

Award No. 8306
Docket No. CL-7743

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**

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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

(a) That Carrier violated rules of the Clerks' Agreement in filling position of Shed Foreman at Malden, Missouri, on the sixth day—Saturday—of each week.

(b) That Loran Shipman and his successors, if there be any, be paid for all time worked by the improperly assigned employee at overtime rate with the minimum of eight hours commencing Saturday, April 29, 1950, and the Saturday of each week thereafter until the rules violation is corrected.

NOTE: Reparation due employees to be determined by joint check of Carrier's payrolls and such other reference that may be deemed necessary to establish proper claimant and the amount due.

EMPLOYEES' STATEMENT OF FACTS: The normal station force subject to the provisions of the Clerks' Agreement at Malden at the time this dispute arose comprised the following:

POSITION	NAME OF ASSIGNEE
Demurrage Clerk	J. L. Kalkbrenner
Yard Clerk	J. D. Wagster
Shed Foreman	Loran Shipman
Trucker	G. E. Goza
Trucker	R. L. Camp
Trucker	A. O. Summers

The position of Shed Foreman was bulletined as a five day per week position, with rest days Saturdays and Sundays, on April 10, 1950. Employees' Exhibit No. 1.

Vacancy was assigned to the Claimant, Loran Shipman, April 19, 1950. Employees' Exhibit No. 2.

"(7) The least desirable solution of the problem would be to work some regular employes on the sixth or seventh days at overtime rates and thus withhold work from additional relief men."

The intent thus was to spread the work, and it is clear that the provisions of the agreement should be construed with that thought in mind.

The fact that no claim was filed for over one year is itself good evidence that the Employes considered the relief proper in the present case. If they had considered that a violation of rules existed no doubt they would have filed claim promptly. The Board has held that employes must exercise due diligence if a claim is to be made.

Award 2811 denied a claim of a pumper assigned less than six days a week because of delay in making and progressing claim. The assignment was in effect from April 16, 1933 until January 1937, without protest. The Opinion included the following:

"Under circumstances such as we have related when the claim involves merely the right to compensation, we are certain the far greater number of our decisions and those which are sound in principle hold to the rule that the doctrine of estoppel is applicable and that claims similar in character to this one are barred because of inaction and delay on the part of the party making them and that their laches in failing to present them within a reasonable time, make it unjust and inequitable that they should be permitted to recover. * * *"

The Carrier respectfully submits there clearly was no violation of the rules in this case. It was proper to use Trucker Goza to relieve the Shed Foreman and use an extra Group 3 employe as Trucker in place of Goza.

Without prejudice to its position, as previously set forth herein, that the claim is entirely without support under the rules, the Carrier submits that the claim that Shed Foreman should receive an allowance at time and one-half rate for work not performed is contrary to the well established principle consistently recognized and adhered to by the Board that the right to work is not equivalent to work performed under the overtime and call rules of an agreement. Please see Awards 4244, 4645, 5195, 5437 and 5764. There are many others also.

In conclusion, the Carrier respectfully reasserts that the claim of the Employes is entirely without merit or support under the rules and should be denied in its entirety.

All data herein has been presented to representatives of the Employes.

(Exhibits not reproduced)

OPINION OF BOARD: This case presents the same issue as Award No. 8303 and is governed by the Opinion therein. The claim is therefore sustained at pro rata, not penalty, rate except for the period from June 19, 1952, the date of the final declination on the property, until June 10, 1955, the date of Petitioner's notice of intention to file with the Board, for which period no compensation shall be paid.

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 Employes involved in this dispute are respectively Carrier and Employes 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 to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of April, 1958.