# Award No. 7094
# Docket No. CL-6892

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Edward F. Carter, Referee**

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## PARTIES TO DISPUTE:

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

## THE WESTERN WEIGHING & INSPECTION BUREAU

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

(a) The Carrier violated the Clerks' Agreement when it required Messrs. N. B. Johnson, N. O. Bohling, L. W. Anderson and R. J. Santry to leave their regular assigned positions as Chief Traveling Agent and Traveling Agents for work in positions of City Auditors at Kansas City, Missouri, also

(b) Claims that Messrs. Johnson, Bohling, Anderson and Santry be paid at time and one-half their regular rate for each day they were withheld from their regular assigned positions and assigned to perform City Auditor's work at Kansas City; this in addition to the amount they have already received, also

(c) Claim that Messrs. C. J. Babic, George Scott and W. H. Henningsen, City Auditors at Kansas City, Missouri be paid for time and one-half in addition to the amount already received for each day the Traveling Agents were assigned to perform City Auditor's work at Kansas City, Missouri.

(d) Carriers shall be required to make a joint check with Employe's representatives in order to determine the correct number of days Traveling Men were assigned to the City Auditor's work at Kansas City, Missouri, and also in order that wage losses sustained by Claimants may be properly and accurately ascertained.

**EMPLOYES' STATEMENT OF FACTS:** The Claimants, Chief Traveling Agent N. B. Johnson and Traveling Agent N. O. Bohling, L. W. Anderson and R. J. Santry are regularly assigned to their headquarters to perform work that is assigned to their respective territories. As an example see Employes' Exhibit No. 1. The other Claimants, City Auditors C. J. Babic, George Scott, and W. H. Henningsen are regularly assigned to perform work within the switching limits of Greater Kansas City. See Exhibit No. 2.

The work of the City Auditors is to call on the Shippers and Consignees throughout the city, checking their records in determining that the proper weight and descriptions are tendered the Railroads, etc. When the employes first learned that the Carrier had brought to Kansas City some of their Traveling Men we immediately asked for a conference with District Man-

our City Auditors to work overtime; therefore, the contention of the Brotherhood that we violated our Agreement by having Traveling Agents perform a portion of the auditing at Kansas City is definitely without merit.

It is well, gentlemen of your Honorable Board, to consider the findings of the Honorable Referee Francis J. Robertson in Award Number 5625, which involved a claim of the Brotherhood of Railway Clerks identical in principle with the claim involved in this case. The Referee in Award Number 5625 among other things stated:

> ". . . there is but one issue to be decided here and that is whether or not this temporary assignment, in fact, had the effect of absorbing overtime on either position. In the absence of any evidence to the contrary, prior awards of this Board appear to raise a presumption that overtime is absorbed by suspending an employe from his regular assignment to work another over an extended period. However, the presumption disappears in the light of evidence and in this instance Carrier shows by affirmative evidence that the work of Claimant's position, or of the position he worked during the period involved in the claim, could have been permitted to accumulate for a month or more without prejudice to Carrier's business . . .".

The same situation prevailed on this property. The work of the City Auditors at Kansas City can and does accumulate without prejudice to our business. This same situation is true with regard to some of our traveling representatives. Their work at times accumulates but the accumulation of such work does not in any way interfere with the duties and responsibilities assigned to employes of this Bureau.

In this case the Employes place their principal reliance on what they contend is a violation of Rule 36 of our Agreement, which reads as follows:

> "RULE 36.—ABSORBING OVERTIME
>
> Employes will not be required to suspend work during regular hours to absorb overtime."

The very language of this rule is definitely inapplicable in this case because there was no suspension of any kind—as we have pointed out to your Honorable Board, our Traveling Agents had completed the work which had been assigned to them, following which they were requested to do auditing work in Kansas City. This was in accordance with Rule 43 of our Agreement and we respectfully request that the logic expressed by Referee Robertson in Award 5625 be the basis on which your conclusions are reached because in that case as in this, identical situations prevailed.

All data contained herein has been presented to the Employes.

(Exhibits not reproduced)

**OPINION OF BOARD:** Commencing on February 26, 1951, the Bureau used Claimants Bohling, Anderson and Santry, regularly assigned Traveling Agents (Auditors) to perform work assigned to City Auditors Babic, Scott and Henningsen. The Organization alleges that this was in violation of Agreement rules and demands that compensation be made for the violation.

The Traveling Agents and City Auditors are in the Kansas City seniority district and they all appear on the same seniority roster. They do substantially the same work. The Traveling Agents are higher rated than the City Auditors due to the fact that they are required to travel. The Traveling Agents are assigned to work outside of Kansas City and the City Auditors are assigned to work within the switching limits of Kansas City. The record indicates that the Traveling Agents here involved had completed the necessary work of their positions and were used by the Carrier to help

the City Auditors in Kansas City to catch up on accumulated work. The Traveling Agents were paid the compensation of their higher rated positions and the expenses required while working away from their assigned headquarters.

Claim (a) is that the Bureau violated the Agreement in taking them from their assigned positions and using them to help the lower rated City Auditor positions in Kansas City. Claim is made for time and one-half for the Traveling Agents and the City Auditors for each day the Traveling Agents worked in Kansas City in addition to the rate of their assigned positions. The Carrier relies primarily on Rule 43, the "Preservation of Rates and Positions" rule, and the Organization relies on Rule 36, "Absorbing Overtime" rule. The principle appears to be well settled by the awards of this Board that payment under a "Preservation of Rates" rule is not a defense to a claim if the temporary assignment of a regularly assigned employe to another position effects a suspension of hours and the absorption of overtime. Awards 5625, 6683. The primary question, therefore, is whether or not these temporary assignments of Traveling Agents had the effect of absorbing overtime on the City Auditors' positions. If it had such an effect, the claims are valid. If not, the "Preservation of Rates" rule is applicable.

In the absence of evidence on the subject, there is a presumption that overtime is absorbed by suspending an employe from his regular assignment to work another when no vacancy exists. The presumption disappears when evidence is produced and the question must then be determined the same as any other disputed question of fact.

The record shows that the Traveling Agents involved in this dispute had their work completed when they were assigned to help the City Auditors who had fallen behind in their work. The Bureau states that it was not necessary to have the work done at the time the Traveling Agents helped the City Auditors,—the work could have been permitted to accumulate and be performed by the City Auditors at a later date. The record shows that overtime had never been required and that the work had always been done by the regular employes as they got to it. It will be noted that the work involved is a type that ordinarily does not need to be performed promptly and that delay in performance worked no hardship on the Bureau. This is evidence that overtime would not have accrued to the City Auditors even if assistance had not been provided by the Traveling Agents. The purpose of the rule prohibiting suspension of work to absorb overtime is to prevent loss to employes who would otherwise have performed overtime. But where it is shown that they would have suffered no loss of overtime work, the rule grants them no relief because they have not been injured. See Awards 4151, 5625, 6673.

The Organization contends, however, that the record shows that the named City Auditors were deprived of overtime work. In this respect, the record shows that the work of the City Auditors had accumulated while that of the named Traveling Agents was practically completed. The record shows, however, that there were many corrections to be made in connection with the check of the International Milling Co.'s records and that the Bureau wanted them in the hands of the carriers as soon as possible. The Bureau admitted this to be true in its submission before this Board in the following language:

> "Also in view of the large number of corrections in connection with the International Milling Co.'s check and in order to get these corrections in the hands of the Carriers as soon as possible, we have asked these Traveling Agents to assist in issuing these corrections."

This evidence clearly indicates that a condition existed which required that certain work be done as soon as possible and that the Bureau did not desire it to be accumulated for processing at some future time. This is clear

evidence that overtime would have been required to get this work done promptly. We think, therefore, that the use of the Traveling Agents, when all the evidence is considered, was to absorb the overtime work of the City Auditors. Awards 4499, 4500, 4646, 4690, 4692, 6153. The last cited award is particularly in point with the present case.

The claims can be sustained at the pro rata rate only. As to the Traveling Agents, they worked the same hours at Kansas City that they worked on their regular assignments. There was no work on any day in excess of 8 hours and consequently no overtime pay was earned. Awerds 2695, 4109, 4710. As to the City Auditors, they fall within the oft stated rule that time for work lost will be paid for at the pro rata rate.

Claim (d) will be denied for the reason that the record shows the days which the Traveling Agents worked in Kansas City. A joint check is not therefore required.

**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.

AWARD

Claim (a) sustained as to Claimants Bohling, Anderson and Santry.

Claim (b) sustained at the pro rata rate as to claimants named in Claim (a).

Claim (c) sustained at pro rata rate.

Claim (d) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 1st day of August, 1955.

**DISSENT TO AWARD 7094, DOCKET CL-6892**

There is solid ground for dissent against the validity of any decision which is geared to theories of penalty and enforcement because we are completely and wholly devoid of any such authority. That is the basis for this resistance to an award which purports to order the assessment of punitive damages under the "Absorbing Overtime" rule.

The referee here has awarded pay to the traveling auditors who were not suspended from work during their regular hours at all but who worked

in their own craft and class and seniority district on work of no substantial difference in assisting city auditors. The same referee said in our own **Award 6946** that "The loss of work accrues to the employe who was entitled to perform it, not to the one who has been paid for performing it." The same referee said in Second Division **Award 1638** that an employe "should be made whole"[1] and that this measure of damages not only "eliminates punitive damages which are not favored in law", but "conforms to the legal holding that the purposes of the Board are remedial and not punitive"; finally, that the purpose of this Board "does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterrents against future violations." Deviations and complete departures from such sound legal principles are of no stature whatever and certainly have no effect, persuasive or otherwise.

The "Absorbing Overtime" rule has suffered intermittent pains of distortion through the mistreatment of professors, academicians and hypertechnical arbiters who ignored the solid history behind it. Such awards and their "slanted" theories arising out of the travails of this Board in its first decade or more of existence are recognized as being wrong now in the 1955 language of **Awards 6946** and **7082** and others of this Division, and the 1953 language of **Award 1638** of the Second Division.

The "Absorbing Overtime" rule has a clear, understandable history. It means and has always meant that an individual employe will not be prevented from or withheld from working within his regular hours **without pay** and then be required to work during other hours at a straight time rate of pay in order to avoid the accrual of compensation at time and one-half. It had, and has, nothing whatever to do with "lending a hand". Compare **Award 5820.** Nor does it concern working on another job for that is specifically provided for in rules for the preservation of rates of pay.

The rule first appeared in the railroad industry in 1917 at which time it was applicable to the skilled crafts. It grew out of a proposal by the Employes that "No employe covered by this Agreement shall be laid off to equalize time on account of having worked overtime." The intent of the provision was specifically in its safeguard against an employe being withheld from work during his regular hours in order to equalize overtime he may have been required to perform, or may be required to perform.

On September 20, 1919, a so-called National Agreement was effected by the Director General of Railroads, establishing a rule for the six shopcrafts containing the provision that "When it becomes necessary for employes to work overtime they shall not be laid off during regular working hours to equalize the time." The safeguard contained in these provisions for the benefit of employes spread quickly to other crafts and was later represented to the United States Railroad Labor Board as being a universal need. It became recognized as such and on January 1, 1920, the Director General of Railroads established the same safeguard in the so-called National Agreement for the clerical craft. Consequently, there is no doubt of the purpose of this rule being a proscription against the undesirable practice of requiring those who had worked overtime to lay off without pay to offset, or absorb, the overtime expense. The rule is still nothing more than that. It represents a dealing in good faith and has no greater scope now than it had then, irrespective of the misconceptions in the minds of neutral referees who were apparently imbued with momentary concepts of authority to penalize which is far beyond the function of interpretation.

The referee here has erroneously reverted to those scattered decisions which were written in complete disregard of the historical background. In disregarding that background, however, it became necessary then as well as in the instant case to also disregard the "Preservation of Rates" rule. The referee says that rule is not a defense to a claim "if the temporary

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[1] ibid. "Making the employe whole simply means he shall suffer no loss."

assignment of a regularly assigned employe **to another position** effects a suspension of hours and the absorption of overtime". The patent error in this dismissal of a valid defense is its own misconception of the meaning of the "Absorption of Overtime" rule through adhering to those awards which committed the original error. Moreover, neither the traveling auditors nor the city auditors were injured. All employes involved worked during their regular hours; they had substantially the same work; they received the contractually proper rate of pay; and, all of this is recognized in the majority's Opinion.

The referee places some significance on the record fact that the Carrier wanted to get the work in question done "as soon as possible". He says "This is clear evidence that overtime would have been required to get this work done promptly." This is not at all true. It has no such evidentiary significance. As a matter of practical operation and good judgment, it is completely incorrect and most unrealistic to assume, as the Opinion does here, that overtime must be worked in order to get a job accomplished "as soon as possible". We sincerely regret that what should be the serious considerations of this Board can be laid upon the fallibilities of such impractical presumptions.

/s/ E. T. Horsley

/s/ J. E. Kemp

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan