Award No. 5929
Docket No. CL-6007

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

GULF COAST LINES, INTERNATIONAL-GREAT NORTHERN RAILROAD CO., SAN ANTONIO UVALDE & GULF RAILROAD CO., SUGARLAND RAILWAY COMPANY, ASHERTON & GULF RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Agreement at Valley Junction, Texas, on Sunday and Monday, January 28 and 29, 1951, when it denied Mr. P. E. Abell the right to work his position of Report Clerk. Also

(b) Claim that Mr. Abell be paid in full the exact amount he would have earned had he been permitted to work on those two days.

EMPLOYES' STATEMENT OF FACTS: Mr. Abell is regularly assigned to Report Clerk position at Valley Junction, Texas.

The position works seven days each week and Mr. Abell's rest days are Sunday and Monday.

On Sundays and Mondays Mr. Abell is relieved by Swing Clerk on position 2035-R.

The Clerk on position 2035-R performs rest day relief work as follows:

Day	Position	Location
Saturday	Cashier	Hearne
Sunday	Report Clerk	Valley Junction
Monday	" "	" "
Tuesday	Chief Clerk	" "
Wednesday	" "	" "

Effective Saturday, January 27, 1951, Mr. J. W. Bower exercised displacement rights on position 2035-R, and worked the position of Cashier at Hearne on that day.

"February 7, 1951
159-7-H

Mr. J. L. Dyer
General Chairman, BRSC
Houston, Texas

Dear Sir:

Your file G-1984, in regards to claim of W. A. Handorf, Yard Clerk, Palestine, for 8 hours at time and one-half September 7, 8, 9, 10 and 11, account not used to work position of Line Desk Clerk No. 3 and using employe that was assigned to regular position, Velasco.

In line with various Board Awards covering payments of this kind, am agreeable to allowing Mr. Handorf straight time for days in question, which will be allowed on next payroll period.

Yours truly,

/s/ E. C. Sheffield
Superintendent"

It will be observed that in the above case while claim was made for payment at the time and one-half rate the settlement was made at the straight time rate by the Superintendent. We assume that payment was satisfactory since the Carrier has heard nothing further from the Organization concerning the matter.

It is not considered necessary to burden the record by citing other additional similar settlements on the property with this same organization, the Carrier believing that the above reference of previous rulings of your Board, on both this property and others, together with the voluntary settlements made on this property with this same General Chairman, will serve to show beyond any reasonable question of doubt the precedents established, not only by your Board but by the Organization itself. Obviously the above referred to cases clearly support the payment already made by the Carrier in this case at the straight time rate, and deny the Employes' contention that payment should be made at the overtime rate. Therefore, it is the position of the Carrier that the Employes' claim as here presented be unqualifiedly denied.

All matters contained in this submission have been the subject of discussion and/or conference between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, P. E. Abell, is the regular occupant of the position of Report Clerk, a seven-day position with assigned rest days Sunday and Monday, at Valley Junction, Texas. J. W. Bower, a regularly assigned swing or relief clerk, holding Swing Position No. 2035-R, protects the seven-day position on its assigned rest days. Although reguarly assigned to do so as a part of the duties of his swing position Bower, who was being used on another position, was not available to relieve Abell on his rest days, Sunday and Monday, January 28 and 29, 1952. Confronted by that situation the Carrier called a Mr. Bowling to work those days. In due time this Claim, based on the theory that under the foregoing condition Abell was entitled to work his two relief days at the punitive rate of time and one-half, was filed on the property.

At the outset it should be stated that shortly after the Claim was presented to the Carrier it conceded Abell was entitled to work the days in

question under the existing facts and rules of the Agreement and thereupon paid him for those two days at the pro rata rate. The record makes it appear the Organization refused to accept this payment in full settlement of the Claim and that when the Carrier declined to pay time and one-half as initially submitted the dispute was progressed to this Division of the Board for consideration and review.

From what has been heretofore stated it becomes crystal clear the single question we have for decision is whether under the facts as heretofore related and the rules of the Agreement Abell, who had the right to work the two rest days in question but did not do so because the work was assigned to and performed by another employe, is entitled to reparation at the pro rata rate or the punitive rate by reason of the Carrier's violation of the Agreement in assigning it to someone else.

In support of its position the penalty should be time and one-half instead of the pro rata rate, and frankly conceding that under most of our decisions the latter rate has been held to be applicable in cases where the person entitled to work a position did not do so because it was assigned to some other employe, the Organization states that it relies on a November 1949 *Agreement, entered into between the parties subsequent to the effective date* of the current contract, which is supported by Rules 37 (c-5) and 43 of the latter Agreement. We fail to see where either of the rules last mentioned is entitled to the import given them by the Organization. Rule 37 (c-5) deals with the rate to be paid employes for service **rendered** on rest days while Rule 43 provides that except for paragraph (b) (not here involved in any way) employes **notified or called** to perform work on Sunday and holidays under certain circumstances shall receive the time and one-half rate. In the instant case Claimant was neither notified or called for service on the two days nor did he perform any work on such days. Therefore, since neither of the rules mentioned have application, we turn to the special Agreement relied on which, so far as pertinent, reads:

> "When, for any reason, a relief employe is not available to work on rest days of six (6) and/or seven (7) day positions the regular employes shall work their respective rest days."

The established rule, as we have heretofore indicated, and we should add the one to which we are disposed to adhere in the absence of special or extraordinary circumstances making it inapplicable, is that the penalty rate for work lost because it was improperly given to one not entitled to it under a collective bargaining Agreement is the rate which the employe to whom it was regularly assigned would receive if he had performed it. Illustrating the general principle see our Awards 3193, 4467, 5437, 5444, 5721 and 5831. For further illustrations, dealing with factual situations so similar to those here involved there can be no question but what the conclusions therein reached are highly persuasive, if not decisive and controlling of our decisions in the instant case, see Awards 5548 and 5708. Also Award 5607 where we said:

> ". . . Under the Special Agreement, therefore, when the holder of the relief position does not report for duty, in the absence of available qualified off-in-force reduction employes, the right to the work on his rest day belongs to the holder of the regular assignment. It follows that the claim should be sustained. In accordance with numerous holdings of this Board, the applicable penalty is the pro rata rate and not the punitive."

Reverting again to the portion of the understanding heretofore quoted we note the Organization points out that under its terms regular employes shall work their respective days when for any reason a relief employe is not available. Quite true but it does not follow that fact changes the rule announced in the foregoing Awards or entitles an employe to the punitive rate for work not performed. *If that were so, and by far the great weight*

of our Awards are to the contrary, the same thing would hold true of rules providing that seniority prevails in the filling of temporary vacancies when there are no extra or furloughed men available. In fact as we read it the import to be given the understanding is that on the positions therein described the regular employe is insured the right to work his position regardless of seniority.

Boiled down, we are inclined to believe that in the arguments advanced here the Claimant is not presenting anything new or extraordinary as creating an exception to the rule but is simply seeking to reargue what has been already established by our Awards in the hope of modifying its force and effect. If not it has certainly ignored or unintentionally overlooked what we think is the short, simple, and overall answer to the Claim. That answer is that Bower, the holder of the Swing Position, who was absent and unavailable to fill the duties of his assigned position, not the Claimant, was the employe to whom the work in question was regularly assigned. If he had been available and performed it he would have done so at the pro rata rate. That under Award 3193, **supra**, and the others to which we have referred, means the penalty recoverable by Abell, who was neither notified nor called and did not perform the work, is likewise the pro rata rate.

In reaching the conclusion just announced we have not overlooked the Awards relied on by the Organization as sustaining reparation at the rate of time and one-half. Except for Award 5243 and the two Awards cited in the second paragraph of its Opinion, which we are disinclined to follow because not in accord with what we believe is the sounder rule adhered to by practically all of our more recent Awards, we find no Award among those cited that is not distinguishable and hence fails to support its position under the facts of the instant case. In Award 5579, a case where work had been assigned to employes outside the scope of the Agreement, we recognized the rule and specifically stated that since no relief position had been established to cover rest days on the involved position time and one-half would be allowed because that is what the regular occupant would have received under the Agreement if he had worked it. Award 5117 also recognized the general rule and the reparation there allowed was predicated upon an express agreement. Award 5078 involved overtime and the penalty rate was imposed on the basis of what was spelled out as studied and repeated attempts to evade provisions of the contract. Award 5837 involved a holiday and the Agreement itself provided that the regular occupant or anyone else who worked that day would receive time and one-half. In Award 5873 the Claimant worked the position and hence became subject to an entirely different rule.

We find nothing in the existing facts and circumstances, in the arguments advanced respecting them, or in our review of pertinent Awards of this Division which, in our opinion, would warrant an Award allowing Claimant reparation at the rate of time and one-half. The result is that Claim (a) will be sustained because the question whether he was denied the right to work the involved rest days of his position in violation of the Agreement is not in dispute. Claim (b) will be denied because the record discloses Claimant has already been paid at the pro rata rate and fails to establish any sound ground for the awarding of reparation at the rate of time and one-half.

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 Employes involved in this dispute are respectively Carrier and Employes 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 but Claimant was paid all reparation to which he was entitled prior to the filing of the Claim with this Division.

AWARD

Claim (a) sustained. Claim (b) denied. All as set forth in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sigd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 12th day of September, 1952.