

Award No. 8205
Docket No. CL-7964

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Sidney A. Wolff, Referee

PARTIES TO DISPUTE:

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

LOUISIANA & ARKANSAS RAILWAY COMPANY

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

(a) That Carrier violated Rules of currently effective Agreement dated September 1, 1951, by unilaterally shifting S. G. Gab off his regular assignment as Settlement Clerk in Local Freight Agent's Office at New Orleans to assist the Expense Bill Clerk and Switching Clerk thus requiring Gab to suspend work on his own regular assignment to absorb overtime that otherwise would have been required of the Expense Bill Clerk and Switching Clerk.

(b) That S. G. Gab, Settlement Clerk, be additionally compensated for actual time he was arbitrarily required to suspend work on his regular assignment to handle work normally assigned to the Expense Bill Clerk, to-wit:

March 3, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
March 8, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
April 12, 1954—	1:00 P. M. - 4:30 P. M.—	3 hours 30 minutes
April 15, 1954—	1:00 P. M. - 4:30 P. M.—	3 hours 30 minutes
April 19, 1954—	1:00 P. M. - 4:30 P. M.—	3 hours 30 minutes
April 21, 1954—	8:00 A. M. - 5:00 P. M.—	8 hours
April 28, 1954—	1:00 P. M. - 4:00 P. M.—	3 hours
April 29, 1954—	1:00 P. M. - 4:00 P. M.—	3 hours
May 6, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
May 7, 1954—	10:00 A. M. - 5:00 P. M.—	6 hours
July 8, 1954—	10:00 A. M. - 5:00 P. M.—	6 hours
July 9, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
Total		52 hours 30 minutes

and to handle work normally assigned to the Switching Clerk, to-wit:

March 29, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
March 30, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
March 31, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
April 22, 1954—	1:00 P. M. - 4:00 P. M.—	3 hours
April 26, 1954—	1:00 P. M. - 4:00 P. M.—	3 hours
April 27, 1954—	1:00 P. M. - 4:00 P. M.—	3 hours
May 3, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
May 4, 1954—	1:00 P. M. - 5:00 P. M.—	4 hours
Total		29 hours

(c) That J. P. Balser, Expense Bill Clerk, and A. T. Murphy, Jr., Switching Clerk, be paid the equivalent number of hours at overtime rate that they would have earned on their respective positions had Gab not been arbitrarily assigned to handle work normally attached to their positions as set forth in Section (b) hereof, i.e., Balser 52 hours and 30 minutes and Murphy 29 hours.

EMPLOYEES' STATEMENT OF FACTS: In the Carrier's Local Agent's Office at New Orleans as of the date this dispute arose in March 1954 there were approximately 20 clerical positions subject to the Scope Rule of our currently effective Agreement with the Carrier revised as of September 1, 1951.

All positions in this Office are filled pursuant to rules of our Agreements, hence it can be said that workers are assigned to positions that are bulletined when applied for by the employees with due regard to their seniority, fitness and ability under Rule 7 captioned "Promotion, Assignment and Displacement," Rule 8 captioned "Seniority Rights," and Rule 9 captioned "Vacancies—Bulletins" of our General Rules Agreement.

Among the positions in the Local Agent's Office are:

Expense Bill Clerk—5 day position—rate, \$13.38 per day—hours of assignment, 8 A. M.-5 P. M. with Saturday and Sunday as designated rest days—assigned to J. P. Balser.

The normal duties assigned to this position are making freight bills and putting them in numerical order. Employees' Exhibit No. 1.

Settlement Clerk—5 day position—rate, \$14.28 per day—hours of assignment, 8 A. M.-5 P. M. with Saturday and Sunday as designated rest days—assigned to Sidney G. Gab.

The normal duties assigned to this position are paying loading, unloading, and tollage to various consignees and consignor on import and export traffic. Employees' Exhibit No. 2.

Switching Clerk—5 day position—rate, \$13.38 per day—hours of assignment, 8:30 A. M.-5:30 P. M. with Saturday and Sunday as designated rest days—assigned to A. T. Murphy, Jr.

The normal duties assigned to this position are making switching settlement statements, paying switching charges of other carriers, making switching bills, mailing out freight bills and arrival notices and answering telephone. Employees' Exhibit No. 3.

With application of the Forty Hour Week Rules of the March 19, 1949 National Agreement, effective September 1, 1949, the Carrier closed the Local Freight Office at New Orleans and changed the week day assignment of the clerical forces from a 6-day week Monday to Saturday, inclusive, to a 5-day week Monday to Friday, inclusive.

For some time prior to the Employees filing the instant claim on March 30, 1954, Carrier unilaterally shifted employees off their regular assignments to assist clerks on other desks to avoid paying overtime to the regular assignee on the job to perform the work on his desk or assign sufficient force to meet such situations, particularly was this practiced in the forepart of the week, Mondays and Tuesdays, on the Expense Bill Clerk's desk (Balser) account no Expense Bill Clerk working on Saturdays or Sundays. To meet such situation the Settlement Clerk, Mr. Gab, was taken off his regular assignment, as such, to assist Balser with the work of handling expense bills to avoid overtime expense that Carrier would otherwise incur for services of Balser to the extent of the number of hours that Gab handled work normally attached to Balser's desk.

"(b) A 'Temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time involved.

"(c) Assisting a higher rated employe due to a temporary increase in the volume of work does not constitute a temporary assignment."

is to do an injustice to carrier and employes.

Rule 47 means just what it says—and no more—to preserve rates. Clerk Gab was paid his (higher) rate while assisting Clerks Balser and Murphy, although he was not "temporarily" or "permanently" assigned to either of those positions—only to assist them. He did not assume the duties or responsibilities of such jobs but merely assisted due to the volume of work on certain dates under provisions of paragraph (c) of Rule 47.

Instead of employes being prohibited from assisting each other in order to keep certain work on a current basis, there are a number of rules in the schedule that positively contemplate and require such assistance and cooperation. Rule 47—Preservation of Rates—mentioned above, is one. In addition, the schedule agreement between the parties also contains Rule 54 providing for certain sick leave allowances in case "where the work of an employe is kept up by other employes without cost to the carrier". This rule contemplates that work will be kept up by fellow employes during regularly assigned hours in the absence of the sick employe. Any other meaning would make the sick leave rule ineffective. Also, there are paragraphs (a) and (b) of Article 10 of the National Vacation Agreement for non-operating employes, dated December 17, 1941, which are also a part of our agreement with the Brotherhood. They provide:

"(a) An employe designated to fill an assignment of another employe on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater; . . .

"(b) Where work of vacationing employes is distributed among two or more employes, such employes will be paid their own respective rates. However, not more than the equivalent of twenty-five per cent of the work load of a given vacationing employe can be distributed among fellow employes without the hiring of a relief worker unless a larger distribution of the work load is agreed to by the proper local union committee or official."

These provisions show that the parties understood it was proper to have employes assist one another without violating the "absorbing overtime" rule which appears in most non-operating agreements.

This claim is strictly an attempt to collect a penalty merely for penalty's sake, and to secure a new rule.

Claim should be denied and this Division is earnestly requested to so hold.

All data submitted herein are known or have been made known to representatives of claimant by correspondence or in conference, as is evidenced by Exhibits 1 to 16 attached hereto and made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 30, 1954 the Local Chairman presented a claim for a day's pay for March 3rd and March 9th, 1954 in favor of claimants Gab and Balser, and a day's pay for claimants Gab and Murphy on March 29, 1954. These claims were denied and an appeal was then taken to the Carrier's Superintendent, who likewise denied the claim on April 22, 1954.

On May 14, 1954 a further appeal was made by the General Chairman to the Carrier's Assistant to the President, and on July 20, 1954 the General Chairman wrote:

"I * * * will amend our claim to apply to Gab under Rule 38 for the entire time and for Balser and Murphy for 5 hours overtime."

Then on August 3, 1954 the General Chairman sought to amend the claim to include the various dates now stated in the Brotherhood's ex parte submission.

Carrier did not accept the amendment and again on April 18, 1955 affirmed the prior denials of the claim as originally filed. The matter was then referred to this Board.

At the outset, Carrier objects to our consideration of any claim other than the one originally made and we sustain this objection.

Rule 25 of the parties' Agreement provides:

"Disputes in regard to the interpretation or application of agreements between the parties hereto shall be handled by one or more duly accredited representatives, first with the immediate supervisory officer and if not satisfactorily settled, shall be appealed in the order of succession up to and including the highest officer designated by the Carrier to whom appeals may be made."

The record shows that the only claim that was handled on the property was the one for 2 days' pay for Mr. Gab and Mr. Balser for work done on March 3rd and 9th, 1954 and one day's pay for Mr. Gab and Mr. Murphy for work done on March 29th.

Although the General Chairman did on August 3, 1954 attempt to amend the claim to include additional dates, the Carrier did not waive the provisions of Rule 25. It consistently refused to recognize any claim other than the one initially presented and processed on the property.

This Board has consistently ruled, absent special circumstances, that it will only consider the original claim, devoid of new matter requesting additional monetary adjustment (Award 7445, Shugrue; Award 6692; Leiserson).

Accordingly, this Board, only having jurisdiction over the claim as originally made on the property, is therefore limited to a determination of that claim.

This dispute results from the Carrier's suspension of Mr. Gab from his regularly assigned settlement clerk position during regular hours to assist Mr. Balser, the expense bill clerk, and Mr. Murphy, the switching clerk. These three positions and the normal duties assigned are:

Position	Incumbent	Duties
Expense Bill Clerk	J. P. Balser	making freight bills and putting them in numerical order.
Settlement Clerk	Sidney G. Gab	paying loading, unloading and tollage to various consignees and consignors on import and export traffic.
Switching Clerk	A. T. Murphy, Jr.	making switching settlements statements, paying switching charges of other carriers, making switching bills, mailing out freight bills and arrival notices and answering telephone.

The clerical operation at the local freight agent's office at New Orleans was, with the institution of the 40 hour week, changed from a six day work

week, Monday through Saturday, to a five day work week, Monday through Friday. Due to an accumulation of work over the weekend, the work generally performed by claimants Balser and Murphy increased with a portion of the increased work taken over by claimant Gab. The expense bill clerk and the switching clerk simply had more work than they could handle. Since the work had to be performed, Mr. Gab was suspended from his regular position to assist Mr. Balser and Mr. Murphy at the time involved.

Since these two employees worked on a full 8 hours on each of their work days, they would have had to perform this additional work on an overtime basis but for the assistance furnished by Mr. Gab. Clearly, the effect of suspending claimant Gab from his work during regular hours to assist in the work of the other two clerks, was to absorb overtime. As we have said "purpose or intent is not already determinable. One test is to ask what is the natural result of the thing done" (Award 3301, Simmons).

When a position is worked by one regularly assigned to another position it would appear there was some need for his services. Couple this to the fact that the regular incumbent was also on duty makes it obvious that but for the assistance rendered by the other, the regular man would be on overtime.

"The rule has been consistently interpreted and construed, over the years, to prevent Carriers from suspending employees from their bulletined and assigned positions for the purpose, or with the effect, of absorbing overtime. The overwhelming weight of authority sustains that proposition. For comparative purposes, see Awards 2695, 2823, 4500, 4646, 5105, 7094" (Award 7346, Coffey).

The Carrier asserts there is no showing that the work done by Mr. Gab for the expense bill clerk and switching clerk would otherwise have been done on an overtime basis. It cites Referee Robertson in Award 5625:

"* * * In the absence of any evidence to the contrary, prior awards of this Board appear to raise a presumption that overtime is absorbed by suspending an employee from his regular assignment to work another over an extended period. However, the presumption disappears in the light of evidence and in this instance Carrier shows by affirmative evidence that the work of Claimant's position * * * could have been permitted to accumulate * * * and that it would not have been necessary to have ordered overtime if Claimant had not been temporarily assigned to the lower rated position. It follows that in this instance the effect of the temporary assignment was not to absorb overtime and therefore, a denial award is required."

However, it is to be observed that this record is barren of any real evidence that the work of the employees involved "could have been permitted to accumulate" and that it would not have been necessary to order overtime. Hence, it is appropriate for us to assume that the overtime was absorbed and in this connection it is particularly noteworthy that it appears to have been a regular and steady practice to utilize Mr. Gab's services in assisting the other clerks following the weekends when the freight agent's office was closed.

Rule 38 involved in this case is the same as the one that was involved in our Award 6015 (Messmore). There we said:

"Rule 38, relied upon by Employees, is clear and unambiguous. No exceptions are to be found therein. That its terms encompass overtime absorbed by an employee suspended during regular hours on the position of another employee as well as his own position, is no longer an open question. We have expressly so held. Award 2823. Other decisions placing a like construction upon the rule sustaining claims based upon its alleged violation by reason of a suspended employee having absorbed overtime on a position other than his own are so numerous that they hardly require citation. * * *."

"Starting with our Award No. 2346, and continuing to the present time, we have uniformly held that to require an employe to suspend work on his regularly assigned position in order to work on another position, except in emergencies, is considered to be a suspension of work to absorb overtime in violation of the rule prohibiting such action."

It appears from the record that Mr. Gab was not harmed in any respect. He worked his regular hours although on March 3rd and March 9th he put in 4 hours helping the expense bill clerk and on March 29th, 4 hours helping the switching clerk. He suffered no loss. Actually he gained, since he was paid a higher rate. He is not entitled to further compensation (Award 6618, Robertson). However, Mr. Balser, the expense bill clerk, is entitled to compensation for the total of 8 hours put in by Mr. Gab on March 3rd and March 9th, and Mr. Murphy is entitled to compensation for the 4 hours put in by Mr. Gab on March 29th. For this time lost they are to be paid at pro rata rates (7094, Carter; 4646, Connell; 7346, Coffey).

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 Carrier violated the Agreement as stated in the Opinion.

AWARD

Claim of J. P. Balser for 8 hours and A. T. Murphy for 4 hours sustained with payment to be made on pro rata basis in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of January, 1958.