

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Peter M. Kelliher, Referee

PARTIES TO DISPUTE:

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

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY—(Coast Lines)**

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. C. L. Maus, Roundhouse Laborer, Winslow, Arizona, to perform clerical work covered by the scope and operation of the Clerks' Agreement and by such action deprived employes who hold seniority rights in that district and to this work their right under the Clerks' Agreement to perform such work; and

(b) W. F. O'Neill shall be compensated at the rate of \$9.64 per day on the basis of eight (8) hours per day at time and one-half rate on January 7, 1947.

EMPLOYES' STATEMENT OF FACTS: In the Mechanical Department at Winslow, Arizona, there exists a second shift position titled Shop Timekeeper identified by payroll number 116 with a Tuesday rest day. On Tuesday, January 7, 1947, the assigned relief employe, who regularly relieves the incumbent of this position on his rest day, was being used to fill another vacancy. Instead of filling the rest day vacancy on this position by using the regular incumbent thereof, there being no qualified off-in-force-reduction employe available. Roundhouse Laborer C. L. Maus, who holds seniority rights under the Shop Crafts' Agreement, but who holds no seniority rights under the Clerks' Agreement, was instructed by the Carrier to perform the duties of Position No. 116 on that date.

Mr. W. F. O'Neill, who was the regular incumbent of Position No. 116 on this date, was available and willing to perform this rest day service on his own position but was denied this right, whereupon he submitted overtime ticket to the Master Mechanic claiming payment on the basis of eight (8) hours at time and one-half for January 7, 1947. This ticket was declined by the Master Mechanic on the grounds that the vacancy was filled in accordance with Article III, Sections 9 and 10-a.

POSITION OF EMPLOYES: This dispute arose at Winslow, Arizona, when on January 7, 1947, the Carrier used a Roundhouse Laborer, who is neither a regular assigned relief employe nor an off-in-force-reduction employe, to perform rest day relief on Position No. 116 titled Shop Timekeeper, the incumbent of which is considered necessary to the continuous operation

the Carrier on their assigned rest days “* * * either by the use of regular relief employees or by the use of available qualified off-in-force-reduction employees * * *” (emphasis supplied) the incumbents of such positions would be used on their assigned rest days. In the instant dispute the claimant employee, along with five other clerical employees at Winslow, were being regularly relieved on their assigned rest days by Mr. Maus who was protecting a temporary vacancy on the regular rest day relief position, and it will thus be apparent that the claimant employee, Mr. O'Neill, had no right to protect or work his rest day on January 7, 1947 under Item 4 of the letter of agreement. A careful analysis of the April 15, 1943 letter of agreement and particularly Item 4 thereof will plainly reveal that it lends no support whatever to the Employees' claim in this dispute and further that the Employees are attempting to read a requirement into Item 4 which is neither contemplated nor provided for therein.

In conclusion, the Carrier reiterates that the instant claim is without support in the rules of the current Clerks' Agreement or otherwise. It is in fact nothing more than an attempt to repudiate and nullify the Carrier's right to fill temporary vacancies without regard to the agreement rules, as specifically provided for in Article III, Section 10-a of the Current Clerks' Agreement. The instant claim should be denied in its entirety.

The Board's attention is here again directed to the fact that the Brotherhood's claim contemplates that the complainant W. F. O'Neill shall be compensated at punitive time and one-half rate for time not worked on January 7, 1947. Without prejudice to its aforestated position that the instant claim is without support in the rules of the current Clerks' Agreement or otherwise, the Carrier further asserts that the Third Division has repeatedly held that time not actually worked cannot properly be treated as overtime and paid for at punitive rates, but that compensation under such circumstances must be limited to the pro rata rate—see Awards 3587, 3876, 3890, 3910, 4037, 4046, 4179 and many others.

(Exhibits not reproduced).

OPINION OF BOARD: In the Mechanical Department at Winslow, Arizona, there exists a second shift position titled “Shop Timekeeper”, identified by Payroll Number 116, with a Tuesday rest day. This position is within the Clerks' Agreement. On Tuesday, January 7, 1947, the assigned relief employee, who regularly relieved the incumbent of this position on his rest day, was being used to fill another vacancy. There was no qualified off-in-force-reduction employee available to fill the position. Roundhouse Laborer C. L. Maus, an employee within the Shop Crafts Agreement, and holding no seniority rights under the Clerks' Agreement, was assigned by the Carrier to work the position on January 7, 1947. The claim is that the Carrier violated the Agreement in that work was not assigned to an employee under the Clerks' Agreement. It is the Carrier's position that its action was proper under Article III, Section 10-a of the Agreement, reading as follows:

“Article III, Section 10-a. 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 employee not then protecting some other vacancy; (2) if there is no such off-in-force-reduction employee available, by advancing a qualified employee in service at the point who makes application therefor. If neither of these alternatives produces an occupant for the vacancy, it may be filled without regard to these rules, but employees 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 employees shall not be compelled to protect such temporary service, but those accepting it will do so 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, involving the same Rule on this Carrier, and a substantially identical factual situation, has been considered by this Board. Awards 4962 and 4970. For the reasons stated in those Awards we are sustaining the claim here made at the pro rata rate of the position.

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 per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of October, 1950.

DISSENT TO AWARD 5050, DOCKET CL-4894

This Award relies entirely upon Awards 4962 and 4970.

The dissents to those Awards are equally applicable here and, by reference thereto, are made a part of this dissent.

/s/ A. H. Jones

/s/ R. H. Allison

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ C. C. Cook