

Award No. 4990
Docket No. CL-4845

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**

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

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

(a) Carrier violated the rules of the Clerks' Agreement when it required and permitted Mr. Gus J. E. Bethany, a Switchman at Sweetwater, Texas, to perform clerical work covered by the scope and operation of the Clerks' Agreement and by such action deprived employees who hold seniority rights in that district and to this work their right under the Clerks' Agreement to perform such work; and,

(b) W. E. Horn, R. C. Hayes, Frank W. Rousseau, M. H. McGlothing and J. B. LaRue and/or any other occupants of Yard and Car Clerk Positions Nos. 435, 428, 436, 427 and 437, shall be compensated for eight (8) hours each at time and one-half the regular rate of their respective positions for each day that Switchman Gus J. E. Bethany was improperly used to relieve them on their assigned rest day from March 11, 1946, to date violation was corrected.

EMPLOYES' STATEMENT OF FACTS: On March 11, 1946, there existed in the Station force at Sweetwater, Texas, the following clerical positions:

Pos. No.	Title	Incumbent	Assigned Hours	Rate
435	Chief Yard Clerk	W. E. Horn	7:45 A.M. to 3:45 P.M.	\$8.89
428	Car Clerk	R. C. Hayes	11:00 P.M. to 7:00 A.M.	7.77
436	2nd Yard Clerk	F. W. Rousseau	3:45 P.M. to 11:45 P.M.	8.41
427	Car Clerk	M. H. McGlothing	3:00 P.M. to 11:00 P.M.	7.77
437	3rd Yard Clerk	J. B. LaRue	11:45 P.M. to 7:45 A.M.	8.41

In addition, there was another Car Clerk position, No. 426, which is not involved in this claim. The employees who occupy these six positions are necessary to the continuous operation of the Carrier and, under provisions of Article VIII, Section 1, of the current agreement, are regularly assigned to such service.

Prior to February 8, 1946, under provisions of Letter Agreement of April 15, 1943, these employees were required to protect their own rest days

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position on March 11, 1946, the question of whether he did or did not establish such seniority has no particular bearing on this dispute since Mr. Bethany's assignment to the rest day relief position was clearly in accord with the terms of Article III, Section 9. Moreover the question of Mr. Bethany's seniority in Class 1-2 was resolved when he voluntarily relinquished the rest day relief position beginning April 23, 1946 and thereby forfeited any seniority he may have established by reason of his regular assignment to the rest day relief position. As to the General Chairman's statement that Mr. Bethany "continued to retain his switchmen's seniority throughout this entire period", the Carrier can only reaffirm its prior statements that the unfortunate loss of his left arm while in the service of the Carrier had served to disqualify Mr. Bethany for further service as a switchman, hence any seniority he may have held as a switchman could have been of no benefit to him and gave him no rights to continued service in the Yardmen's class. In this connection, the Carrier cannot help but express the view that the complainant Employees' position in this dispute is not only contrary to the express provisions of the agreement rules but also ignores the misfortunes of their fellow employees, and would, if sustained, have the effect of handicapping the Carrier in its efforts to find suitable employment for those of its employees who are unfortunate enough to suffer an injury or illness which might serve to disqualify them for further employment in their usual class of service.

The Boards' attention is finally directed to the fact that the Brotherhood is, in the instant dispute, requesting that the claimant employees named therein be paid punitive time and one-half rates for time not worked on their assigned rest days during the period of March 11, 1946 to April 22, 1946; the employees' claim apparently being premised on the theory that the claimant employees and not Mr. Bethany had the right to protect those rest days under the agreement rules. Even if the Brotherhood's contention in this respect was supported by the agreement rules, and the Carrier emphatically reasserts that it is not, the Third Division has repeatedly held that the right to the performance of work under agreement rules is not the equivalent of overtime worked under the overtime rules of the agreement and does not, therefore, justify the payment of time and one-half for time not worked. See Awards 3876, 3890, 3910, 4037, 4038, 4046, 4171, 4292 and many other Third Division awards.

In conclusion the Carrier submits that:

(1) The assignment of Mr. G. J. E. Bethany to the regular rest day relief position involved in this dispute was clearly in accord with the terms of the second sentence of Article III, Section 9 of the current Clerks' Agreement.

(2) The employees have cited no agreement rule which could possibly serve to nullify the provisions of Article III, Section 9, and support the employees' claim that the claimant employees are entitled to the penalties claimed in their behalf.

(3) The employees' claim, would, if sustained, serve to nullify the provisions of the first sentence of Article III, Section 9 and constitutes an attempt to revise the agreement rules which may only be accomplished by negotiation.

(4) The Employees' claim should be denied.

(Exhibits Not Reproduced.)

OPINION OF BOARD: On March 11, 1946, there were six clerks positions assigned in the station force at Sweetwater, Texas. These positions were necessary to the continuous operation of the Carrier. Prior to February 8, 1946, these employees were required to protect their own rest days at the time and one-half rate in accordance with a Letter Agreement of April 15, 1943. On February 8, 1946, Carrier bulletined the rest day relief position for these six clerical positions. No bids were received and there were off-in-force-reduc-

tion employees available. Carrier, on March 11, 1946, assigned Gus J. E. Bethany, an employe having no seniority under the Clerks' Agreement, to work the rest day of five of the clerical positions, the occupants of such positions being the claimants in whose behalf this claim is made. The Carrier contends that the use of Bethany was in accordance with Article III, Section 9, Current Agreement, providing:

"If no applications are received for assignment to a bulletined position or vacancy, and the application of Sections 8-d, 8-e and 13-b of this Article does not provide an incumbent therefor, it may be permanently filled without regard to these rules. If such position or vacancy is to be filled during the bulletin period, it shall be done in the manner specified in Section 10-a, of this Article, for filling temporary vacancies; it being understood that employes in Class 3 not holding seniority in higher classes shall not establish seniority in such higher classes by reason of such temporary service."

The Carrier asserts that since the alternatives provided in the rule did not produce an occupant for the relief position that the Carrier was free to fill the position without regard to any rules of the Agreement because of the phrase therein contained that "it may be permanently filled without regard to these rules." It is the contention of the Organization that the language used had reference only to the particular rules applicable to the filling of bulletined positions and vacancies but does not have the effect of removing the positions or the occupants thereof from the scope rule of the Agreement. The position assumed by the Organization is the correct one. The principle involved was recently decided in Award 4962. We are required to here say, as we there said, that the phrase "it may be permanently filled without regard to these rules" is limited and restricted to the Article of the Agreement of which it is a part. We adopt the reasoning of that award on this point without repeating it here. Nor was Bethany a new employe under the Clerks' Agreement as claimed by the Carrier. He made no application, was given no seniority date, and has never claimed seniority as a clerk. We therefore hold that the assignment of Bethany to work the relief position hereinbefore described was an improper removal of the work from the Clerks' Agreement and a violation of the Clerks' Agreement. Claimants were entitled to the work under the circumstances shown by virtue of Section 4 of the Letter Agreement of April 15, 1943. The claim will be sustained from March 11, 1946 until the date of correction at the pro rata rate in accordance with the rule announced in Award 4244.

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 Employee involved in this dispute are respectively carrier and employee 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 at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of August, 1950.

DISSENT TO AWARD 4990, DOCKET CL-4845

This Award rests primarily on Award 4962. The dissent to that Award is by reference thereto made a part of this dissent. In addition, the Opinion states claimants were entitled to the work under the circumstances shown by virtue of Section 4 of the Letter Agreement of April 15, 1943. That Letter Agreement placed no requirement upon the Carrier under the circumstances here involved, as specifically pointed out in Carrier's "Position" reproduced in this Award and not necessary to repeat here.

/s/ A. H. Jones

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ R. H. Allison

/s/ C. C. Cook