

Award No. 1686  
Docket No. CL-1700

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Sidney St. F. Thaxter, Referee

**PARTIES TO DISPUTE:**

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

**GULF COAST LINES  
INTERNATIONAL-GREAT NORTHERN RAILROAD  
COMPANY  
SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY  
SUGARLAND RAILWAY COMPANY  
ASHERTON & GULF RAILWAY COMPANY  
(Guy A. Thompson, Trustee)**

**STATEMENT OF CLAIM:** "Claim of E. H. Koch for payment at the rate of time and one-half for all time worked in excess of eight hours on November 1, 2, 4, 5, 6, 7, 8, and 9, 1940, January 3, and 4, February 10, and 18, March 3, 4, and 7, 1941."

**EMPLOYES' STATEMENT OF FACTS:** "Mr. E. H. Koch is employed as Commissary Storekeeper at Houston, Texas, and worked overtime on the dates, and to the extent shown below:

						<b>OVERTIME WORKED</b>	
Nov.	1, 1940	6:30 A. M. to 4:00 P. M.	1 hr. Lunch			30 Mins.	
Nov.	2, 1940	6:30 A. M. to 4:00 P. M.	1 " "			30 "	
Nov.	4, 1940	6:30 A. M. to 4:00 P. M.	1 " "			30 "	
Nov.	5, 1940	6:30 A. M. to 4:00 P. M.	1 " "			30 "	
Nov.	6, 1940	6:30 A. M. to 4:00 P. M.	1 " "			30 "	
Nov.	7, 1940	6:30 A. M. to 4:00 P. M.	1 " "			30 "	
Nov.	8, 1940	6:30 A. M. to 4:00 P. M.	1 " "			30 "	
Nov.	9, 1940	6:30 A. M. to 4:00 P. M.	1 " "			30 "	
Jan.	3, 1941	7:00 A. M. to 5:00 P. M.	1 " "	1 Hr.			
Jan.	4, 1941	7:00 A. M. to 5:00 P. M.	1 " "	1 "			
Feb.	10, 1941	7:00 A. M. to 4:20 P. M.	1 " "			20 "	
Feb.	18, 1941	7:00 A. M. to 5:00 P. M.	1 " "	1 "			
Mar.	3, 1941	7:00 A. M. to 5:00 P. M.	1 " "	1 "			
Mar.	4, 1941	7:00 A. M. to 5:00 P. M.	1 " "	1 "			
Mar.	7, 1941	6:40 P. M. to 7:20 P. M.				40 "	

"The position of Commissary Storekeeper is included in, and is a part of, Seniority District Number 13.

"Mr. Koch is shown on the seniority roster with seniority as of the date he began work as Commissary Storekeeper."

**POSITION OF EMPLOYES:** "The employees quote the following rules in support of this claim:

Cars or to any other official of the Carrier of which there is any record. The position of Commissary Storekeeper, to which Mr. Koch is assigned, has been in effect since November 1, 1934, and the present salary is \$175.00 per month.

"It will be noted that although the claim presented by General Chairman Dyer goes back to November 1, 1940, the first information the Carrier received that any claim was being made was when Mr. Dyer's letter of March 12, 1941, addressed to Mr. Gall, was received. The position of Commissary Storekeeper, however, has never been included in the scope of the Clerks' Agreement."

**POSITION OF CARRIER:** "Mr. E. H. Koch, with title Commissary Storekeeper, is employed at Houston, Texas, in the Commissary Department under Mr. W. A. Gall, Asst. Supt. Dining & Parlor Cars, and performs the following duties:

"With assistance of the Porter, assembles supplies ordered on requisitions for five dining cars daily on Trains 10, 4, 11, 22 and 26, for business cars and special trains when dining cars are operated on them. He also orders perishable supplies from various concerns while other supplies, such as dry supplies, are ordered by the Purchasing Department. He also cost-prices these requisitions and issues linens to cars. In addition to the above duties, he does some clerical work in the Office of Asst. Supt. Dining & Parlor Cars, such as typing letters etc., and when the Assistant Superintendent and Supervisor are out of town, it is necessary for the Storekeeper to handle all business which might come up, assigning crews and general dining car operation.

"Although the position of Commissary Storekeeper has been in effect since November 1, 1934, it has never been listed as coming under the scope of the Clerks' Agreement. It is the contention of the Carrier that it is not now and never has been included in the Agreement with the Brotherhood of Railway Clerks.

"Inasmuch as the representative of the Clerks' Organization is contending that the position of Commissary Storekeeper comes under the schedule and is making claim for overtime alleged to have been worked by Mr. Koch, the Carrier would respectfully call the attention of your Honorable Board to the fact that Mr. Koch has never presented an overtime slip or made any claim to the Carrier for payment for overtime worked, which he should have done at the time the overtime work was performed, if he considered he was entitled to payment for any overtime.

"Rule 46, of the current Agreement with the Clerks' Organization, reads as follows:

'When time is claimed in writing and such claim is not allowed, the employe making claim shall be notified in writing and reason for non-allowance given.'

"Proper interpretation of the above quoted rule is that when an employe works overtime or makes claim for any other time it should be done in writing and that in case it is not allowed, he shall be notified in writing and reason given for non-allowance. Mr. Koch has worked in the Commissary Department for more than six years, his working conditions have been the same at all times during that period and the Carrier has no record of him ever having made claim for overtime and even though he worked the time as claimed by the General Chairman and his position should be classified as coming under the Clerks' Schedule, having made no claim to the Carrier for overtime payment and the Carrier having no record of the hours worked by him, would not, at this late date, be in position to verify any overtime claim presented in his behalf by the General Chairman of the Organization as indicated in his letter to the Asst. Supt. Dining & Parlor Cars on March 12, 1941."

**OPINION OF BOARD:** This is a claim presented by the System Committee for payment for overtime worked by E. H. Koch who was employed as Commissary Storekeeper at Houston, Texas.

The Carrier bases its refusal to pay on two grounds: First, that the position is not covered by the current agreement which became effective November 1, 1940; Second, that the employee never presented any overtime slips and never made any claim for payment at the time the work was performed. We shall dispose of this second question at the outset.

The Carrier contends that the implication of Rule 46 is that such a claim as this must be presented in writing to the Carrier. Assuming but without deciding that such is the interpretation of the rule, we are of opinion that such provision is directory and not mandatory and may be waived by the parties. Here the requirement has been waived, because it is apparent from the record that during the negotiations concerning this claim the only question discussed was whether this employee was covered by the Agreement. The Carrier in its Surrebuttal Statement admits that this is true when it says: "The statement in the employees' rebuttal brief that the Carrier has from beginning to end declined the claim on only one contention, which is that the position is not covered by the Agreement, is correct." For the same reason the Carrier must be held to have waived any objection to the delay in presenting the claim. We shall therefore proceed to what is the fundamental issue between the parties to this dispute.

As was the case in CL-1730, Award 1689, the position here in question is not specifically mentioned in either Rule 1 or Rule 2. But there are additional facts before us here which would justify a contention that the occupant of this position may be regarded either as a "clerk" or possibly as a "store employee."

The duties assigned to the position are largely those which would ordinarily be performed by a clerk, such as the checking and handling of supplies, the keeping of records and accounts, the taking of inventories, the handling of correspondence, and the preparing of payrolls. The Carrier argues that there is no definite evidence showing that the time during which purely clerical duties are performed is as much as the three hours for the majority of the working days of the month prescribed by Rule 2. Even though direct evidence on this point may be lacking, yet the inference from the admitted facts is very strong that more than that time during the day is spent by this employee in the performance of work ordinarily regarded as clerical.

Whether the claimant may be covered under the Agreement as a "store employee" is perhaps more doubtful, although some of his time is given to that class of work.

In view of the doubt, which by reason of the Carrier's contentions is thrown about the proper classification of the position held by this employee, we may properly look to see whether the parties by their acts have thrown any light on the proper interpretation of the rules as they may affect his status.

It appears that this same controversy existed under the agreement effective April 1, 1939, and that the Carrier had refused to set up a seniority district covering the positions in the commissary department, basing its refusal on the ground that the positions were not covered by that agreement. When the present agreement was under consideration, it is apparent that the question was again discussed. It is obvious that the rules as adopted make no specific reference to the position held by this claimant. The reason for such omission as given by the System Committee is that the parties came to an understanding and the Committee assumed that there was no further question about the matter. This contention is borne out by the fact that Rule 5 establishing seniority districts provides in part as follows: "Commissary Department (Entire System) . . . District Number 13." But that is not all. February 6, 1941, the general chairman of the employees wrote to the general manager of the Carrier asking for two copies of the seniority rosters for seniority districts Nos. 13 and 16. The seniority roster for District 13, which came in response to this letter reads as follows:

**"SENIORITY  
ROSTER**

Seniority District 13  
Commissary Department  
February 11, 1941

Seniority roster posted under requirements of Rule 6  
as of November 1, 1940.

1.—E. H. Koch Commissary Storekeeper Houston, Tex.  
Nov. 1, 1934.

2.—A. C. Oswald Commissary Supervisor San Antonio, Tex.  
Jan. 16, 1941.

/s/ **W. A. Gall**  
**Asst. Supt. Dining Cars**

/s/ **E. C. Griffith**  
**Local Chairman"**

What is the Carrier's explanation of these its own acts? The seniority district, it says, was established not to cover the present situation but to anticipate what might happen in the future. And the roster was neither properly posted nor signed by the proper official designated by Rule 6 (c). Furthermore, it is suggested, the official who signed it did so without authority. But it may be asked, why should a seniority district be set up to apply only to what might happen in the future when there was an acute present controversy before the parties which they were considering? And why should the general manager of the Carrier have sent to the representative of the employees without any qualification a roster signed by one of his subordinate officials which was claimed to be invalid? The act of the officer who signed this roster seems to have been ratified by the very one who had the power to ratify it, and the Carrier is now estopped to set up any lack of authority.

By executing this roster, the Carrier has admitted formally that this claimant is covered by this agreement. It is interesting to note that in Docket CL-128, Award 137, the Carrier there involved (admittedly not the one concerned in the present case) argued that its failure to include the name of an employe on a seniority list was evidence that he was not covered by the Clerks' Agreement. If his name is included as here, is there not an admission that he is covered?

We are of opinion that Rule 1 of the Agreement should be construed to include as subject to its provisions the position of "Commissary Storekeeper."

**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 position in question is covered by the Agreement as contended for by this employee and that the claim should be sustained.

**AWARD**

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

**ATTEST:** H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1942.