

Award No. 5243
Docket No. CL-4864

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee.

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated the Clerks' Agreement:

When the Carrier on February 12, 19, 27 and March 5 and 13, 1949, forced Mr. Robert Baker to suspend work on his regular assignment to absorb overtime on other positions, and claim is as follows:

1. February 12—Claim for one day's pay favor of Robert Baker account required to suspend work on his regular assignment to absorb overtime on position in Crew 31. (Rule 41)

Claim for one day's pay at rate of time and one-half favor of Robert E. Gililand, who was off on his rest day but not called to fill vacancy in a position that Carrier has designated as necessary to its continuous operation. (Rule 44)

2. February 19—Claim for one day's pay favor of Robert Baker account required to suspend work on his regular assignment to absorb overtime on position in Crew 51. (Rule 41)

Claim for one day's pay at rate of time and one-half favor of Thomas Downs who was off on his rest day but not called to fill vacancy in a position that Carrier has designated as necessary to its continuous operation. (Rule 44)

3. March 5—Claim for one day's pay favor of Robert Baker, account required to suspend work on his regular assignment to absorb overtime on position in Crew 36. (Rule 41)

Claim for one day's pay at rate of time and one-half favor of James Barber, who was off on his rest day but not called to fill vacancy in a position that Carrier has designated as necessary to its continuous operation. (Rule 44)

4. February 27—Claim for one day's pay favor of Robert Baker account required to suspend work on his regular assignment to absorb overtime on position in Crew 38. (Rule 41)

Claim for one day's pay at rate of time and one-half favor of Pat Shea who was off on his rest day but not called to fill vacancy in a position that Carrier has designated as necessary to its continuous operation. (Rule 44)

5. March 13—Claim for one day's pay favor of Robert Baker account required to suspend work on his regular assignment to absorb overtime on position in Crew 36 Job 11.

Claim for one day's pay at rate of time and one-half favor of Paul A. Richards, who was off on his rest day, but not called to fill vacancy in a position that Carrier has designated as necessary to its continuous operation. (Rule 44)

EMPLOYEES' STATEMENT OF FACTS: Employee Robert Baker was assigned to position in Crew No. 46 in the Mail and Baggage Department of the Carrier, as per advertisement and award Bulletin Number A-70, reproduced herewith:

"BULLETIN A-70
DISTRICT 30
January 4, 1949

Following position is advertised for bids in accordance with rule 11 of Clerks' Agreement. Applications must be prepared as specified in the rule and forwarded so as to reach the undersigned before 5:00 P. M., January 9th 1949—

Title of position.....Mail-baggage handler
Job R-46-1 (L. Roberts)
LocationUnion Station
Rate of pay.....\$9.09 per day
Hours of assignment:
Friday 6:00 A. M. to 2:30 P. M. Extra in Crew 46
Saturday 6:00 A. M. to 2:30 P. M. " " " 46
Sunday 6:00 A. M. to 2:30 P. M. " " " 46
Monday 6:00 A. M. to 2:30 P. M. relieves Job 46-1
Tuesday 6:00 A. M. to 2:30 P. M. " Job 46-2
Wednesday 6:00 A. M. to 2:30 P. M. " Job 46-3
Assigned day of rest.....Thursday
Meal Period.....10:00 A. M. to 10:30 A. M.
Vacated byLyman L. Haywood
DutiesLoad, unload, transfer, and any other
work incident to the movement of
U. S. mail, baggage, and other traffic
handled by this department.

C. J. WEHMEYER
General Baggage Agent

cc—Mr. E. J. Schmidt, Genl. Chairman, B of RC
cc—Mr. H. A. Ferguson, Local Chairman, B of RC
cc—Messrs. Tierney and Kloustermeyer
cc—Mr. Mosher"

"BULLETIN A-70
DISTRICT 30
Jan. 17, 1949

Position of mail-baggage handler as advertised in my bulletin A-70 has been awarded to Robert S. Baker.

C. J. WEHMEYER
General Baggage Agent"

ployes are trying to twist that language to mean suspension of work on his regular assignment. To meet their views would require some additions to the agreed rule, which is not within their province or that of this Division. In their Statement of Claim, the Employees admit that he was not "required to suspend work during regular hours," because they specifically say that he was only required "to suspend work on his regular assignment."

Another factor the Employees have overlooked in progressing the claim, is that it relates to suspension of work for one purpose only; i. e., the absorption of overtime, and even if there had been a violation of the rule, which we deny, the suspension of the man from the duties of his regular assignment could not have been for the purpose of absorbing overtime as the overtime that ensued as a result of the regular employees' failure to report for duty was paid for under Award 4467. That award compelled us to pay the men who should have been called from home on their days of rest instead of using Mr. Baker. Having paid for the overtime, there is nothing left to absorb.

As indicated in the carrier's Statement of Facts, the claims of Messrs. Gililland, Downs, Barber, Shea and Richards have already been paid under the provisions of Award 4467 of this Division as a result of a standby agreement with the organization.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants Gililland, Downs, Barber, Shea, and Richards were regular occupants of positions necessary to continuous operations, and the dates set forth in the Claim were their respective rest days. On said dates no furloughed or extra men were available and the Carrier called Claimant Baker from his regular position and used him to fill the vacancies, instead of calling the other Claimants.

The Carrier offered to compensate Gililland and his similarly situated associates at their straight time rates, but the Employees contend for pay at time and one-half. That said Claimants had a right to said work in preference to Claimant Baker must be conceded, and had they been called they would have been entitled to their time and one-half rates. This calls for the application of the rule that when an employe is entitled, willing and ready to work and is prevented from doing so by his employer, the employe should receive the emoluments that would have been his, had he worked. This principle is supported by the Awards of Board, as well as the law of the jurisdiction where this controversy arose. See Awards Nos. 3371 and 3375, citing *Steinberg v. Gebhardt*, 41 Mo. 519.

The Employees also ask that the Claimant Baker be compensated, additionally, at his pro rata rate for each of the days that he was taken from his regular position and required to fill the positions to which the other claimants were entitled. The Carrier says, however, that Baker, on the days covered by the Claim, performed the same character of work, during the same hours, that he would otherwise have performed on his own position, and that to adopt the Employees' theory would result in the imposition of a double penalty.

Baker occupied his regular position through the exercise of his seniority and it had been duly assigned to him by bulletin. His assigned hours were 6:00 A. M. to 2:30 P. M., Friday through Wednesday, with Thursday as his day of rest. This being a position necessary to continuous operation, he was required to work on Sundays at his straight time rate. All of the positions filled by Baker on the days in question had assigned hours that were different than those of his regular position.

Under these circumstances, the conclusion is inescapable that Baker was required to suspend work on his regular assignment to absorb overtime on other positions, in violation of Rule 41. See Awards 4646, 4352 and 5105.

Technically, a double penalty only results when an employee is twice compensated for the **same work**, and that can hardly be said to be the situation here. In any event, penalties are regarded as coercive in character, rather than compensatory. They are often imposed, as a matter of sound discretion, to bring about the observance of agreements. Such exactions often appear harsh and the benefits thereof frequently accrue to the enrichment of persons whose rights to them would otherwise be difficult to justify. They are sometimes justified, however, to maintain the vitality of agreements. See Award No. 4539. We deem the penalty warranted in the instant case.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute 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

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of February, 1951.

DISSENT TO AWARD 5243, DOCKET CL-4864.

This award allows a penalty of two and one-half days for one alleged violation for each day involved, in the absence of any Agreement provision providing for such penalty, or any reasonable construction of prior awards of this Board. The award is contrary to innumerable holdings by this Board on the question of penalties at the rate of time and one-half, as well as contrary to prior awards by this same Referee. Support for that portion of the award is alleged to be found in an old Missouri State Court decision, not a statute, in an industrial dispute, irrespective of the fact that this Board, including this same Referee, has previously adopted a definite pattern on the question.

We are in disagreement with the award.

(s) A. H. Jones
(s) R. H. Allison
(s) R. M. Butler
(s) C. P. Dugan
(s) J. E. Kemp