

Award No. 4991
Docket No. CL-4846

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 at Sweetwater, Texas, when it assigned or permitted a Switchman, Mr. Gus J. E. Bethany, to perform work regularly assigned to and performed by Clerks; and,

(b) C. L. Stamps be compensated for two (2) hours at punitive rate of Car Clerk rate, \$7.77 per day, for June 29, July 1, 2, 3, 5, 8, 9, 12, 15, 16, 17, 19, 21, 22 and 23, 1946; and,

(c) C. H. Dammann be compensated for six (6) hours at punitive rate of Car Clerk rate, \$7.77 per day, for June 29, July 1, 2, 3, 5, 8, 9, 12, 15, 16, 17, 19, 21, 22 and 23, 1946; and,

(d) Messrs. Stamps and Dammann and/or any other Clerk affected at Sweetwater, Texas, be compensated for any and all time that Mr. Gus J. E. Bethany or any other Switchman is subsequently permitted to perform work that is regularly assigned to and performed by clerical employees.

EMPLOYES' STATEMENT OF FACTS: On June 28, 1946, there existed in the station force at Sweetwater, Texas, the following clerical positions:

Pos. No.	Time	Incumbent	Assigned Hours
426	Car Clerk	C. L. Stamps	7:00 A.M. to 3:00 P.M.
427	Car Clerk	M. H. McGlothing	3:00 P.M. to 11:00 P.M.
429	Car Clerk	C. H. Dammann	8:00 A.M. to 5:00 P.M.

Second shift Car Clerk M. H. McGlothing was absent account illness from June 28 to July 23, 1946, both dates inclusive, and, during his absence, his position, No. 427, was filled as follows:

June 28—Doubling Clerks, Stamps 2 hours and Dammann 6 hours.
June 29—Switchman Bethany.
June 30—Doubling Clerks, Stamps 2 hours and Dammann 6 hours.
July 1—Switchman Bethany.
July 2—Switchman Bethany.

The Board's attention is finally directed to the fact that the Brotherhood is, in the instant dispute, requesting that the claimant employes named therein be paid punitive time and one-half rates for time not worked on the dates named in the instant dispute; the employes' claim apparently being premised on the theory that the claimant employes and not Mr. Bethany had the right to protect the temporary vacancy 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, 4179, 4292 and many other Third Division awards.

In conclusion, the Carrier submits that:

(1) The use of Mr. G. J. E. Bethany to protect the temporary vacancy on Car Clerk Position No. 427 was clearly in accord with the terms of the second sentence of Article III, Section 10-a of the current Clerks' Agreement.

(2) The employes have cited no agreement rule which could possibly serve to nullify the provisions of Article III, Section 10-a and support the employes' claim that the claimant employes are entitled to the penalties claimed in their behalf.

(3) The employes' claim, would, if sustained, serve to nullify the provisions of the second sentence of Article III, Section 10-a and constitutes an attempt to revise the agreement rules which may be accomplished by negotiation.

(4) The Employes' claim should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: Car Clerk McGlothing was regularly assigned to Position No. 427 at Sweetwater, Texas, and assigned hours 3:00 P.M. to 11:00 P.M. He was absent from work from June 28, 1946 to July 24, 1946. On certain dates, eleven in number, the position was filled by doubling regular assigned employes who were paid the time and one-half rate. The position was filled on the remaining days the vacancy existed by one Bethany, an employe holding seniority rights under the agreement covering Yard Employes but having no seniority rights under the Clerks' Agreement. The Carrier asserts the assignment was properly made under Article III, Section 10-a, reading as follows:

"Vacancies of fifteen (15) calendar days or less duration shall be considered temporary and, if to be filled, shall be filled (1) by recalling the senior qualified and available off-in-force reduction employe then protecting some other vacancy; (2) if there is no such off-in-force reduction employe available, by advancing a qualified employe in service at the point who makes application therefor. If neither of these alternates produces an occupant for the vacancy, it may be filled without regard to these rules, but employes holding seniority in Class 3 on the same seniority district, whether in regular employment or otherwise, shall be given preference in accordance with Section 8-e of this Article. Individual Class 3 employes shall not be compelled to protect such temporary service, but those accepting it will do at the rate applicable thereto and without penalty to the Company, either through payment of expenses or otherwise. If taken from regular employment, they will return thereto when released from the temporary vacancy."

This question is controlled by Award 4990. If the vacancy was not subject to Article III, Section 10-a, for the reason that the vacancy existed more than

15 days, then the assignment was in direct violation of the scope and seniority rules of the controlling agreement. For the reasons stated in Award 4990, the claim will be sustained at the pro rata rate.

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 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 4991, DOCKET CL-4846

This Award rests primarily on Award 4990 which in turn rest primarily on Award 4962. The dissents to Awards 4962 and 4990 are by reference thereto made a part of this dissent and apply with equal force.

/s/ A. H. Jones
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ R. H. Allison
/s/ C. C. Cook