

Award No. 6144
Docket No. CL-6190

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY**

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

(a) The Carrier violated the agreement in the Store Department at Palestine, Texas, on June 4, 5, 6 and 7, 1951, when it worked a junior clerk overtime in preference to a senior clerk. Also

(b) Claim that Mr. George J. Torma be reimbursed the exact amount he lost as a result of Carrier's action.

EMPLOYEES' STATEMENT OF FACTS: On the dates in question Mr. Torma was assigned to the position of Store Foreman.

Mr. Wall was working position of Timekeeper.

Mr. Torma's seniority date is March 6, 1928.

Mr. Wall's seniority date is April 24, 1942.

Due to an accumulation of work on the Price desk it was necessary, on the dates named, to use other employees on an overtime basis.

The work involved was not attached or related to either Mr. Torma's position or Mr. Wall's position.

Both Messrs. Torma and Wall are qualified Price Clerks.

The Carrier worked the junior employee, Mr. Wall.

POSITION OF EMPLOYEES: The question here presented to your Honorable Board is the Carrier's action in using a junior employee to work overtime and denying a senior employee the right to perform and be paid for such work.

Rule 7 (a) of the current agreement reads:

"Employees covered by these rules shall be in line for promotion. Promotion, assignments, and displacements under these rules shall

In the first place, it is the Carrier's position, based upon the foregoing record, that claimant was not deprived of overtime work to which he was entitled and consequently he "lost" nothing, therefore, the claim should be denied.

In the second place, but without any thought or intention of detracting from the position of Carrier and the merits supporting said position as argued in the foregoing submission, the Carrier, however, realizing but not necessarily anticipating, the possibility of an adverse decision and, further, appreciating the fact that conflicting decisions have been rendered where claims for payment have been made, as here, when no service was performed by claimant, desires to call attention to the fact that by far the majority of such decisions recognize the pro rata rate only as applicable where the merits of the case have in the opinion of the Board justified payment at all. Awards 3587, 3467, 3955, 4244, 4245, 4963, 5419, 5620, 5638. In this particular case, however, the Carrier feels that the contention of the Employee is not only void of merit, but obviously impracticable and unworkable as well, and, therefore, the accompanying claim should be denied.

The substance of matters contained in this submission have been the subject of discussion in conference and/or correspondence between the parties.

(Exhibits not reproduced).

OPINION OF BOARD: The facts of this case are not in dispute. An accumulation of work on the Pricing Clerk's position in Carrier's General Storekeeper's office at Palestine, Texas, made overtime work necessary. Carrier used Rufus Thompson, the regular occupant of that position, to the fullest extent possible. This was in accordance with the requirements of Rule 45(b) of the parties' Agreement. However, Thompson was not able to do all of the work. Consequently, on June 4, 5, 6 and 7, 1951, Carrier used W. T. Wall, a Timekeeper in the same office, to do the work Thompson was not able to do. Claimant, assigned and working at the time as Store Foreman in Carrier's Shipping Department at Palestine, claims he was available and, being senior to Wall, should have been called by reason of his rights under Rule 7(a) of the parties' Agreement.

Both Claimant and Wall are qualified to do Pricing Clerk's work, although at the time neither was regularly assigned thereto. Both are on the Clerks' roster for Seniority District No. 22, Claimant being senior to Wall. The Clerks' Seniority District No. 22 apparently covers the Carrier's entire system, at least besides Palestine it includes such other cities as Houston and San Antonio.

Carrier must respect seniority rights in having extra work performed unless it is otherwise provided in the parties' Agreement, such as Rule 45(b). (See Award 2341 of this Division.) In that respect Rule 25(b) has no application here.

Under the parties' Agreement, when overtime work cannot be performed by employees regularly assigned to the class of work for which overtime is necessary as provided by Rule 45(b), the available senior qualified employee is entitled thereto under Rule 7(a) and Carrier must give him an opportunity to perform it. In this respect Carrier inferentially admits that although the Shipping Department is some 556 steps from the General Storekeeper's office if it had called Claimant he would have been able to respond and perform the work. In other words, he was available. We think that is correct. Carrier should have called Claimant to do the work and violated his rights by not doing so.

Carrier says that in such cases it has always been the practice in selecting employees not to go outside of the immediate office in which the overtime work originates, using the senior qualified employee in that office who desires to do the work on an overtime basis.

Without deciding, but for the purpose of discussion, we shall assume the existence of this practice. A practice carried on under a rule that is contrary thereto, when the rule is clear and unambiguous, does not have the effect of abrogating it. Either party may at any time require that such practice be stopped and the rule applied according to its terms. It is only when the rules are not clear or ambiguous that practice thereunder has any force and effect. Then it may be used to show what the parties thought the rule meant by their application of it on the property.

Since the Clerks' Seniority District No. 22 includes such cities as Houston, 150 miles distance, and San Antonio, 260 miles distance, where the Carrier has clerical employes the Carrier says to apply Rule 7(a), as here contended for, is impractical, if not impossible. As a matter of fact, clerical employes at these other cities would not be available to perform overtime work at Palestine. It is undoubtedly true that this requirement presents an operating problem at Palestine, since the employes there seem to work in different places, but we cannot change the rules of the parties' Agreement by reason of that fact. Admittedly Claimant was available to do the work. If Carrier wants seniority as to overtime work limited to the employes working in the office where it originates it will have to be done by a rule. In the absence thereof the general principle applies, that is, when a qualified senior employe is available he has a preference thereto. This right the Carrier must respect.

The monetary claim made is that Claimant be reimbursed the exact amount he lost as a result of Carrier's action. Since we have come to the conclusion that he had a prior right to the work and was available to perform it the question arises as to the rate at which he should be paid. The penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. That, in this instance, would have been overtime. Consequently the claim here made should be paid at that rate. See Awards 3277 and 3744 of this Division.

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: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 19th day of March, 1953.