

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT & TERMINAL RAILWAY COMPANY

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

(a) The Carrier is violating the Clerks' Agreement by requiring the Order Clerk to perform, on Sundays and holidays only, work that is regularly assigned to and performed by the Assistant Rate and Bill Clerk on all other days. Also

(b) Claim that the Assistant Rate and Bill Clerk be paid under the provisions of Rule 43 for each Sunday and holiday during the period the violation exists.

EMPLOYES' STATEMENT OF FACTS: The outbound billing department in the Local Freight Station consists of the following positions:

Rate Clerk	10:00 A. M. to 7:00 P. M.
Chief Bill Clerk	11:00 A. M. to 7:00 P. M.
Asst. Chief Rate Clerk	1:00 P. M. to 9:00 P. M.
Bill Clerk	2:00 P. M. to 10:00 P. M.
Waybill Checkers	2:00 P. M. to 10:00 P. M.
Comptometer Operator	2:00 P. M. to 10:00 P. M.
Asst. Rate and Bill Clerk	4:00 P. M. to 12:00 P. M.

The Order Clerk who performs the work in question on Sundays and holidays is assigned 8:00 A. M. to 5:00 P. M. He does not do any billing during the week.

During conference January 25, 1943, the Agent and General Chairman made a check to determine the number of cars billed by the Order Clerk on Sundays, January 3, 10, 17 and 24, which disclosed the following:

DATE	CARS BILLED
January 3rd	80
January 10th	123
January 17th	65
January 24th	99
Total	367

The above is an average of 91.75 cars per Sunday.

OPINION OF BOARD: The record shows that the Carrier maintained the position of Order Clerk in the local freight office at Houston, Texas, the incumbent of the position being regularly assigned to Sunday work. On Sundays and holidays he was required to prepare way-bills on carload shipments, this being no part of his work on other days. This claim arises as a result of his being required to work overtime on Sunday to handle way-bills. The Assistant Rate and Bill Clerk, whose duty it was to handle way-bills during week days, claims that he is entitled to the work under the provisions of Rule 45 (b) which became effective on November 16, 1940.

Rule 45 (b) is as follows: "In working overtime before or after assigned hours, employees regularly assigned to class of work for which overtime is necessary shall be given preference; the same principle shall apply in working extra time on Sundays and holidays.

We think the application of this rule to the foregoing state of facts has been fully decided in CL-1675, Award No. 1630, wherein this Division said: "The rule has reference to the particular class of work done by the individual employe, not to the class of work done in a particular department, and requires the Carrier to give preference in working overtime or in working extra time on Sundays and holidays to the employe regularly assigned to such work." In the case before us, it is conceded that the Assistant Rate and Bill Clerk, together with other bill clerks, handles all way-bills on carload shipments on week days. As to the Order Clerk, it is fill-in work that he can properly do during his regular eight hour assignment but under the interpretations given the rule in previous awards by this Division, overtime or extra work on Sundays and holidays belongs to employees regularly assigned to the class of work for which overtime was necessary. Consequently we are obliged to say that the Carrier violated the Agreement in permitting the Order Clerk to perform overtime or extra work after his regular eight hour Sunday assignment had been completed, such work not being the class of work to which he was regularly assigned.

The Carrier insists that this arrangement has been used for many years without objection by the Organization and that it constitutes a practice. We think the Carrier's position in this respect was correct until November 16, 1940, when Rule 45 (b) was negotiated. The very purpose of that rule was to change the practice existing at or prior to the time it became effective. But the Carrier contends that the Organization permitted the practice to continue after November 16, 1940 and until July 19, 1943, when formal complaint was first made. The record is not clear as to the precise time when the alleged violation was orally discussed. Of course, a continued violation of a contract cannot have the effect of rewriting the contract itself. We quite agree that if the pertinent part of the contract was indefinite or ambiguous, the mutual interpretation which the parties placed upon it would be strong evidence of what the parties intended when they made it. But this contract is devoid of indefiniteness and ambiguity. The contract being clear as to its meaning, it is not subject to construction and must be enforced according to its terms.

It is urged that the Organization acquiesced in the way the Carrier was handling this overtime or extra work on Sundays and holidays. Acquiescence implies a passive consent which in turn implies consent with knowledge of the facts. A mere lapse of time without complaint is not such an acquiescence as would in any wise affect the rights of the parties.

The Carrier further urges that the Assistant Rate and Bill Clerk is not a proper party to prosecute this claim. The evidence shows that he was one of several regularly assigned to the class of work performed during the overtime period and that no other employe is making claim. This meets all requirements as to the interest necessary to prosecute the claim. See Awards 571, 1058, 1605, 1646 and 2282.

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 Carrier violated the Clerks' Agreement when it failed to assign Sunday overtime or extra work for handling way-bills to the employee regularly assigned to perform that class of service.

AWARD

Claim (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of November, 1943.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 2388
DOCKET CL-2414

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employees

NAME OF CARRIER: Houston Belt and Terminal Railway Company

Upon application of the representatives of the employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The work of preparing way-bills on carload shipments belonged to certain clerical employes during their six day assignment. The Assistant Rate and Bill Clerk was one of this group. Any extra or overtime work growing out of these positions belonged to them under the provisions of Rule 45 (b). In the Opinion, we followed the holding in Award No. 1630, the effect of which is that employes regularly assigned are entitled to preference in the assignment of extra time on Sundays and holidays. In other words, the Assistant Rate and Bill Clerk is entitled to all the extra work performed on Sunday which is the same class of work which he performs on his regular assignment. In sustaining the claim without attaching any conditions, we complied with the foregoing rule notwithstanding certain improvident statements appearing in the Opinion which point to a different conclusion.

Referee Edward F. Carter, who sat with the Division as a Member when Award No. 2388 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of March, 1944.