

**Award No. 4312**

**Docket No. CL-4195**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Francis J. Robertson, Referee**

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**PARTIES TO DISPUTE:**

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

**GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN  
RR CO.; THE ST. LOUIS, BROWNSVILLE & MEXICO RY. CO.;  
THE BEAUMONT, SOUR LAKE & WESTERN RY. CO.; SAN  
ANTONIO, UVALDE & GULF RR CO.; THE ORANGE & NORTH-  
WESTERN RR CO.; IBERIA, ST. MARY & EASTERN RR CO.;  
SAN BENITO & RIO GRANDE VALLEY RY. CO.; NEW  
ORLEANS, TEXAS & MEXICO RY. CO.; NEW IBERIA  
& NORTHERN RR CO.; SAN ANTONIO SOUTHERN RY. CO.;  
HOUSTON & BRAZOS VALLEY RAILWAY CO.; HOUSTON  
NORTH SHORE RY. CO.; ASHERTON & GULF RY. CO.; RIO  
GRANDE CITY RY. CO.; ASPHALT BELT RY. CO.; SUGAR-  
LAND RY. 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 Palestine, Texas, beginning on or about March 21, 1946, by requiring an employe in Seniority District No. 24 to perform work in Seniority District No. 15, between the hours of 11:00 P. M. and 7:00 A. M. Also

(b) Claim that employes in Seniority District 15 at Palestine be compensated for eight hours at the rate of time and one-half account being denied the right to perform and be paid for this work.

**EMPLOYES' STATEMENT OF FACTS:** As a result of reduction in force the Carrier, on or about March 21, 1946, changed the manner in which messages, reports, etc., between Houston and Ft. Worth were received and sent at Palestine.

Prior to this time the above work was all performed in the Telegraph Office located in the Passenger Station. Any messages, reports, etc., received by telegraph for other offices or departments were delivered by Messengers employed in Seniority District No. 15.

6. The \$7.92 rate of the caller is higher than the \$7.28 rate of the messenger;

7. The previously expressed "Opinion" of your Board in Awards 3587, 4232, and 2012.

it is quite evident that the contention and claim here presented by the Employees is most unreasonable and without justification or merit.

Therefore, it is the position of the Carrier that the contention of the Employees be dismissed and the accompanying claim accordingly denied.

(Exhibits not reproduced.)

**OPINION OF BOARD:** At Palestine, Texas, the Carrier employs three shifts of callers who are included in Seniority District No. 24. Two shifts of messengers included in Seniority District No. 15 are employed in the Telegraph Office working 6:00 A. M. to 2:30 P. M., and 2:30 P. M. to 11:00 P. M. No messengers have been or are employed from 11:00 P. M. to 6:00 A. M. "Q" Tower is about 767 feet north of the Caller's office and is the point where all train and engine crew members working out of Palestine go on duty and where the train register for crews is kept. From 1932 to June 1942, telegraphic service was performed in "Q" Tower. In June 1942, an additional telegrapher was established in "H" Office, which position performed the telegraph service that had been previously performed in "Q" Tower. "H" Office is located about 190 feet north of the Caller's Office. About March 21, 1946, the arrangement for transmission and receipt of communications between "H" and "Q" Towers was changed so that it reverted back to the practice in existence from 1932 to 1942. From 1932 to 1942 and from March 21, 1946 to February 27, 1947, between the hours of 11:00 P. M. and 7:00 A. M., the third trick caller, on the average, would make two trips from the Caller's office to "Q" Tower and on the way would stop by at "H" Office to handle telegraphic communications between "H" and "Q" Tower. February 27, 1947, the handling of these communications by the third trick caller was discontinued since which time any such communications are not delivered until the first trick messenger comes on at 6:00 A. M. Employees claim a violation of the seniority rules of the Agreement in the handling of these communications by the third trick caller since that work was performed by messenger at other times during the day and request compensation from March 21, 1946, for employees in Seniority District No. 15 as set forth in the notice of claim.

Carrier stresses the point that the practice of having the third trick caller pick up these communications was in existence with the acquiescence of the Organization. This, of course, as has been pointed out in many of the awards of this Division, does not operate to effect a change in the clear terms of the Agreement. However, the Board has held in numerous awards that a long period of acquiescence in a practice allegedly violative of the Agreement may work to estop the employees from claiming compensation.

The question as to whether or not there is a presently existing violation of the Agreement is now moot, in view of the Carrier's discontinuance of the practice of having the third trick caller handle the communications between "H" and "Q" Towers. As to whether or not there was a violation of the Agreement prior to February 1, 1947, we believe that the Carrier's defense, constituting as it does, mostly a plea of mitigating circumstances is an indication that it did not consider its position herein very tenable. That the work performed in handling these communications was messenger work belonging in Seniority District 15 can hardly be doubted. Although the amount of time consumed in doing the work does not appear from the record, that it was not substantial is a most reasonable conclusion from the uncontroverted facts. This last factor does not, however, make it any the less a violation of the Agreement. However, in view of the Organization's long acquiescence in the practice and the Carrier's correction of the violation, we do not feel warranted in sustaining the claim from the date set forth in the notice of claim, but will confine it to the period beginning with the date of complaint to the Carrier by the Employees, to wit: June 5, 1946, and at pro

rata rate only. We believe that this is a clear case where only the straight time penalty should be invoked for there is no reasonable basis upon which to conclude that had the work been performed in strict compliance with the Agreement, it would have been necessary to assign it to the first and second trick messengers after or before the completion of their regular assignments.

**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 employees involved in this dispute are respectively carrier and employees 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 to extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 16th day of February, 1949.