

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, 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.;
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 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 Rockdale,
Texas, on Sundays, December 7, 14, 21, 28, 1952; January 4, 11 and
18, 1953, when it failed to call M. G. McBurnett to perform work
assigned to and performed by him Monday through Saturday. Also

(b) Claim that Mr. McBurnett now be paid the difference be-
tween eight hours at pro rata rate and eight hours at time and one-
half rate. (Carrier allowed claim at pro rata rate.)

EMPLOYES' STATEMENT OF FACTS: During the period here involved
the station force at Rockdale included, among others, the following positions:

Title	Number	Hours	Days Per Week
Cashier	2280	8:00 AM-5:00 PM	5
General Clerk	2291	11:00 AM-8:00 PM	7

During his regular tour of duty Monday through Friday the Cashier
handled all work in connection with passenger trains Nos. 25 and 21, such as

contention that payment should be made at the overtime rate. Therefore, it is the position of the Carrier that the Employees' claim as here presented be unqualifiedly denied.

All matters contained in this submission have been made the subject of discussion and/or correspondence between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts of this case are not in dispute and there is no need for encumbering the record by restating them, even in summarized form. Carrier has conceded the current Agreement was violated by using the wrong man for the seven Sundays in controversy and has already paid Claimant seven days' pay for that period of time at the pro rata rate. Therefore the sole question involved is whether he should be paid at the straight time or the time and one-half rate.

The Brotherhood insists that, since it is admitted Claimant was entitled to the work and has been paid seven days at the pro rata rate, Rule 43 (b) of the current Agreement is controlling as to the basis of payment. Such rule reads:

"Employees who are called regularly on Sundays and specified holidays shall be allowed a minimum of eight (8) hours at time and one-half rate."

Admitting the assignment of the involved work to another employee was erroneous and that Claimant was entitled thereto does not warrant a conclusion the portion of the above quoted rule is decisive of the single question involved as the Brotherhood suggests. Claimants was not called regularly, in fact, was not called at all. He performed no work pursuant to a call on Sunday and that day was not included in the assigned days of his regular assignment. All these facts impel the view that Rule 43 (b) has no application. Moreover the referee, now sitting as a member of this Division of the Board, is of the opinion the confronting facts and circumstances bring this case within the rule, followed by many, of what he deems to be the better reasoned decisions of the Division, that where only the right to perform work is involved the penalty for work lost is the rate of the position. That, since Rule 43 (b) is inapplicable, would be the pro rata rate, which has already been paid to the Claimant. For just a few of the numerous Awards adhering to and applying such rule under the facts and circumstances there involved, noting referees, see Awards Nos. 6019, 5939, 5929, 5419, 4962 (Parker); 6158 (Jasper); 5049 (Kelliher); 3955, 4244, 5176 (Carter); 5261, 5267, 5333 (Robertson); 5967 (Douglas); 5831, 5898 (Daugherty); 5142 (Coffey); 5950 (Guthrie); 6262 (Wenke).

In conclusion it should be stated Claimant directs our attention to the rule to be found in numerous Awards stating that the penalty rate for work lost because it was given to one not entitled to it under an involved agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. We have examined the Awards cited by Claimant and many others. It can be said that most of them deal with situations where the position of a regularly assigned employee has been temporarily vacated and what is there stated relates to the rate applicable to the day of the temporarily vacated position. Even so it cannot be denied some of the Awards cited by Claimant hold contrary to the conclusion announced in the preceding paragraph of this Opinion. As to them it suffices to say that after careful analysis and examination of all such Awards the present referee cannot subscribe to the conclusions therein reached or the views there expressed.

Based on what has been heretofore stated it follows Claimant's contention he was entitled to be paid at the rate of time and one-half cannot be upheld.

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 claim (a) is sustained but, since the record makes it appear Claimant has been compensated at the pro rata rate of his regularly assigned position, claim (b) is denied.

AWARD

Claim (a) sustained. Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1954.