

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

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

PENNSYLVANIA RAILROAD COMPANY

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

Irma M. Neff, R. L. Sumpman, J. S. Duncan, H. C. Sharbaugh, E. D. Melley, H. S. Sheridan, and Margaret M. Nihil, Supervisor Clerks, should be allowed eight hours' pay at punitive rate daily except Sunday and Holidays, retroactive ninety days from July 22, 1943, and until settled, on account of the use of track laborers by the Carrier to perform overflow clerical work.

EMPLOYEES' STATEMENT OF FACTS: In accordance with a practice of long standing which is partly embodied in an Agreement, dated July 1, 1945, this claim was progressed to the "chief operating officer of the carrier designated to handle such disputes" by means of a joint submission. A copy of this joint submission is shown as Exhibit "A." Final decision of the carrier is contained in its letter of March 15, 1946, copy of which is shown as Exhibit "B." The carrier notified the Organization under date of June 17, 1946: "This is to advise that we are unwilling to join with you in submitting this case to the National Railroad Adjustment Board, Third Division."

The "Joint Statement of Agreed Upon Facts" embodied in Exhibit "A" are also the "Employes' Statement of Facts" and are here shown for ready-reference:

"The following clerical force was assigned to each supervisor's office as of April 1, 1943:

Symbol Number	Location	Sub- division Number	Name of Incumbent	Rate of Pay
D-8	East Liberty	13	Irma M. Neff	\$179.60
D-9	Trafford	12	R. L. Sumpman	179.60
D-11	Derry	11	J. S. Duncan	179.60
D-12	Johnstown	10½	H. C. Sharbaugh	179.60
D-13	Cresson	10	E. D. Melley	179.60
D-15	Cresson	35	Hazel S. Sheridan	169.60

All of the above positions are six-day assignments with relief day Sunday.

The Carrier further submits that under no circumstances would the Claimants be entitled to compensation of eight hours at the time and one-half rate for each date on which other than clerical employees were used to perform clerical work. Such a claim can be founded only on the theory that the Carrier should have used the Claimants to perform all of the clerical work in the Supervisor's offices, that is, sixteen hours daily except Sundays and holidays. Obviously, to have done so would have imposed a physical strain upon the incumbents which they could not have withstood. Added to this was the fact that the Supervisor in charge of each office must concentrate the clerical work in the regular office hours, if it is to be given proper supervision by him.

In the light of the evidence and the agreement provisions set forth in this submission, it is respectfully urged that the instant claim should be denied because:

1. In the absence of extra clerical forces the use of persons other than Clerks to perform the work in the Supervisors' offices was not in violation of the Agreement.

2. Even if your Honorable Board should decide that the Agreement was violated, the Claimants herein are not entitled to the compensation claimed, since they were on duty and, consequently, were not available to perform the additional work.

IV. Under the Railway Labor Act, The National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement Between the Parties 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 said Agreements and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3 (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 Agreements between the parties to it. To grant the claim of the employees in this case would require the Board to disregard the Agreements 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 under the applicable Agreements between the parties to this dispute that the Carrier made every reasonable effort to obtain extra Clerks to perform the work in question, and, therefore, no violation of the Agreement occurred when persons other than Clerks were used to perform such work, and furthermore, even if a violation of the Agreement had occurred, the Claimants would not be entitled to the compensation claimed.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

OPINION OF BOARD: This dispute comes to the Board upon the agreed statement of facts shown in the record. As disclosed by this statement regular clerks performed the clerical work at Cresson, Pennsylvania and this part of the claim is eliminated. However, at Trafford, Derry and Johnstown Maintenance of Way employees were used to perform clerical work on a full time basis from April 1, 1943 to November 23, 1943, at which time regular positions were established and filled by persons who were brought under the Clerks' Agreement. At East Liberty clerical work to the extent of four hours a day was performed by a Maintenance of Way employe and was so being performed at the time of the agreed statement.

It has repeatedly been held by this Board that work embraced within the scope of an agreement cannot be removed therefrom and assigned to employes not subject to its terms.

Carrier first contends that it was unable to obtain extra clerks to perform the work in question, and, therefore, no violation of the Agreement occurred when persons other than Clerks were used to perform such work. However, these positions at Trafford, Derry and Johnstown were full time positions requiring eight hours work, and it appears that when they were established as such on November 23, they were properly filled by persons brought under the Agreement. It is clear that the work involved comes within the scope of the Agreement, and the failure of the Carrier to establish this work as a regular position for a period of more than seven months, and during this period use persons not covered by the Agreement to perform the work on a full-time basis, in our opinion, constitutes a clear violation of the Agreement. On January 17, 1944, Carrier wrote the General Chairman, offering to make the work at East Liberty a part-time position. We believe this was a good faith attempt to obviate the violation, and under conditions as shown in the record we believe no penalty for a violation should be assessed after this day.

Carrier further contends that if it had used the regularly assigned Clerks for the work performed by others it could not have done so except after the regular office hours. This might be true, but it does not excuse the violation of the Agreement, nor exempt Carrier from a penalty for this violation. Awards 1646, 2282, 2469.

The question arises as to the amount of the penalty. We think the penalty should be the rate the positions carried when finally established and not the punitive rate as claimed by Petitioners. Time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides. Awards 2346, 2695, 2823, 3049, 3193.

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 the Agreement was violated by the Carrier.

AWARD

Claim sustained to the extent indicated in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 11th day of June, 1947.