

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees:

1. That the Carrier violated the Clerks' Agreement when during the latter part of the year 1945, and thereafter it failed to call Clerk Fred T. Holland to perform overtime outlined in our "Statement of Facts", and

2. That Employee Fred T. Holland be compensated for all monetary loss sustained account of failure of the Carrier to call him for the performance of this work.

EMPLOYEES' STATEMENT OF FACTS: During the latter part of the year of 1945 (actual date unknown as records are not available to us), it was necessary to work certain employees overtime at Great Falls, Montana, in connection with backpay for Engineers and Firemen which was allowed them under a decision of the Nat. R.R.Adj.Bd., Awards 10495 and 10496. In order to properly apply these Awards, it was necessary to assemble information as to the number of hours worked, names of Engineers and Firemen who were to receive payment, make time allowances, post them in time books and prepare payrolls. The records which formerly had been compiled in the Roundhouse Office at Great Falls, known as Sixteen-Hour Books and what is called the Sick and Lay-off Books, which were necessary to determine the names of the Engineers who were to receive payment covering the territory of what was known as the old Butte Division were brought over to the Superintendent's Office and the work performed by Clerks in that Office on an overtime basis to determine from information shown in them, the names of Engineers and Firemen to whom payment should be made. The Clerks used in the Superintendent's Office to determine the information from the Sixteen-Hour Books and the Sick and Lay-off Books are not incumbents of the positions which regularly performed this work.

POSITION OF EMPLOYEES: There is in evidence an Agreement between the parties from which the following rules are cited:

Rule 4—Acquisition of Seniority. (a) Seniority of employees shall date from the first paid performance of service on positions covered by this schedule.

Probationary Period (b) When new employees enter service, if their services are satisfactory, and application for permanent employment is not de-

The Carrier, therefore, feels that in line with the policy of your Board, as determined in Award 2999 covering an identical set of circumstances, you cannot do other than deny the claim of the employees in this case.

OPINION OF BOARD: Between December 16 and December 23, 1945, it was necessary to work certain employees overtime at Great Falls, Montana, in connection with the computation of back pay for engineers and firemen resulting from an award of the First Division of this Board. To properly apply the award it was necessary to assemble information as to the number of hours worked, the names of engineers and firemen who were to receive payment, make time allowances, post them in time books and prepare payrolls. The records pertaining thereto which had been compiled in the roundhouse office were taken to the Superintendent's Office where employees in that office performed the work. It is the contention of the Organization that the work belonged to Roundhouse Clerk Fred T. Holland by virtue of Rule 37, current Agreement, which provides in part:

"When overtime work is required by the company, the incumbent of the position to which such overtime work is necessary shall be given preference in its performance."

It is clear that under this rule the work which was removed from the roundhouse office and performed by clerks in the Superintendent's office belonged to the incumbent of the position out of which the overtime grew. Award 2999 of this Division is cited as sustaining a contrary conclusion. We have examined that award with a great deal of care and, while we dislike to overrule previous awards of this Board, we are obliged to say that Award 2999 is in error. We think the work involved in that award belonged to the occupant of the position out of which it grew and that the senior clerk in the Superintendent's office had no right to it whatsoever.

It appears that after obtaining an affirmative decision in Award 2999 in favor of the senior clerk in the Superintendent's office, the Organization undertook to file a claim for the Roundhouse Clerk. In denying the claim, this Board said in Award 3316:

"The Brotherhood in progressing the claim involved in Award 2999 put its finger on Smith and said he was 'the proper employee to perform the work'."

The Organization progressed the claim in behalf of the occupant of the position of Roundhouse Clerk out of which the overtime grew. In denying the claim, this Board said in Award 3316:

"Having been sustained in Award 2999, it now undertakes to say in effect that neither Shaffroth (who performed the work) nor Smith (the senior employee), but Mans (the Roundhouse Clerk) was entitled to perform the work. Having elected to claim the work for Smith, it cannot now claim it for Mans. The fairness of such a finding is too clear to require discussion."

We are likewise of the opinion that although the work in the present case belonged to Roundhouse Clerk Holland, the Organization has estopped itself to claim a penalty in his behalf. The work was clearly assigned in accordance with the holding in Award 2999. The Organization will not be permitted to induce an erroneous award and then, after the Carrier applies it in a subsequent case, allow the Organization to claim a violation of the Agreement on a theory repugnant to the award which it, itself, advocated, induced and brought about. It creates a situation requiring the application of the doctrine of estoppel by conduct.

However, the doctrine of estoppel cannot be invoked as a defense to similar situations arising after the adoption and release of this award.

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 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 violated, but as stated in the Opinion an affirmative award as to compensation is not warranted in this particular case.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1947.