

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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

(a) The Carrier violated Rule 33(e) of Clerks' current agreement when it refused and continues to refuse to compensate employe Paul Henchey, West Oakland General Stores, for the total wage loss sustained by him account required to remain on Commissary Helper position subsequent to the expiration of thirty days from the date he was assigned to Class "A" Helper position.

(b) Carrier be required to compensate employe Paul Henchey for the difference between what he was compensated and the total earnings on the position subsequent to expiration of the thirty-day period to the date he was placed on the Store Attendant position.

EMPLOYES' STATEMENT OF FACTS: An Agreement bearing date of October 1, 1940, as to rules and working conditions, is in effect between the parties to this dispute. The employees involved in this claim is covered by that Agreement.

Mr. Paul Henchey, occupying position of Commissary Helper, at the West Oakland, California, General Stores, of the Carrier, bid for and was assigned by bulletin to position of Class "A" Helper, August 1, 1944; he was never actually physically placed on the position and, later bid for and was placed on position of Store Attendant, February 28, 1945.

The position of Class "A" Helper to which Mr. Henchey was assigned by bulletin, and which he was not permitted to occupy was, before, during and subsequent to his acquiring the Store Attendant position, working ten hours per day, i. e. two hours overtime each working day.

Due to the fact that Carrier had not permitted Mr. Henchey to take the position of Class "A" Helper to which he had been assigned by bulletin, he was, for the period commencing thirty days subsequent to August 1, 1944, the date he was assigned by bulletin to the Class "A" Helper position, and continuing to February 27th, inclusive, 1945, the date he was placed on the Store Attendant position, allowed the difference between Commissary Helper's rate and that of Class "A" Helper, on an 8-hour basis, but was not allowed the extra compensation which had been earned on the Class "A" Helper job by reason of the fact position was working ten hours per day.

33 (e). It merely provides for the payment of the rate applicable to the position to which assigned. For the Division to sustain the claim in this docket would be tantamount to deleting from Rule 33 (e) the words "on basis of not less than the rate of the position to which assigned" and inserting in lieu thereof "in an amount equal to that received by the occupant of the position to which assigned".

Rule 33 (e) clearly recognizes that the carrier may not be able to place an assigned employee on the position to which assigned within thirty days. The said rule likewise imposes a penalty in such circumstances to the extent that the carrier must pay such employee at the rate of the position to which assigned following said thirty-day period; in other words, Rule 33 (e) imposes a specific penalty, namely, "on the basis of not less than the rate of the position to which assigned". What the petitioner is endeavoring to accomplish in this docket substantially enlarges upon said provision. As a matter of fact, the statement of claim as submitted to this Division clearly indicates that the petitioner is endeavoring to secure for the claimant the exact amount that was paid to the employees temporarily used on the position of "A" Helper during the period of October 1, 1944 to February 27, 1945, inclusive, notwithstanding, the fact that the rate paid said employees was not the rate of the position of "A" Helper, but was rate of their regular assignments, which was substantially higher than the rate of position of "A" Helper, and in addition thereto, the earnings of such employees for overtime worked.

It should be borne in mind that during the period from October 1, 1944 to February 27, 1945 the claimant actually worked but eight hours per day; had he worked in excess of eight hours per day, he would have been compensated for such service at the overtime rate of position of "A" Helper.

CONCLUSION: The carrier submits that it has conclusively established:

1. That the claim in this docket is not the same claim that was handled and progressed on the property, and therefore it should be dismissed;
2. That when the carrier compensated the claimant during the period of October 1, 1944 to February 27, 1945, inclusive, at the "A" Helper's rate of pay for all service he performed during that period, it complied in all respects not only with Rule 33 (e), but with all other provisions of the current agreement.

Therefore, the carrier respectfully submits that the claim in this docket should be dismissed for want of jurisdiction; that if not dismissed, then it should be denied.

OPINION OF BOARD: While holding a position as Commissary Helper, Claimant was, as of September 1, 1944, awarded a position of "A" Helper carrying a higher rate of pay. Due to emergent conditions he never was permitted to take over the position. February 28, 1945, he was placed on a still higher rated position—Store Attendant.

In the meantime the Carrier paid him wages at the straight time rate of "A" Helper. The claim is for the difference in what he received and what he would have received had he actually worked the "A" Helper position. The claim is predicated on the fact that the "A" Helper job was worked overtime during the period he was entitled to hold it. That the position was worked overtime during such period there can be no doubt.

The claim must stand or fall on the construction of Rule 33 (e) of the current Agreement, which provides:

"Assignments will be made and notices issued within eight (8) calendar days after the closing date of receiving applications. Except in emergency, successful applicant will be placed on the position as soon as practicable, but within not to exceed thirty (30) days thereafter. If not placed thereon within the thirty-day period,

employee will thereafter be compensated on basis of not less than the rate of the position to which assigned." (Emphasis supplied.)

The Carrier contends that it has complied with the rule in that from September 1, 1944 (30 days after closing date of receiving applications) it paid Claimant at the straight time rate of the "A" Helper position during the period he was entitled to hold it. This contention, we think fails to take into account the force of the words "not less than" in the last sentence of the rule. Indeed the contention, if sustained, would effectually eliminate those words from the rule and substitute "at" in their place. In other words, if the contention were sustained the rule would read: "employee will be * * * compensated at the rate of the position to which assigned". If the parties had meant to so limit the amount of compensation they no doubt would have so phrased the rule. The words "not less than" carry, by necessary implication, the possibility of something more. As used in the rule they clearly contemplate that the compensation may be more than the mere straight time rate of the position from which the employee is withheld. It seems to us that, if the words are to be given any effect at all, they must be held to mean that the Claimant will be compensated on the basis of the wages paid the position to which he was assigned during the period he was entitled to hold it.

It should perhaps be noted that the Carrier contends the claim as negotiated on the property is not the same as that presented to this Division. We think the contention is without merit. The substance of the claim presented to the Carrier is the same as that presented to this Division.

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 parties waived oral hearing thereon;

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 Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of February, 1947.