

Award No. 8414
Docket No. CL-8125

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

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

FORT WORTH AND DENVER RAILWAY COMPANY

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

1. Carrier violated the Clerks' Agreement on November 27, 28, December 4 and 11, 1954, at Childress, Texas, by assigning or permitting Mr. D. O. Nash, General Storekeeper (not covered by agreement) to perform work which is regularly assigned to Store Foreman, Mr. C. E. Morgan; and

2. That Carrier now be required to pay to Mr. Morgan eight (8) hours at the rate of time and one-half for each of the days (November 27, 28, December 4 and 11, 1954) on which Mr. Nash supervised and checked out material from cars unloaded.

EMPLOYEES' STATEMENT OF FACTS: Mr. C. E. Morgan has a seniority date of October 18, 1920. He occupies position of Store Foreman, working Monday through Friday, with rest days of Saturday and Sunday. His position is excepted from only one rule of the present working agreement, namely, Rule 6, "Promotion, Assignment and Displacement."

Duties attached to Mr. Morgan's position as Store Foreman by bulletin are as follows:

"Supervision of Childress General Store, labor forces and work performed." (See Employees' Exhibit "A".)

Duties as outlined by Mr. Morgan himself are as follows:

"Supervise all Store Laborer's work in general.

Check material received from all cars to see it is stored in correct place.

SUMMARY

In conclusion, the Carrier avers:

(1) That this claim must fail because the Petitioners have produced no evidence to support their contention that the work upon which this claim is predicated accrues exclusively to the Claimant. As stated in Award 4758 of this Division:

"The Claimant in coming before the Board, assumes the burden of presenting a theory which, when supported by the facts, will entitle him to prevail. The Board cannot accept the burden of finding a reason to grant relief when the Claimant fails to make a case."

Also see Award 2577, 3477, 3523, and 4011 of this Division.

(2) That nothing in the applicable Rules and Working Conditions Agreement delineates the work accruing to the craft or classes covered thereby. See Third Division Award 6042. Since it has been established that by practice and custom this work upon which claim has been predicated does not accrue exclusively to clerks, there can be no basis for this claim.

(3) That the work upon which this claim is predicated has never been relinquished by the General Storekeeper to any craft or class of employes, and has by practice and custom been performed as incidental to his duties.

The Carrier sums up its case by asserting that the evidence clearly points to a finding that no work which can be properly described as the exclusive duties of the Store Foreman was performed by the General Storekeeper on the dates claimed. A finding based on the facts can be nothing less than a complete denial of this claim.

The Carrier affirmatively states that all data herein and herewith submitted have previously been submitted to the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is that the Carrier violated the Agreement, particularly Rule 42 (f), on the four rest and unassigned days in question when the general storekeeper exercised supervision over the work of a derrick operator and a head laborer, both of whom are Group 3 employes under the Agreement, when they unloaded carloads of scrap track material on these respective days. He also made certain records setting out the car number, date unloaded and the contents of the cars.

Claimant occupies the position of store foreman under the Clerks' Agreement and part of the work assigned to him in accordance to the Carrier's Bulletin Notice No. 39 of March 15, 1954, is the following:

"Supervision of Childress General Store, Labor Forces and Work Performed."

Duties as outlined by Mr. Morgan himself are as follows:

"Supervise all Store Laborer's work in general. Check material received from all cars to see it is stored in correct place.

Make unloading report on each car as to kind and amount of material, and calls as to new, second-hand or scrap.

Make report of all cars unloaded each day under heading 'Cars Released.'

Cars loaded—check material called for on all orders to be shipped to see correct material is shipped, make report on all cars loaded for billing out, show location of car as to what track same can be found on. General supervision of all Store employees."

His regularly assigned days were Monday through Friday with Saturday and Sunday as rest days.

Rule 42 (f), which is the rule allegedly violated in this instance, reads as follows:

"Work on Unassigned Days. Where work is required by the Carrier 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."

The General Storekeeper is an officer of the Carrier and his position is not within the scope of operation of the applicable agreement between the Carrier and the Clerks' Organization. The claim in this case is not the actual assignment of a person not covered by the Agreement to the work in question but the performance of that work by another employee on the dates in question who is not covered by the Agreement.

The rule has been firmly established by repeated decisions that work on rest days should be assigned in the first instance to a regular assigned relief man if there be such; secondly, to an extra or unassigned employee; and finally, if such employees are not available, to the regular occupant of the position on an overtime basis. (See Awards 5271; 5333; 5465; 5475; 5558; 5708; 5804; 6019 and others of this Board.)

"Where such work is unassigned work it may be performed in the first instance by extra or unassigned employees; in all other cases by the regular employee."

That has been established as the rule under parts of an agreement such as that of 42 (f) as contained in this particular contract. It was shown in the testimony and part of the record that the work performed on these particular days by the General Storekeeper was not performed by him during the five days of the week when the claimant performed his regular work and, although there is some discrepancy as to the amount of time consumed in performing this work on the days in question, it is admitted by the Carrier that certain of the work which falls definitely within the classification of the Claimant was performed by the General Storekeeper on these particular dates.

It is the opinion of this Board that the work in question, being the work performed by the Claimant on his regular assigned days during the week cannot lose its identity and still remains work in that same classification on the unassigned days and being in the same category must of necessity be handled in accordance with the terms of the Agreement covering the unassigned days as set forth in the contract. The fact that there was supervision

performed on these unassigned days and other work which is in the classification of this Store Foreman indicates very clearly that the work was actually needed and performed on those days. Therefore, it comes squarely within the provisions of 42 (f) of the Current Contract.

Work of this description being required on the unassigned days, it is the decision of this Board that the work must be handled in accordance to Section 42 (f) of the Contract and the performance of that work by the General Storekeeper who is not covered by the Agreement created a violation of the Agreement.

The Board is not unmindful of its awards which hold that the amount of supervision required by the Carrier is for the Carrier to determine (Award 4235) and that the Carrier can properly reduce supervisory positions provided that the work from the abolished position is properly assigned. We are also mindful of the fact that the Storekeeper performed supervisory functions at times after the regular shift was completed.

Here, however, we are not dealing with abolished positions or overtime but the assignment or performance of work within the Scope of the agreement on an unassigned day and it is the opinion of the Board that rule 42 (f) must be complied with whether or not the work is exclusive to the store foreman.

There remains to consider the penalty appropriate to Carrier's violation. We adhere to the principle established by prior decisions of this Board relative to cases involving this type of question and hold that the Claimant should receive pro rata rather than time and one-half pay for the days requested.

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 in accordance with the Opinion and payment to be made on a pro rata basis.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July, 1958.