

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

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.;
TEXAS & MEXICO RY. CO.; NEW IBERIA & NORTHERN RR.
CO.; SAN ANTONIO SOUTHERN RY. CO.; HOUSTON & BRAZOS
VALLEY RY. CO.; HOUSTON NORTH SHORE RY. CO.;
ASHERTON & GULF RY. CO.; RIO GRANDE CITY RY. CO.;
ASPHALT BELT RY. CO.; SUGARLAND 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 Corpus Christi, Texas, July 1, 1947 to July 19, 1947, both dates inclusive, and July 1, 1948 to July 22, 1948, both dates inclusive, when it used an employe from Seniority District No. 16 to perform station work in Seniority District No. 25, namely, the handling of diversions, on grain only, and only from 2:00 P. M. to 10:00 P. M., thereby depriving the Rate Clerk the right to perform and be paid for this work which is specifically assigned to him. Also

(b) Claim that the Rate Clerk be paid eight hours, at the rate of time and one-half, for each of the dates named above.

EMPLOYES' STATEMENT OF FACTS: Corpus Christi, Texas station is included in, and is a part of Seniority District No. 25. Mr. Gibson is assigned to the position of Rate Clerk and his duties, as designated and assigned by the Carrier are:

"Check rates; perform billing, balance abstracts; handle diversions and oil reports."

During the year 1947 Mr. Gibson performed all of the duties assigned to him for the entire year with the exception of the first nineteen days in July

in many similar claims for payment at overtime rate that—"Time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides." (Award No. 3587.) Also see Awards 2346, 2695, 2823, 3049, 3193. There is no rule in the Clerks' Agreement on this property specifically providing for payment at time and one-half rate under the circumstances existing in this case.

Here the Employees are requesting that claimant be paid additionally at the rate of time and one-half for work which he did not perform, at least four hours of which were performed at the time the claimant, himself, was actually on duty and under pay (Claimant's assigned hours were 9:00 A. M. to 6:00 P. M., while the traveling car service agent worked 2:00 P. M. to 10:00 P. M.) The Employees also ignore the fact that the eight hours service performed by the traveling car service agent at Corpus Christi on the dates involved, and which services, it is claimed, the claimant should be paid for at the rate of time and one-half, embraced work, the majority of which would have been performed in the office of Assistant Superintendent of Transportation at Houston.

It is the position of the Carrier, in light of all the facts and circumstances involved, that the contention and claim of the Employees in the instant case are without justification and accordingly should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was assigned the position of Rate Clerk at Corpus Christi. His assigned duties were to "check rates; perform billing; balance abstracts; handle diversions and oil reports." During the periods stated in the claim, Carrier used employees from another seniority district to handle diversions on grain which Claimant contends he was entitled to perform on an overtime basis.

The record is clear that the employees from the other seniority district had no seniority at Corpus Christi. The work of handling diversions on grain was assigned to Claimant. It was the work of Clerks in Seniority District No. 16 at Corpus Christi. It was clearly a violation of Agreement rules to assign this work to employees in another seniority district. Awards 4076, 3964, 3746, 1808. An affirmative award is in order.

The contention that the claim should be sustained at the time and one-half rate is without merit. The right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. One who claims compensation for work lost which he was entitled to perform, will be paid the rate of the position. The claim in the present case is sustained at the pro rata rate. Award 4244.

The Organization contends that the Carrier has settled numerous claims of a similar nature at the overtime rate of time and one-half. It is asserted that this constitutes a practice which is binding upon the Carrier. We think not. Rates of pay, including penalty rates, are determinable from the contract. It could not be said that an employee paid less than the contract rate of his position over a period of time, could not recover the deficiency because a practice had been created. The Agreement is superior to a practice. Neither can the Carrier be restrained from correcting an erroneous application of rates of pay, including penalty rates, on the theory that a practice had arisen. Compensation for work is contractual and therefore superior to any alleged practice.

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 Agreement was violated.

AWARD

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of August, 1949.