

Award No. 6145

Docket No. CL-6204

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

Florence MacDonald, Ticket Clerk, Trenton, New Jersey, be returned to service with all rights unimpaired and be compensated for all monetary loss sustained dating from March 4, 1950, until adjusted. (Docket N-286).

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 Employee involved in this dispute are respectively Carrier and Employee 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;

That the dispute was certified to the Third Division of the Adjustment Board ex parte by the complainant party; and

That hearing thereon has been held and concluded. Under date of March 10, 1953, the parties jointly advised the Secretary of the Third Division of their desire to withdraw this case from further consideration by the Division, which request is hereby granted.

AWARD

Case dismissed.

**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.

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.