

Award No. 7720
Docket No. CL-7656

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

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

(1) Carrier violated the Clerks' Rules Agreement when, on Saturday, January 5, 1952, and subsequent Saturdays, it failed to use Employee Josephine Piconere, Clerk at Cragin Station, to perform clerical work regularly performed by her Monday through Friday, and in lieu thereof assigned that clerical work to the Agent, an employee outside the scope and application of the Clerks' Rules Agreement.

(2) Carrier shall compensate Employee Josephine Piconere for four (4) hours at the penalty rate of her regular assignment for Saturday, January 5, 1952, and each subsequent Saturday that the violation continued.

EMPLOYEES' STATEMENT OF FACTS: On December 19, 1951 the Carrier issued Bulletin No. 300 advertising for bid in Seniority District No. 30, Clerks position No. 1290 at Cragin Station; Rate of pay, \$12.656 per day; assigned hours 7 A. M. to 4 P. M.; assigned meal period 11 A. M. to 12 noon; assigned rest days, Saturday and Sunday. The duties of the position as described on the bulletin are selling passenger tickets, yard check, checking industries and clerical duties as assigned. See Employees' Exhibit "A" attached.

Employee Josephine Piconere was the only applicant for Position No. 1290 and was appointed to that position by Carrier's notice of appointment to Bulletin No. 300 dated December 31, 1951, copy of which is attached as Employees' Exhibit "B".

Employee Piconere performed the duties assigned to Position No. 1290, including the daily yard check and check of industries for demurrage purposes, Monday through Friday each week, but was not permitted to make the yard check or check of industries for demurrage purposes on Saturday. That Work, which Employee Piconere regularly performs each day Monday through Friday and which requires from 3½ to 4 hours of her time on each

Carrier submits the claimant in any event is not entitled to the claimed overtime rate as the claim is predicated on the basis that claimant was denied the right to perform the work in question. In Award 4244 in which Referee Edward F. Carter participated, it was stated:

"The right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. Whether the overtime rate be construed as a penalty against the employer or as the rate to be paid an employee who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing that makes the higher rate applicable. One who has been deprived of work is not entitled to recover penalties accruing to the employee who actually performs the work where such penalties arise from the fact of his actually performing it. They are personal to such employee and are not a part of the loss sustained by the employee deprived of the work. The latter's loss is the rate the regularly assigned occupant of the position would have received if he had performed the work in the regular course of his employment. The reasoning contained in Award 3193 supports this holding and is reaffirmed. See Awards 2695, 3049, 3222, 3251, 3271, 4196. Awards by other referees to the same effect are: 2346 (Burque), 2823 (Shake), 2859 (Youngdahl), 3232 (Thaxter), 3371, 3375, 3376 (Tipton), 3504, 3505 (Douglas), 3609 (Rudolph), 3745, 3770, 3837 (Wenkle), 3876, 3910 (Yeager), 3890 (Swaim), and 4037 (Parker)."

The Carrier has shown that the claimant clerk never performed the work of checking tracks on Sunday prior to September 1, 1949 nor did she perform that work on Saturday and Sunday subsequent to September 1, 1949, further, that the Agent performed such work on Sunday whenever necessary prior to September 1, 1949 and since has performed such work on Saturday to the extent necessary, in addition to performing exclusively the work in connection with handling of demurrage records and reports.

Therefore, under the facts and circumstances existing in this case, there is no basis for the claim and the Carrier respectfully requests that it be denied.

All data contained herein has been presented to the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was regularly assigned to Clerk Position No. 1290 at Cragin Station, Monday to Friday, rest days Saturday and Sunday. The entire station force at Cragin consists of one clerical position, occupied by Claimant, and one position of agent. It is conceded that among other duties performed by Claimant as part of her regular assignment is that of checking the yard and industries for demurrage purposes. On Saturdays, however, this check is performed by the agent; the clerk is not called to work at all on Saturdays.

The claim is that the work of checking the yard and industries for demurrage is work which belongs to clerks under the agreement between the Carrier and the Clerks' Organization and is part of Claimant's regular assignment; and that the assignment of such work to the agent on Saturdays is a violation of that agreement. Claimant asks compensation for all Saturdays on which such work has been performed by the agent beginning with Saturday, January 5, 1952.

It is Carrier's position that the agent, as well as the clerk, makes yard and industry checks during the week, and therefore that this work may be assigned just as properly to the agent on Saturdays as to the clerk. Carrier submits evidence that prior to 1949, when a 6-day week was worked, the checking of industries on Sundays was done by the agent, not the clerk; and

that since 1949, when the 5-day week was put into effect, the same work on Saturdays has always been done by the agent.

Claimant argues that the fact that such work has been done by the agent in the past does not make it any less a violation, and cites numerous awards to the effect that work which is a regular part of an employee's assignment during the week may not be assigned to another employee on Saturday.

This Division, in Award 7427 with the same referee participating as in this case, recently discussed the principles involved in cases dealing with the rights of employees to certain work under a scope rule and also under a rule granting them the right to rest day work when it is work normally performed as part of a regular 5-day assignment; that discussion is equally applicable here and need not be repeated. In that case, we were called upon to decide whether the work of signing bills of lading and of billing carload freight belonged to a clerk under the scope rule; and whether it was a part of his regular assignment so that he was entitled to a call when such work had to be performed on Saturdays. It was argued by Carrier there, as here, that such work was performed also by the agent-telegrapher during the week and thus could be assigned to him on Saturdays. On the record in that case, we decided that the occasional nature of the performance of such work by the agent-telegrapher did not prevent the work from being a part of the clerk's regular assignment so as to entitle him to its performance on Saturdays. We were confronted there with a factual dispute as to whether the agent-telegrapher actually performed the clerical work during the week or not, and, on the record in that case, we were able to resolve the conflict in favor of the clerk.

The principles applicable to the case at hand are the same as those involved in Award 7427 and again the decision rests upon the resolution of a factual dispute. There are conflicting statements in the record as to whether the agent did or did not regularly perform the yard checks and industry checks which are the subject of this claim during the week while the clerk was on duty. On the whole record, including the evidence as to past practice as well as the statements, we find ourselves unable to resolve the conflict and since the resolution of the claim turns upon this factual question, we will neither sustain nor deny the claim, but will dismiss it without prejudice.

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 there is not sufficient evidence to enable the Board to determine whether or not the Agreement has been violated.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February, 1957.