

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

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

**MISSOURI PACIFIC RAILROAD COMPANY
(GUY A. THOMPSON, TRUSTEE)**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on Sunday, November 10, Monday, November 11, and Wednesday, November 13, 1946, it relieved Yard Clerk F. A. Harrod, Yard Clerk Myrl Oswald and Yard Clerk L. R. Robertson at Durand, Kansas on their designated rest days with an employee hired from the outside, namely, Howard Long, who holds no seniority rights established on the seniority roster and failed and refused and continued to refuse to permit claimants who were available, ready, willing and able to work, and who have established seniority rights on the Group 1 seniority roster, Station and Yards of the Wichita Division, as follows:

F. A. Harrod, November 11, 1918
Myrl Oswald, May 15, 1920
Loren R. Robertson, February 19, 1946

to work on their designated rest days, and in the case of Mr. Harrod on authorized overtime, and be paid for same.

2. That the claimants shall be compensated for eight (8) hours at the time and one-half rate on the dates stipulated in (1) hereof, in accordance with claims filed in writing.

EMPLOYEES' STATEMENT OF FACTS: The seniority roster of employees subject to the scope and operation of the Clerks' Agreement on the Wichita Division Station and Yards of the Division Superintendent of the Missouri Pacific Railroad is divided into three groups, namely:

Group 1—Clerks, and those coming within the purview of (a) and (b) of Rule 1;

Group 2—Other office and station employees, such as those coming within the purview of Group 2, Rule 1, page 3 of the Clerks' Agreement;

of a double penalty which certainly is beyond the comprehension of any rule contained in the agreement and is contrary to prior decisions of your Honorable Board in which the Board has consistently denied such claims when rules of agreement have imposed no specific penalty. In Award 2695 the Board said:

"We are of the opinion that there is no basis for an affirmative award as to claim (b). In Award 2346 the Board said: 'Neither can we find that assignment without actual work is equivalent to work when the overtime rule is to be construed and applied.' We think the reasoning of the foregoing award is sound that overtime cannot be allowed when the regular assignment is not worked. To hold otherwise would inflict a double penalty upon the Carrier. . . . We adhere to the holding on this issue in Award 2346 which requires a denial of Claim (b)."

The Board also said in Award 2859:

"We do not believe, however, that there is any basis for an affirmation award as to Claim (a). This Division has frowned upon infliction of a double penalty as would result if the entire claim were allowed."

The claim here presented in behalf of the claimants named, as recited in the Employees' Statement of Claim, is not supported by rules of the existing working agreement between the Carrier and the Clerks' organization, and for reasons stated in this submission, Carrier believes same should be denied by your Honorable Board.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim arises because Carrier used a new employe, who had no seniority rights established on the seniority roster, to work the relief days of the three Claimants who are Yard Clerks at Durand, Kansas. The Claimants hold seven-day positions with regularly assigned relief days.

Rule 3 (d) permits a new employe's name to be listed on the seniority roster only when assigned to a position following the issuance of a bulletin. However, the Carrier claims it could properly use the new employe to work the Claimant's relief days, even though he had no established seniority, under the provisions of Rule 3 (e) which reads:

"The fact that seniority of an employe is not established and listed upon the roster until assigned by bulletin will not operate to deny to such employe the right to perform extra and/or relief work in the order of his employment date when such work is not performed by employes that have established seniority."

However, this rule does not sustain Carrier's position. The use of an employe whose seniority is not established is permissible only "when such work is not performed by employes that have established seniority." One of the purposes of seniority rules is to preserve the right to perform the work first for those who have established seniority, so that the above rule does not authorize work to be done by one without established seniority when there are those with established seniority available and willing to do the work as Claimants were in this case. See Awards 2341, 2426, 2706.

Accordingly, the use by Carrier of a new employe without established seniority under the circumstances shown was contrary to the Agreement, and Claimants are entitled to recovery thereunder.

The claim will be sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Claims (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 19th day of April, 1948.

DISSENT TO AWARDS 3860, 3861 AND 3862

Here is error: An Agreement applied to give it the meaning that an employer cannot hire a new employee unless and until, contrary to the intent of the rule providing for an employee's day of rest and to any provisions of the Agreement, the Carrier takes either of the following actions:

(a). Commands a present employee to work on his rest day, i.e., additional to the six days of eight hours only guaranteed by the Agreement,

or

(b). In each and every situation which requires additional man-hours of service each employee who considers himself eligible to perform such work, in addition to his guaranteed six days of eight hours, must be consulted either individually or through the Brotherhood, and his or their privileged acceptance or declination of the additional work secured, before the employer could proceed to hire a new employee.

The error of such application of the Agreement and of this Award is evident in the following facts:

(1). The Agreement does not contain prohibition upon the Carrier in respect to its action in this case.

(2). The parties, with practical knowledge of railroad operations, could not in reason enter into a contract with intent giving either of the results above stated.

(3). This Carrier, one party to the contract, in its knowledge of the utter impossibility of retaining any semblance of possession of control of its property and its operation under such an application, would not become party to an Agreement with such intent or meaning.

/s/ C. C. Cook.