

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

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

PACIFIC FRUIT EXPRESS COMPANY

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

- (a) The Company violated and continues to violate the Rules of the Clerks' Agreement at Laramie, Wyoming, when on April 2, 3, 9, and 10, 1950, and subsequent thereto, it refused and continues to refuse to call the Clerk-Inspector, Class 1 employe, to perform service on his rest days, and required and/or permitted a Class 3 employe to perform this rest day service.
- (b) The Company shall pay Clerk-Inspector W. V. Collins eight (8) hours at the rate of time and one-half of his regular assignment for each date April 2, 3, 9, and 10, 1950, and for all subsequent dates until the Agreement violation is corrected.

EMPLOYES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the Pacific Fruit Express Company (hereinafter referred to as the Company) and its Employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees bearing effective date of September 15, 1939, which Agreement (hereinafter referred to as the Agreement) was in effect on the dates involved in instant claim. The Agreement was amended and/or revised by Memorandums of Agreement dated July 29, 1949, and July 31, 1950, to conform with the National 40-Hour Week Agreement signed at Chicago, Illinois, March 19, 1949. Copy of the Agreement dated September 15, 1939, and subsequent revisions and/or amendments are on file with this Board and by reference thereto are hereby made a part of this dispute.

2. Prior and subsequent to the dates involved in the instant claim, namely, April 2, 3, 9, and 10, 1950, Mr. W. V. Collins (hereinafter referred to as the Claimant) was occupying a regular assignment as Clerk-Inspector, No. L-39, at the Ice Plant, Laramie, Wyoming, with rest days of Sunday and Monday.

3. Prior to April 2, 1950, account no unassigned employes available in Seniority Class 1, the Claimant was called and used on his rest days, Sunday and Monday, and required to work the full eight (8) hours of his regular assignment, for which service he was compensated at the rate of time and one-half.

and were available and qualified, and in the status of unassigned Class 1 employees.

Under the circumstances, the Company submits that the claim in this docket is without basis and requests that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute had its inception in connection with the Company's handling of the work on relief days of position L-39, clerk-inspector, at the Ice Plant, Laramie, Wyoming. The work of the position is of such character that it must be performed on all seven days of every week. The Claimant, clerk-inspector W. V. Collins, was regularly assigned to position L-39 which had relief days of Sunday and Monday. Commencing with Sunday, April 2, 1950, and ending with Monday, June 5, 1950, both dates inclusive, the Company had the work performed on the relief days by either E. C. Widman or L. F. Booth, Jr. Widman and Booth had both Class 1 and Class 3 seniority but at the time they were used to do this work they were doing Class 3 work. The two relief days of this position were not included in any regularly assigned relief position and remained unassigned.

Rule 31 (h), "Work on Unassigned Days" of the parties' Agreement provides:

"Where work is required by the Company to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

It is the Brotherhood's contention that no extra or unassigned Class 1 employees were available and because of that fact Claimant was entitled to the work under the last provision of the rule. On the other hand the Company contends that both Widman and Booth were available as unassigned Class 1 employees.

The primary question presented by the dispute is, does the parties' Agreement permit the Company to use employees holding Class 1 seniority, but who have returned to Class 3 work, to do extra or unassigned Class 1 work or is the only way in which, under such conditions, they can return to Class 1 work is for them to bid for and obtain an assignment to a bulletined Class 1 position?

Because of reduction in forces both Widman and Booth had been unable, in the exercise of seniority, to retain a position in Class 1 and had returned to doing Class 3 work.

Rule 3 of the parties' Agreement provides for Class seniority and ordinarily employees in one seniority class cannot perform work in another except as the Agreement provides, because the work of each seniority class is reserved to employees of that class having a senior right thereto. But here the parties have specifically agreed in regard to the employee's right under a situation such as we have here. Rule 11 (a) "Retention of Seniority" of the parties' Agreement provides; as far as here material, as follows: " * * * Class * * * 3 employees promoted to Class 1 positions, shall retain and accumulate seniority on the roster in the class from which promoted. If such promoted employees are displaced, and unable, in the exercise of seniority, to retain a position in the class to which promoted at the point at which displaced, they shall retain seniority on the roster of such promoted class with the right to bid in bulletined positions within the seniority district, provided, however, they must, at the first opportunity, return to a regular position for which they have the requisite seniority and qualifications in such higher class at the point where they hold seniority in a lower class, or forfeit seniority in such higher class."

This rule limits the rights of employees under the Class 1 seniority which they retain when, under the circumstances set forth in the rule, they lose their Class 1 positions. The Rule, by specifically setting forth the rights they do have by reason of the Class 1 seniority which they retain excludes all others and, of course, the Company cannot give them rights which they do not themselves have. Not only does the Rule limit their rights to bidding on bulletined positions within their seniority district but expressly provides that when an opportunity presents itself to return to a regular position in Class 1 at the point where they hold seniority in a lower class and for which position they have the requisite seniority and qualifications, they must do so or forfeit their seniority in Class 1.

Under the situation here we do not think either Widman or Booth were unassigned Class 1 employees within the meaning of Rule 31(h) and consequently there were no extra or unassigned Class 1 employees available at Laramie to perform the work on the two unassigned relief days of position L-39. Consequently Claimant should have been used in accordance with the last provision of the Rule, 31 (h).

Claim is made on the basis of time and one-half although Claimant did not perform the work nor is it part of his assignment. The contractual right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. The penalty for work lost is the rate which an employee, if the work had been regularly assigned, would have received if he had performed it. See Awards 5117 and 5240 of this Division. Under this principle the claim should be allowed at the pro rata rate.

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 the Company violated the Agreement.

AWARD

Claim sustained but at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of April, 1952.