

Award No. 9583

Docket No. CL-8988

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that The Ogden Union Railway and Depot Company violated the existing Agreement

(a) When on Sunday, June 19, 1955 it required Clerk Robert M. Draper to suspend work on his assigned position as Yard Clerk and required him to work Office Boy position, and

(b) That Robert M. Draper be paid the rate of Office Boy, \$11.656 per day, for work performed on that position, in addition to Yard Clerk rate \$14.344 per day which he has already been paid.

EMPLOYEES' STATEMENT OF FACTS: Mr. Robert M. Draper was regularly assigned, in compliance with all applicable rules of the existing agreement, to Yard Clerk position No. 7-118, rate \$14.344 per day, hours of assignment from 12:01 A. M. to 8:00 A. M. daily, with Monday and Tuesday assigned rest days.

At 12:01 A. M., Sunday, June 19, 1955 Mr. Draper reported for work at the Yard Office preparatory to performing his regularly assigned duties on Yard Clerk position No. 7-118, at which time he was instructed and required by his supervisor to vacate his position of Yard Clerk and work the shift on Office Boy position 15-4, daily rate \$11.65.

Before taking up his duties on the Office Boy position Mr. Draper protested that he had not made written request to be "rearranged" in line with rules, regulations, interpretations and written instructions. Notwithstanding, Mr. Draper complied with the orders issued by his superior and worked the Office Boy position.

The assigned duties on the position of Office Boy consumed the full eight hours of Mr. Draper's time. No other class of work was performed by him during the shift named in this claim. He did not perform any Yard Clerk work nominally assigned to his own yard clerk position or to any other yard clerk position.

Even though this claim was not barred by the time limit rule and the Board had jurisdiction to decide it on the merits, it could not sustain the claim here made except by amending the contract and writing into it language to provide for the payment claimed.

The claim in this case is not unlike the claim recently decided by this Board in Award 7365 (Referee LeRoy A. Rader). In that case an employe worked eight hours and, during the employe's tour of duty, performed work on another position. In Award 7365 this Board held:

"Under the facts here presented as applied to the rules of the Agreement we are of the opinion that the work performed by Claimant on the days in question was not in violation of rules cited in support of this claim.

The work, we consider, was of a nature which she could be assigned to do if necessary under the duties of her position. Also, the record shows that she was paid the higher rate of her regular position.

On the question of the rule governing absorbing of overtime we do not think that a sufficient showing has been made to entitle the Claimant to a sustaining award. No definite proof of this proposition is presented. See Awards 7167, 7185, 7312 and other awards of this Division on the application of like rules.

We think this claim lacks merit and should be denied."

To the extent the Board should hold that it has jurisdiction to decide this claim on its merits the claim should, the Carrier submits, be denied, because support for the additional day's pay here claimed cannot be found in any provision of the effective agreement, and it is not within the Board's authority to write a rule into the contract. Only by eliminating Rules 3 and 28 and writing substitute rules could this claim be sustained, and that is a function reserved by the Railway Labor Act to the parties who wrote the contract.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known by the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a companion case to Award 9582, the circumstances of which are practically identical; it therefore requires the same conclusions.

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 Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of October, 1960.