Award No. 3417
Docket No. CL-3411

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN RAILROAD CO.; THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY CO.; THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY CO.; SAN ANTONIO, UVALDE & GULF RAILROAD CO.; THE ORANGE & NORTHWESTERN RAILROAD CO.; IBERIA, ST. MARY & EASTERN RAILROAD CO.; SAN BENITO & RIO GRANDE VALLEY RAILWAY CO.; NEW ORLEANS, TEXAS & MEXICO RAILWAY CO.; NEW IBERIA & NORTHERN RAILROAD CO.; SAN ANTONIO SOUTHERN RAILWAY CO.; HOUSTON & BRAZOS VALLEY RAILWAY CO.; HOUSTON NORTH SHORE RAILWAY CO.; ASHERTON & GULF RAILWAY CO.; RIO GRANDE CITY RAILWAY CO.; ASPHALT BELT RAILWAY CO.; SUGARLAND RAILWAY CO.

(Guy A. Thompson, Trustee)

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

(a) The Carrier violated the Clerks' Agreement at Kingsville, Texas, beginning November 28, 1945, when it withheld Mr. H. P. Faulk from his assigned position and work and required him to perform an entirely different character of work in another department. Also,

(b) Claim that Mr. Faulk be paid at the rate of $8.42 per day for each day he was withheld from his assigned position and work; this in addition to the amount he has actually been paid for working in the Accounting Department. (The rate named above to be increased by sixteen cents (16) per hour effective January 1, 1946).

EMPLOYES' STATEMENT OF FACTS: Mr. Faulk entered the service of this carrier on January 1, 1925 and now has more than twenty-one years seniority.

In the final analysis the foregoing record shows:

1. No rule in the Clerks' Agreement to support the contention and claim of the Employes.

2. Rule 50 of the Clerks' Agreement herein quoted and relied upon by the Carrier not only contemplates Employes on occasion being temporarily assigned to other than their regular position but specifically provides how they will be compensated when they are used on other than their regular position.

3. Mr. Faulk was used and compensated in accordance with the provisions of Rule 50.

4. During the period in question Mr. Faulk did not perform service on his regular position in addition to his service on the temporary position in connection with compiling completion reports, nor could he have done so as the daily hours of assignment of both positions were the same, i.e., 8:00 A. M. to 5:00 P.M. with lunch period 12:00 noon to 1:00 P. M.

5. Since Mr. Faulk performed service on but one position on each of the dates in question and could not have performed service on his regular position in addition to service performed on his temporary assignment certainly there is no justification for the claim presented for two days pay on each of the dates in question.

6. The principle involved in this case has previously been ruled on by your Honorable Board in Award No. 2511, hereinbefore cited, which denied the Employes' claim for two days pay, i.e., the rate of his regular position in addition to the rate of the position on which he was temporarily used.

7. Award No. 2262, above referred to, conclusively supports the position of the Carrier in the case under consideration.

Based on the above it is the position of the Carrier that the contention of the Employes should be dismissed and the accompanying claim accordingly denied.

OPINION OF BOARD: This dispute presents the same question as was presented in Docket No. CL-3390, Award Number **3416:** whether a clerk, required to suspend work on his regularly assigned position and fill another position is entitled to recover, as a penalty, the amount he would have received had he worked his own position.

Briefly stated the facts are: that Claimant was regularly assigned to the position of Transportation Clerk; that, beginning November 28, 1945 and until March 1946 he was suspended from work on that position and required to work on a position of Utility Clerk in the same office. However, the Utility Clerk, to whose position Claimant was assigned, was required to take over the latter's work as Transportation Clerk. The hours of the two positions were the same.

That the arrangement had the effect of absorbing overtime, we think, is clearly established by the facts of record. The transfer of Claimant from his own position to that of Utility Clerk, therefore, constituted a violation of Rule 44 of the Agreement.

The Carrier points out that during a portion of the time Claimant was separated from his own position he was assigned to a position carrying a higher rate at which he was paid.

We think this has no relevance in the light of the principle laid down in Awards Nos. 2695, 2823, 2859, 2884, which we applied in disposing of the dispute presented in Docket No. CL-3390, Award Number **3416.** What we there said is equally applicable to the instant dispute.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of January, 1947.

DISSENT TO AWARDS NOS. 3416, 3417, 3418, DOCKETS CL-3390, CL-3411, CL-3413.

These Awards, Nos. 3416, 3417, 3418, finding violations of Rule 44, make declaration that the Board has several times sustained similar claims under rules identical in terms with Rule No. 44, naming four other late awards, each of which late awards related to different circumstances and, in their Opinions leading to the awards, contained differentiating statements, here disregarded, which reserved, at least in part, the intent and practical application of the rule relating to non-suspension of work to absorb overtime.

Those four awards relied upon, though not as arbitrarily applying the rule to the circumstances therein respectively involved as do the awards in the three instant cases, had their genesis, as a perusal of them will show, in Award No. 2346, discussed, but not referred to in the instant Opinions of Board, which lately preceding the four awards relied upon, gave application of the rule to a circumstance of a temporary assignment of an employe to other than his regular assignment.

That Award No. 2346, however, did note the fact that the claimant there protested the change but was required to make it. The award further contained the statement that "in the absence of proper showing on the part of the Carrier that avoidance of overtime was not the motivating cause, it may be assumed that it was" and, proceeding further to find under another rule there involved that the Carrier "does not show that there was good and sufficient cause for the change of positions", declared violation to be established.

During the existence of this Board prior to the issuance of Award No. 2346, and those later four restrictive awards upon which the instant awards here rely, the records of the Third Division contain numerous cases, showing circumstances of similar temporary assignments as well as claims that circumstances of similar temporary assignments should have been made, which former cases contained statements by employes and carriers alike and, as well, submissions respectively of facts incident to those cases, evidencing the knowledge of the employes' organization presenting the instant claims that such circumstances as are here involved did not comprehend the restrictions of the rule relating to non-suspension of work to absorb overtime.

The finding of a violation of the Agreement through declaration "that overtime was effectually absorbed by suspension" of the claimants' work on their own positions under the respective circumstances of these three cases and through reliance upon the assertion that

> "this Board has several times sustained similar claims under rules identical in terms with rule No. 44. See Awards 2695, 2823, 2859 and 2884,"

is one that gives improper application to the rule contrary to its meaning and intent as it has been understood and generally accepted by carriers and employes, including the carrier and employes here involved. This is more particularly apparent when recognition is given to the generally accepted custom of 25 to 30 years since the rule here involved relating to non-suspension of work to absorb overtime was promulgated by the Director General of Railroads and to its subsequent application.

The awards being contrary to the meaning and intent of the agreement between the parties, as evidenced by the records in the cases, are unwarranted.

/s/ C. C. Cook
/s/ A. H. Jones
/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan