

Award No. 5895

Docket No. CL-5943

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul G. Jasper, Referee

PARTIES TO DISPUTE:

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

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

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

(1) The rights of Group 2 employees were violated under the provisions of Rule 3, paragraphs (a) and (e), and the intent and purpose of Rule 39 (a) was disregarded when the employee regularly assigned to Group 1 position of Sectional Storekeeper, G. L. Truscott, was required to suspend work on his regular position and was used at various times on certain dates during his tour of duty to perform Group 2 work and duties of counterman at Helper, Utah storehouse, while the regularly assigned Group 2 employee, Storehelper (counterman) Albert Sacco, was used to perform other Group 2 work outside the storehouse within the hours of his assignment.

(2) Storehelper (counterman) C. T. Haycock, regularly assigned 4:01 P. M. to 12:01 A. M. at Helper, Utah storehouse, shall be paid at time and one-half rate for six (6) hours and twenty-five (25) minutes August 4, 1949; two (2) hours and forty (40) minutes August 5, 1949; two (2) hours and thirty-five (35) minutes August 15, 1949; two (2) hours and five (5) minutes August 18, 1949; two (2) hours and thirty-five (35) minutes September 6, 1949; three (3) hours and forty-five (45) minutes September 13, 1949; a minimum of two (2) hours September 14, 1949 and two (2) hours and thirty (30) minutes September 16, 1949, under Rule 37, account not called and used to perform Group 2 work when Group 1 Sectional Storekeeper G. L. Truscott was used on the dates cited to relieve Storehelper (counterman) Albert Sacco, regularly assigned 8:01 A. M. to 4:01 P. M., so that Sacco could be used to perform other Group 2 work outside the storehouse within the hours of his assignment.

EMPLOYEES' STATEMENT OF FACTS: Prior to July 31, 1949 the Store Department force at Helper, Utah was comprised of one Group 1 position of Sectional Storekeeper, assigned hours 7:30 A. M. to 4:00 P. M. with thirty minute lunch period; three Group 2 positions of Storehelper (counterman), assigned hours 8:01 A. M. to 4:01 P. M., 4:01 P. M. to 12:01 A. M. and 12:01 A. M. to 8:01 A. M.; one Group 2 position of Utility Storehelper, assigned hours 7:30 A. M. to 4:00 P. M. with thirty minute lunch period. The duties of the Group 1 position of Sectional Storekeeper consisted of checking and keeping record of material in stock, making requis-

(1) That the carrier violated, and continues to violate, the Clerks' Agreement when it blanked the only position of trucker (Group 3) at Colorado Springs, Colorado, and assigned the duties of that position to employees in Group 1, and

(2) That the occupant of the position of trucker at Colorado Springs, Mr. Dale R. Liljerstrom, be compensated the difference between what he was paid and eight hours for each working day he was laid off at the expiration of four hours, or prevented from performing any service subsequent to January 1, 1947.

OPINION OF BOARD: Claimant, Dale R. Liljerstrom, was assigned as a trucker at Colorado Springs, Colorado, with Group 2 seniority date of July 3, 1945. On January 1, 1947, the Carrier instituted the practice of laying Claimant off at the end of four hours' service daily and assigning the trucking of freight remaining to Clerks regularly assigned to Group 1 positions. The Organization contends that this practice is violative of the Agreement.

The rules applicable to the situation are:

'(a) Seniority rights of employees to vacancies or new positions will be governed by these rules. Seniority is restricted to the three groups designated in Rule 1 of this Agreement as follows:

Group 1 shall constitute one seniority class

Groups 2 and 3 combined shall constitute one seniority class

(b) Seniority in Group 1 begins at the time an employee is first assigned to a position in accordance with Rule 10, in the seniority district where assigned. Seniority in Groups 2 and 3 begins at the time pay starts, in the seniority district where initial service is performed.

(e) Employees advanced from one seniority group to another in the same seniority district will retain and continue to accumulate seniority on the roster from which promoted. Employees who have been promoted from seniority Groups 2 and 3 to seniority Group 1 must first exhaust their seniority on Group 1 positions, for which they may be qualified, in event they are disturbed from their regularly assigned position. Having thus exhausted their Group 1 seniority, they may, within five (5) calendar days, resume date and exercise seniority in displacing employees of seniority Groups 2 and 3. In order to retain their seniority date in Group 1, employees who have reverted to seniority Groups 2 and 3 must protect Group 1 vacancies or new positions, for which they may be qualified, immediately when available and bid for and accept such vacancies or new positions, except as provided in Paragraph (f).'

Art. III, Rule 3 (a), (b), (e), current Agreement.

Similar disputes have been before this Division and a clear interpretation of the meaning of the foregoing rules does not appear to have resulted. That difficulties lie in the way of harmonizing the various rules, and various clauses within some of the rules themselves, is apparent on their fact.

It is clear to us that the only seniority district here involved is the 'Colorado Springs station and yard forces'. See Art. III,

Rule 5, current Agreement. This assertion is also borne out by the language used in Art. III, Rule 3 (e), wherein it is stated that 'Employees advanced from one seniority group to another in the same seniority district will', etc.

It is evident from a careful reading of Rule 3 (e), hereinbefore quoted, that Group 1 and Groups 2 and 3 employees were not to be used whimsically and interchangeably in performing the work of the other group or groups. It is true that seniority attaches to the individual employe and that positions include the performance of the work of the position. But when seniority entitles an employe to occupy a position, he is entitled by the very nature of things to perform the work of that position. A trucker is a Group 3 employe, and we think the Agreement contemplates that if there is available work for the establishment of a trucker position, an employe holding seniority in Groups 2 and 3 seniority class is entitled to the position and to perform the work thereof. On the other hand, if there is insufficient work for the establishment of a trucker position or if there is additional extra work not sufficient to require a second trucker position, we think the Agreement permits Group 1 employees to perform it.

This, of course, raises the question: When does work exist which requires the establishment of a position? This question was answered in Award 1211 wherein it was stated that it applied to a position worked 'with substantial regularity'. But the answer proved just as indefinite and ambiguous as the situation previously existing until this Board in Award 2161, more or less arbitrarily, defined 'substantial regularity' as 'three days' work or more per week'. Until the parties produce a better definition by agreement, we shall continue to apply that standard.

The record shows that trucking work in excess of three days per week existed at Colorado Springs. It in fact shows that more than six days trucking work existed there. The position of trucker occupied by Liljerstrom under Group 3 should, therefore, have been retained.

If this was not so, no effect would be given to that part of Rule 3 (e) providing: 'Employees who have been promoted from seniority Groups 2 and 3 to seniority Group 1 must first exhaust their seniority on Group 1 positions, for which they may be qualified, in event they are disturbed from their regularly assigned position. Having thus exhausted their Group 1 seniority, they may, within five (5) calendar days, resume date and exercise seniority in displacing employees of seniority Groups 2 and 3.' Clearly, a Group 3 employe can be deprived of his position where the work of the position exists only in the manner stated in the foregoing rule; that is, by a proper exercise of seniority rights. If Group 1 employees could be assigned indiscriminately to perform the work of the Group 3 position as the Carrier saw fit, much of the rule would be meaningless, a situation to be avoided if possible in contract interpretation.

The claim of the Organization is sustained under the facts here shown, subject to the provisions of Rule 25, current Agreement, effective June 1, 1941.

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, 1945:

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim (1) sustained. Claim (2) sustained from June 1, 1947.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of April, 1949."

Organization heretofore has not objected to the use of Group One (1) seniority employees to perform irregular Group Two (2)-Three (3) seniority employees' work. In support of this statement attention of your Board is directed to Award 3371. Award 3371 involved a dispute which arose in the Store Department at Helper, Utah. Organization in Award 3371 made a claim that Carrier should pay sectional storekeeper L. W. Johnson (group one (1) seniority) because not permitted to unload wheels which is group two (2)-three (3) seniority employees' work.

Award 3371 involved the following claim:

"That Store Helper W. H. Rodeback and Sectional Storekeeper L. W. Johnson be paid two and one-half hours' pay at time and one-half of their respective rates account Mechanical Department employees, not having seniority rights under the scope of the Clerks' Agreement, being used to unload wheels 11:00 A. M. to 2:00 P. M., exclusive of meal period 12 Noon to 12:30 P. M., Saturday, May 6, 1944. This claim is based on the provisions of Rules 1, 3, 36, 37 and 50."

If Organization does not believe its agreement with Carrier permits Carrier to use Group One (1) seniority employees to perform irregular Group 2 (2)-Three (3) seniority employees' work why then did it make claim for a sectional storekeeper (group one (1) seniority) because he was not permitted to perform group two (2)-three (3) seniority employees' work in Award 3371.

There is no merit to this claim and it must be denied on the basis of Awards 4385 and 3371.

All data in support of Carrier's position have been submitted to Organization and made a part of this particular question in dispute. The right to answer any data not previously submitted to Carrier by Organization is reserved by Carrier.

OPINION OF BOARD: Claimant Haycock is a storehelper (counterman) with seniority in Groups two and three. He is assigned to the Store Department at Helper, Utah. His regular assigned working hours are 4:00 P. M. to 12:00 Midnight six days a week.

Storehelper (counterman) is an around-the-clock position.

On July 30, 1949 due to decrease work D. R. Wharff, a utility storehelper's position was abolished. As a utility storehelper he assisted in loading and unloading cars of Store Department material.

G. L. Truscott on August 4, 1949 and the dates hereinafter set out, was a sectional storekeeper with a Group 1 seniority. Under the rules he also held seniority in Groups 2 and 3. On August 4, 1949 Albert Sacco, a

store helper (counterman) was required to leave his work inside the storehouse to help load a car with Store Department material.

Both the counterman's duties and the loading and unloading of cars were Groups 2 and 3 seniority work.

C. T. Haycock claims he should have been called to perform the Groups 2 and 3 work taken over by Truscott on August 4, 5, 15, and 18 of 1949 and September 6, 14, 17 of 1949.

The Claimant contends that the Carrier violated Seniority Rule 3 (a) and (e) which are as follows:

"(a) Seniority rights of employees to vacancies or new positions will be governed by these rules. Seniority is restricted to the three groups designated in Rule 1 of this Agreement as follows:

Group 1 shall constitute one seniority class

Groups 2 and 3 combined shall constitute one seniority class.

(e) Employees advanced from one seniority group to another in the same seniority district will retain and continue to accumulate seniority on the roster from which promoted. Employees who have been promoted from seniority Groups 2 and 3 to seniority Group 1 must first exhaust their seniority on Group 1 positions, for which they may be qualified, in event they are disturbed from their regularly assigned position. Having thus exhausted their Group 1 seniority, they may, within five (5) calendar days, resume date and exercise seniority in displacing employees of seniority Groups 2 and 3. In order to retain their seniority date in Group 1, employees who have reverted to seniority Groups 2 and 3 must protect Group 1 vacancies or new positions, for which they may be qualified, immediately when available and bid for and accept such vacancies or new positions, except as provided in Paragraph (f)."

and also violated Rule 39 (a) which is as follows:

"Employees will not be required to suspend work during regular hours to absorb overtime."

A system roster was maintained for all Division storehouses. See Rule 5, item 35.

The facts readily reveal that Sacco could not physically perform the duties required of him in assisting the loading and unloading of cars outside the storehouse and also perform the duties of storehelper (counterman) inside the storehouse. The work belonging to Groups 2 and 3 was entitled to be done by a man from Groups 2 and 3, if available. As has been said, a Group 1 man cannot be used interchangeably to perform the work of the other Group, nor could a Groups 2 and 3 man be used to perform the work of Group 1.

Under the Agreement Group 1 is a separate seniority Group and Groups 2 and 3 are a separate seniority group.

When Sacco was moved from the counterman's duties to perform work of loading and unloading cars outside the storehouse, Claimant Haycock was available to do the work of Groups 2 and 3. If a Groups 2 and 3 man had not been available then a Group 1 man could have been used. See Award 3371.

It was a violation of Rule 39 (a) to use a Group 1 man to do a Groups 2 and 3 man's work. Truscott was used to absorb overtime of another position by being required to suspend his work.

We cannot agree with the contention of the Carrier that Award 4385 is controlling. The facts are distinguishable in the last cited Award. In Award 4385 all jobs were Group 1 positions except the trucker which was a Group 3 position. Men in Group 1 held seniority in Groups 2 and 3. When the Carrier was forced to reduce its man power it abolished the trucker position leaving only Group 1 employees to do the work of the trucker, which work was in excess of three days, and required the position of trucker to be established. The claim of the trucker was sustained. The absorbing overtime rule was not involved. In the claim now before this Board the utility storehelper's position was abolished, but there were other storehelpers working on Groups 2 and 3 work. They were therefore entitled to perform the extra work of their Group before a Group 1 man was entitled to it. Here the absorbing overtime rule is involved. Truscott was required to suspend regular work to perform work in another position which work would have required overtime to be paid. See Award 5331.

The Claimant did not perform the work and therefore is entitled to be paid only at the pro rata rate. See Award 4244. There is some question about the exact amount of overtime absorbed by Truscott on the dates in the claim. This can be ascertained by the parties on the property.

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 Agreement was violated.

AWARD

Claim sustained for the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 28th day of July, 1952.