

Award No. 1211  
Docket No. CL-1189

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Harris L. Danner, Referee

**PARTIES TO DISPUTE:**

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

**DENVER AND RIO GRANDE WESTERN RAILROAD  
COMPANY**

(Wilson McCarthy and Henry Swan, Trustees.)

**STATEMENT OF CLAIM:** "Claim of the System Committee of the Brotherhood

"(1) That the Carrier has violated and continues to violate the agreement revised as of February 1, 1926, when it assigns or requires hourly rated freight platform employes at Salt Lake City to work regularly and fails and refuses to pay such regularly worked employes a minimum of eight hours per day.

"(2) That A. W. Hilton, H. W. Holland and Jared Simister should have been paid a minimum of eight hours at clerical rate of pay on such days when assigned and required to perform duties and responsibilities of receiving clerks or check clerks in December 1936 and January 1937 and thereafter and

"(3) That J. Padley, Joseph Childs, John Bell, Randolph Farris, Jared Simister, Wm. Salisbury, H. W. Holland, A. W. Hilton, Dell Birch, Bert Mendenhall, Hyrum Pocock, M. R. Wurburton, George Jones, H. W. Hanson and James Lloyd were and are entitled to and shall be paid a minimum of eight hours for each day worked retroactive to April 1, 1937, and all other employes engaged in handling freight on that platform who have been worked and paid under similar conditions."

**EMPLOYEES' STATEMENT OF FACTS:** "All of the above named or referred to employes have established and hold seniority rights on the Salt Lake City freight platform, in accordance with our current agreement.

"In the operation of said platform the Carrier has worked and continues to work its freight platform forces as indicated in our Exhibits 'A' and 'B' attached hereto and made a part hereof, Exhibit 'A' being a true record of hours worked and paid for the entire platform force for the period April 1 to April 23, 1937, inclusive. Exhibit 'B' is a true record of time worked by Messrs. Hilton, Holland and Simister on days covered by Item 2 of this claim.

"The attached Exhibit 'A' is representative of the practice and method followed by the Carrier in working and paying its freight handling force at that station prior to and subsequent to April 1, 1937.

"With respect to Award 330, the Carrier contends the circumstances in connection therewith are not applicable to the instant claim. In the case covered by Award 330, a regular force of truckers which had been in existence for some time was discontinued and this force thereafter considered as extra men. Such is not the case in the instant claim. We have not discontinued any of our regular freight platform forces.

"The Carrier also contends the case covered by Award 422 is not applicable to the instant claim. This Award covered employees who had a regular schedule of hours, time of reporting, time of quitting, etc. As a matter of fact, the employees covered by Award 422 were not only required to report every day at a regular time but they knew the number of hours they were to work, etc. Such is not the case in the instant claim.

"The employees involved in the instant claim do not have a regular starting time. While they are called in seniority turn for fluctuating or temporarily increased work, they are not required to respond to call unless they so desire. Furthermore, they are never called and used when the regular forces can handle the work. As hereinbefore stated, the Carrier has no control over the volume of business that it may be necessary to handle at any particular time, and it is only when the work cannot be handled by the regular forces, within the time limit imposed by the requirements of the service that our fluctuating forces are used.

"The Carrier contends the employees involved in this claim are employees who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces and as such have been correctly paid as is provided by Rule 45, above quoted."

There is in evidence an agreement between the parties bearing effective date of February 1, 1926.

**OPINION OF BOARD:** The record as above quoted shows that the carrier operated a freight house, using clerks, callers, stowers and truckers all covered by the Clerks' Agreement. Certain employees have been assigned to regular positions as provided by the Agreement and it is claimed that extra or unassigned men are used to take care of fluctuating or temporary increased work which cannot be handled by the regular force. The rules involved are as follows:

Rule 43: "Except as otherwise provided in this Article, 8 consecutive hours' work, exclusive of the meal period, shall constitute a day's work."

Rule 45: "Employees required to report for work at regular starting time and prevented from performing service by conditions beyond control of the carrier will be paid for actual time held, with a minimum of two hours."

"If worked any portion of the day under such conditions up to a total of 4 hours, a minimum of 4 hours shall be allowed. If worked in excess of 4 hours, a minimum of 8 hours shall apply."

"All time under this rule shall be at pro rata."

"This rule does not apply to employees who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular force, nor shall it apply to regular employees who lay off of their own accord before completion of the day's work."

Rule 61: "Employees covered by Groups (1) and (2), Rule 1, heretofore paid on a monthly, weekly or hourly basis shall be paid on a daily basis. The conversion to a daily basis of monthly, weekly or hourly rates shall not operate to establish a rate of pay either more or less favorable than is now in effect."

Rule 68: "Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such position; employees temporarily assigned to lower rated positions shall not have their rates reduced.

"A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher rated employee, due to a temporary increase in the volume of work, does not constitute a temporary assignment."

Under Item 2, the carrier contends that the employees making this claim were used only in temporary and fluctuating work.

It contends that it is only required to assign as many 8-hour continuous service jobs as the necessities of the service may require, and beyond that point may employ as many part time men as necessary.

We are of the opinion that under the record in this case, that while the business of the carrier varies from day to day, yet it is a regular recurring variation. It is not fluctuating in the sense that it is a seasonable fluctuation, such as is occasioned by the moving of grain during the harvest season, or the moving of fruit during the canning season. While there is a variation in tonnage from day to day, yet part of this variation is occasioned by the fact that no freight was handled on Sundays or Holidays.

Under Item 2, of the claim made on behalf of employees— A. W. Hilton, H. W. Holland and Jared Simister, these employees are entitled to a minimum of eight hours per day at the clerk's rate of pay for such days as they were assigned and required to perform the duties and responsibilities of receiving clerks and check clerks.

We are guided in this opinion by Award No. 438 and are further guided by Award in No. 1127, wherein the Division stated:

"The claimants worked with substantial regularity and with substantially fixed starting times and no adequate reason appears of record why they should be deprived of the eight-hour guarantee, contained in the agreement."

Item 3 covers two groups of employees. In the period covered by employees' "Exhibit A" and carrier's Exhibit No. 2, the 15 hourly rated employees named therein were used with substantial regularity and were a part of the normal force of the carrier, and should therefore, come under the provisions of Rule No. 50, and be paid as provided by Rule No. 43.

These conclusions are borne out by Award No. 330 and other awards cited by the petitioners.

Item 3 covers also other hourly rated employees as follows:

"All other employees engaged in handling freight on that platform who have been worked and paid under similar conditions."

This refers to similar conditions as set out in the first part of Item 3:

It is impossible from the record to determine definitely as to what employees come under this specification of Item 3, and the Board does not pass on this question but remands same for further conferences and negotiations between the parties.

However, when any of these employees or any of the employees of the so-called fluctuating forces, or employees not included in the claim, have been used to relieve employees of the normal force when they were absent from

duty due to voluntary causes, then such relieving employe takes the status as of the regular normal force and shall be compensated under the provisions of Rule No. 43.

Again calling attention to Item 3 of the claim which requests retroactive adjustments from April 1, 1937, the board is not sufficiently advised from the record in this case to pass upon the question of compensation for these hourly rated employes other than for the period of April 1937.

We have attempted in this opinion to lay down rules to guide the parties hereto and refer this matter to the parties for adjustment of these claims. In the event an adjustment cannot be reached the matter can be resubmitted to this Board with a complete and detailed record of the services performed by these employes.

**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 items (1) and (2) be sustained; that item (3) be sustained to the extent indicated in Opinion and otherwise referred back to the parties for further negotiations and settlement and, failing, same may be resubmitted.

#### AWARD

Items (1) and (2) sustained; item (3) sustained to extent shown in Opinion, otherwise remanded with permission to resubmit if not settled in negotiations.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 28th day of October, 1940.