

Award No. 15875  
Docket No. CL-16220

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Wesley Miller, Referee

**PARTIES TO DISPUTE:**

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

**FORT WORTH AND DENVER RAILWAY COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-5953) that:

1) Carrier violated rules of the Clerks' Agreement when it failed or refused to properly compensate Mr. A. V. Landrum, Clerk at Childress, Texas, for work performed on February 12, 1965, which was Claimant's birthday as well as his rest day.

2) Mr. A. V. Landrum shall now be paid an additional eight (8) hours at the rate of time and one-half for time worked on February 12, 1965.

**EMPLOYES' STATEMENT OF FACTS:** February 12, 1965 was Mr. A. V. Landrum's birthday and it was also one of his assigned rest days.

Mr. Landrum was required to work eight hours on February 12, 1965 and was paid eight hours at pro rata rate plus eight hours at the rate of time and one-half for this date.

This claim was handled in the regular order of appeal up to the highest officer of the Carrier designated to handle such claims. See Employees' Exhibits Nos. 1 through 6.

(Exhibits not reproduced.)

**CARRIER'S STATEMENT OF FACTS:** The claim date, Friday, February 12, 1965, was the claimant's birthday, a holiday, as covered by the Mediation Agreement dated November 20, 1964, effective with the calendar year 1965, amending Article II of the Agreement of August 21, 1954, as amended by the Agreement of August 19, 1960, and Rule 47 of the collective agreement as amended by "40 hour week agreement." It was necessary to work assignment of claimant on his birthday holiday due to volume of business and he was used at the overtime rate in accordance with past practice. He was qualified for holiday pay and received eight hours pro rata rate therefor in addition to eight hours at the overtime rate account performing work on the claim date. This is 20 hours' pay, or 2½ times the daily rate for the eight hours of work he performed.

The Petitioner has claimed an additional day's pay at the overtime rate account the claim date was also the claimant's rest day. The claim was denied on the basis that payment already allowed was proper under the applicable agreements and identical to that paid on this property since the Agreement of August 21, 1954. The Schedule of Rules Agreement effective September 1, 1947, the so-called "40-Hour Week Agreement" effective September 1, 1949, and the National Agreement referred to herein are on file with the Board and by this reference are made a part of this submission.

**OPINION OF BOARD:** The issues presented herein have been resolved in a multitude of previous Third Division Awards. We cite in particular Awards 15660 and 15340.

As in those Awards, we hold that the Agreement was violated.

We have studied Award 15564 (a denial Award) and find it was decided on the basis of a well-documented showing of past practice and custom. In the case at hand, in the handling on the property, Carrier made only a brief and casual assertion in reference to custom and offered no probative evidence. Because of this distinguishing circumstance, Award 15564 does not justify overruling our many other Awards on this subject which were rendered prior to and after Award 15564.

This Claim is sustained.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the 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 allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October 1967.

**CARRIER MEMBERS' DISSENT TO AWARD NO. 15875,  
DOCKET NO. CL-16220**

For reasons that are fully and specifically stated in the dissent to Award 15398, Docket CL-16000, we dissent to this Award.

Further dissent is also registered to Award 15875 for the reason that the Referee sustained the claim on the basis that the Carrier offered no probative evidence of past practice and custom. In so doing the Referee ignored the well-established principle that the burden of proving all essential elements of a claim rests upon the Petitioner. Here the Petitioner merely asserted the Agreement had been violated and cited prior awards of the Board involving other carriers, but furnished no proof of custom and practice on the property of the Carrier here involved. In so shifting the burden of proof the Referee committed palpable error and the award is worthless.

**G. C. White  
R. E. Black  
P. C. Carter  
G. L. Naylor  
T. F. Strunck**