

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Charles S. Connell, Referee

PARTIES TO DISPUTE:

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

READING COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Agreement:

1. When Clifton Campbell, George Fessler and Eugene Murray on December 17th, 18th and 19th, 1947, and Robert Dunbar on December 17th, 18th, 19th, 20th, 22nd, 23rd, 26th, 27th, 28th, 30th and 31st, 1947, January 2nd, 3rd, 7th (5 hours) 8th, 9th and 10th, 1948, were removed from their regular assignments in the Office of the Auditor of Revenues, Philadelphia, Pennsylvania, and required to perform special statement work known as "Study of Joint Carload Traffic for the month of June, 1947," and their regular assigned positions were not filled.

2. The Carrier further violated the rules when, on December 22, 1947 at 5:00 P.M., Bulletin No. 907 was posted (which is shown as Employees' Exhibit "A") advertising four temporary positions of Clerks, Statistical Bureau, Auditor of Revenues, at the rate of Ten Dollars and fifty-one cents (\$10.51) per day.

3. That all employees of the Statistical Bureau, incumbents of positions to which seven hundred and forty (740) hours work would have accrued, be compensated to the extent of the same amount of hours at punitive overtime rates.

4. That Clifton Campbell, George Fessler, Eugene Murray and Robert Dunbar be paid an additional day's pay at their prevailing rates by reason of the Carrier's action, for each and every day they were removed from their regularly assigned positions.

5. That all senior qualified employees and all other employees adversely affected in the Auditor of Revenues Office be compensated for all monetary wage loss by reason of the Carrier's failure to fill vacancies on the positions of Clifton Campbell, George Fessler, Eugene Murray and Robert Dunbar on the dates specified in Claim No. 1 when they were removed from their regular assigned positions to perform work on special statement "Study of Joint Carload Traffic for the month of June, 1947."

EMPLOYEES' STATEMENT OF FACTS: On December 16, 1947 the following letter was received by the Local Chairman of the Organization:

"Mr. Elmer Seese, Chairman,
Brotherhood of Railway and Steamship Clerks.

Confirming telephone conversation with you today, relative to data required by legal representatives in connection with Joint Car-

performing work which, in the Auditor of Revenues' opinion, was most closely analogous to the work of the temporary positions. In prescribing such rate, the Auditor of Revenues followed the provisions of Rule 13 (d), reading as follows:

"The rates for new positions shall be in conformity with the rates of analogous positions in the seniority district where created or in comparable localities and shall be established by agreement between the Management and the General Chairman."

Every effort was made to reach an agreement with the General Chairman to establish a rate, but, because of the refusal on the part of the Brotherhood representatives to enter into any negotiations concerning a rate, there was no alternative but to apply the rate which in the Auditor's opinion was fair and equitable to the employees involved and to the Company. In this connection, the Carrier emphasizes that while Rule 13 provides for establishment of a rate for a new position by agreement, it does not require concurrence by the Organization in the establishment of a new position. The right to establish new positions is a right belonging exclusively to Management and the Agreement nowhere limits this right.

Under the foregoing circumstances the Carrier submits that its handling of the matter was not in violation of any of the rules of the agreement, and that it was put to considerable embarrassment and difficulty by the unjustified position taken by the Organization representatives. Moreover the Organization has not complied with Rule 44 covering "Claims for Money Payments". This rule provides that claims for money payments "may be made only by the employee or a 'Representative' as that term is defined in Rule 3 of this agreement, on his behalf and must be presented in writing, to the employee's immediate superior within ninety days from date the employee received his pay check for the period involved or the basis of the claim occurred." (Emphasis supplied). This rule has not been followed in Items 3 and 5 in the claim submitted, in that the claims are general and not specific. The employees allegedly entitled to overtime are not designated or mentioned. Here again we have a rule presumably negotiated in good faith in order to establish an orderly procedure for handling of claims, but its terms have been disregarded, and accordingly the claims are defective and should not be considered.

With regard to the positions temporarily vacated by Messrs. Campbell, Fessler and Murray, the Board has held in Award 792, covering a dispute between the Clerks' Organization and this Carrier, involving a similar claim, that the terms of the Agreement were not violated by failure to fill such positions. Moreover, the Organization is here claiming a double penalty; that is, pay for time not worked at penalty rates. Such a penalty has not been awarded where claimants did not perform the work: see Awards 2346, 3232, 3444.

The Carrier maintains that there has been no violation of the Agreement; that the claims are not supported by the rules and therefore that the same are without merit and should be denied in their entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: On December 17, 18 and 19, 1947, Carrier's Auditor assigned tentatively Eugene Murray, George Fessler and Clifton Campbell, each regularly assigned and senior clerk in their respective bureaus, to work on the preparation of a special non-recurring statement. Robert Dunbar, the majority of his regular work being similar to the preparation of such statements, was assigned on the same date to supervise this work. The three employees, Messrs. Campbell, Fessler and Murray, declined to work on the statement after December 19, 1947, and returned to work at their regular positions. Claimant Dunbar continued working until January 10, 1948. On December 22nd the Carrier posted a bulletin advertising four temporary positions of clerks at the rate of \$10.51, to prepare the special statement. Two

clerks applied for the temporary positions and to fill the two remaining temporary positions, the two senior group two employees were assigned and these four worked at this work from Dec. 26, 1947, until January 17, 1948, when the work was completed.

The Employees contend that it was the practice of the Carrier to have the regular employees perform all special statement work on an overtime basis and the Carrier denies this practice. This Board has stated in former awards that prior practice established by either party cannot change the rules of the Agreement. We can find no rules in the Agreement to substantiate the Employees' contention that all special statement work must be performed by regular employees at overtime.

In Claim 1 there is no dispute to the fact that the Carrier assigned Claimants Campbell, Fessler and Murray away from their regular positions to work on the special statement on December 17, 18 and 19, 1947, and that their positions were not filled. It is also admitted that Claimant Dunbar was removed from his regular duties to work on the special statement, and he so worked until Jan. 10, 1948. The Employees contend that these four employees were suspended from their regular duties on the days in question to absorb overtime they or other employees otherwise would have performed, and the Carrier's action was a violation of Rule 7 (d), citing Awards Nos. 3301, 4352, 4499, 4500, and others. We are of the opinion that the facts in this case are substantially in accord with the authorities cited and it follows that Claim 1 must be sustained. Regular assignments should not be disturbed except as a last recourse, and in this case another and proper method was available to Carrier as will be seen in the following discussion.

Dealing particularly with Section 2 of the claim, the Claimants allege that the Carrier violated Rule 27 when it bulletined for the four temporary positions who performed the special statement work, i.e. Bulletin No. 907, Employees' Exhibit "A". In Rule 27 there is a specific exception to bulletining for positions of 30 days or less duration and the Employees contend that when the Carrier posted the bulletin in question for a position of less than 30 days' duration, it violated the agreement. The Board is of the opinion that the clear meaning of this exception to Rule 27 does not forbid the Carrier to publish such a bulletin, but merely states it is not required. The Carrier states it was a notice in the form of a bulletin to advise employees with seniority preference of this temporary position, though such action was not required. This was in compliance with Rules 31 and 32 that senior qualified employees should have preference on such temporary positions. We can find no violation of the Agreement when the Carrier bulletined these four new temporary positions, and its action was in accord with the provisions of the Agreement relating to such temporary positions to do special non-recurring work. Claim 2 will be denied, as will Claim 3 which is the claim for compensation based on Claim 2.

Claim 4, which is the compensation claim for violation of Claim 1, will be sustained at pro rata rate. However, Claim 5 must be denied in accordance with this Board's constant rulings that it will not order double penalty awards.

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

That both parties to this dispute waived oral hearing thereon;

That the Carrier and the Employees 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 Carrier violated the Agreements as per Opinion.

AWARD

Claims 1 and 4 sustained; Claims 2, 3 and 5 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 9th day of February, 1950.

DISSENT TO AWARD 4710, DOCKET CL-4708

This Award gives improper application of Rule 7 (d), relating to suspension of work to absorb overtime, to that minor part of this claim which only is sustained, contrary to its meaning and intent as it has been generally accepted by Carriers and Employees, including the Carrier and Employees here involved.

The Award declared the major portion of the claim originating in behalf of four employees who continued on the involved work for three weeks to not have been a violation of the Agreement. The work done by those four employees was done without any overtime, and evidences that all of the work, including the minor portion for which the claim was sustained, did not require overtime and consequently gave no occasion for the application of Rule 7 (d).

/s/ C. C. Cook
/s/ C. P. Dugan
/s/ R. H. Allison
/s/ A. H. Jones
/s/ J. E. Kemp