it also specifically denies that Guerin could have covered this location while on duty at the Oil House (his pre-1956 Sunday relief assignment), situated some 300 feet away.

Had this direct conflict arisen on the property, there might well have been a real attempt made to resolve it through interviewing those persons directly concerned. But the issue never really appeared until after the case left the property. We are thus faced with opposing assertions and no way to resolve them.

We conclude, then, that this claim must be dismissed since (1) it departs, to a significant degree, from the claim submitted and processed on the property and (2) the Carrier was deprived of its reasonable right to investigate and adjust the claim which is the subject of the case at hand.

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 for reasons stated in the opinion the claim must be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1962.