

Award No. 13664
Docket No. CL-13612

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, BURLINGTON AND QUINCY
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, (GL-5236) that:

1. Carrier violated the Rules of the Clerks' Agreement when work was required by the Carrier to be performed on the unassigned rest days of the First Yard Checker position, Job No. 1187, Alliance, Nebraska and the regular employe was not permitted to work.
2. Mr. B. C. Brice, occupant of Job No. 1187, be compensated eight (8) hours at the overtime rate of the position, (\$18.82 per day) starting Saturday and Sunday, March 25 and 26, 1961 and for each succeeding Saturday and Sunday to and including May 6 and 7, 1961.

EMPLOYEES' STATEMENT OF FACTS: Prior to the claim dates there was in existence at Alliance, Nebraska a Relief Clerk, Job No. 1, with the following assignment:

Wednesday	—	Roundhouse Clerk — Job No. 7005
Thursday	—	2nd Yard Checker — Job No. 1188
Friday	—	2nd Yard Checker — Job No. 1188
Saturday	—	1st Yard Checker — Job No. 1187
Sunday	—	1st Yard Checker — Job No. 1187
Monday	—	Rest Day
Tuesday	—	Rest Day

Under date of March 21, 1961 the Carrier issued notice to the employes advising that the Second Yard Checker, Job No. 1188 and Relief Clerk No. 1, as being abolished, effective March 19, 1961. See Employes' Exhibit No. 1.

Also under date of March 21, 1961 the position of First Yard Checker, Job No. 1187, was bulletined as a permanent vacancy, Monday through Friday, 12:00 Noon to 8:00 P. M., Saturday and Sunday rest days. See Employes'

It appears that it was proper to use Mrs. Everett and Mrs. Jernigan under such circumstances. This is the conclusion reached by the Board in Award 7191 covering a dispute between the same parties and involving an identical issue. That Award is controlling here. Accordingly, claim will be denied."

In the case at bar there can be no dispute over whether or not the furloughed or unassigned clerks used on the claim dates were "bona fide" employees.

In conclusion, the Carrier respectfully submits:

1. The work claimed by the Claimant was unassigned work to which Rule 36 (k) is applicable.
2. The unassigned clerks used stood for this work under Rule 36 (k).
3. It is recognized on this property that "unassigned", "laid off" and "furloughed" are synonymous in the application of the rules.
4. Rule 25 does not require the establishment of an extra list before unassigned clerks may be used under Rule 36 (k).
5. Settlements on the property and Adjustment Board awards conclusively support the Carrier's contentions.
6. The unassigned employees used were "bona fide" employees.

The Carrier is certain that it has produced ample evidence to prove that the claim is invalid. However, without receding from that position in the slightest, the Carrier would point out that even if for some unexplained reason the claim should be sustained, the demand for punitive rate cannot be supported. The National Railroad Adjustment Board has consistently held that pay for time lost can only be made at the pro rata rate. This principle has been so well established that citation of authority should no longer be necessary.

The claim must be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: For the period from March 25 to and including May 7, 1961, Carrier used the services of one or another of three named furloughed employees to work the unassigned rest days (Saturday and Sunday of each week) of the position of First Yard Checker, Job No. 1187, at Alliance, Nebraska. Claimant was the regular incumbent of that position. He makes claim for compensation for these days at the overtime rate for the job.

When this claim was initiated and progressed on the property it was predicated solely on the ground that "due to the delay of the Carrier in establishing and setting up an extra list as provided for under the provisions of Rule 25, of the Agreement effective January 1, 1961, for the relief of such positions as 1st Yard Checker, Job 1187, and as no agreement was made for handling this relief between the parties, we claim that Rule 36 (k) of the Agreement * * * has been violated." In other words, the sole basis for the claim as considered on the property was that, absent the timely establish-

ment of an Extra List, the Carrier was not privileged to use the services of the three laid off employees to work the unassigned rest day of the Claimant's position. Instead, this work, under the strictures of Rule 36 (k) of the Agreement, had to be performed by the "regular employee" occupying the position, namely the Claimant. Manifestly, there was no suggestion at that time that the three furloughed employees in question were ineligible to accept the assignments because of any failure to protect their seniority rights, or that they were not bona fide employees of the Carrier on legitimate layoff status and available for call at all times. (Cf., Award 6999 — Carter.)

It was only on appeal to this Board that, for the first time, the basis of this claim was entirely recast. Thus in the Employees' submission of the dispute to this Board the stated position in support of the claim was that the three furloughed employees whose services were used were ineligible because they "failed to protect their seniority rights when laid off in force reduction", and consequently had "forfeited all seniority rights to work when a regular employee was available and willing to perform the services." In this context the Employees' earlier position urged on the property was seemingly abandoned or relegated to the background.

While the Carrier makes vigorous rebuttal of this newly injected basis for the claim, it urges primarily that it now be dismissed in its entirety on jurisdictional grounds. In light of the provisions of Section 3, First (i) of the Railway Labor Act, as consistently construed and applied by this Board, the Carrier's jurisdictional position is here well taken. The opinion of this Division in Award 11182 (no Referee) sets forth in some detail the traditional rationale for such a result, as follows:

"The Railway Labor Act provides, in Section 3 First (i), that if, after certain described disputes between an employee or group of employees and a carrier or carriers have been handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, no settlement is reached the parties or either of them may refer such disputes to the Adjustment Board.

The Rules of Procedure of the Board, as set out in 'Circular No. 1', contain the following:

'No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.'

Thus, an absolute prerequisite to consideration by the Board of any petition is a showing that the subject matter has been handled 'in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes' prior to its submission to the Board.

The record before us shows that such handling was not given its subject matter. We are, therefore, without the power or authority to consider the petition on its merits. The claim must be dismissed accordingly."

See also Awards 12178 (Stack), 11346 (no Referee), 11212 (no Referee), 10416 (Sheridan), 12001 (Dolnick), 11910 (Coburn), 8324 (McCoy), 6692 (Leiserson), 7030, 5151 (Carter), 6140, 5502 (Whiting), among many others.

We hold, therefore, that the claim in its new guise is not properly before us, is barred from our consideration and should be dismissed in its entirety.

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

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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 not violated.

AWARD

Claim dismissed.

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

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 17th day of June 1965.