

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

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

FORT WORTH AND DENVER RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5731) that:

(1) Carrier violated the Clerks' Agreement when it in effect abolished Mr. J. H. Withrow's position of Day Yard Clerk, Wichita Falls, Texas, Monday, November 4 and Tuesday, November 5, 1963, and did not assign anyone to work that position on those days and required Mr. Withrow to work Car Service Clerk's position instead.

(2) The Carrier now be required to pay Mr. J. H. Withrow an additional day's pay at the Day Yard Clerk's rate for being withheld from his assignment on that position on Monday and Tuesday, November 4 and 5, 1963.

EMPLOYEES' STATEMENT OF FACTS: On Monday and Tuesday, November 4 and 5, 1963, Mr. J. H. Withrow occupied the assignment of Relief Clerk at Wichita Falls, Texas. This position relieved the Index Clerk on Sunday, hours 3:00 P. M. to 12 midnight; relieved the Day Yard Clerk on Monday and Tuesday, hours 12 midnight to 9:00 A. M., and relieved the Night Clerk on Wednesday and Thursday, hours 12 midnight to 8:00 A. M.

On Monday and Tuesday, November 4 and 5, 1963, Mr. E. S. Huffman, Car Service Record Clerk in Wichita Falls freight house, with assigned hours from 7:00 A. M. to 4:00 P. M., was absent because of illness. Relief Clerk J. H. Withrow, whose assignment included relieving the Day Yard Clerk position on Monday and Tuesday from 12 midnight until 9:00 A. M., was not allowed to work his regular assignment. Mr. Withrow was required to work the Car Service Record Clerk's position on these dates.

Mr. Withrow did not request assignment to the higher rated Car Service Record Clerk's position. As shown in Employees' Exhibit No. 8, Mr. Withrow had no choice as to whether or not he would work the Car Service Clerk's position and did not protest this change because he did not want to risk a charge of insubordination by refusing the assignment.

Mr. Withrow relieved Index Clerk on November 3, 1963 from 3:00 P. M. to 12:00 midnight and after he was released from Car Service Record Clerk's position at 4:00 P. M. on November 5, 1963, Mr. Withrow returned to work on his regular assignment at midnight on the Night Clerk's position and worked until 8:00 A. M., November 6, 1963 and was paid pro rata rate for all of this service.

Mr. Withrow's assigned position of Day Yard Clerk was not filled on November 4 and 5, 1963.

Mr. Huffman, who was absent because of illness on these dates, was not paid for sick leave.

Attached as Employees' Exhibits Nos. 1 through 7 are copies of correspondence in this case which was handled up to the Assistant to General Manager (Labor Relations) the highest officer of the Carrier to whom appeals are made on the property.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Mr. E. S. Huffman, Car Service Record Clerk, assigned to work 7:00 A. M. to 4:00 P. M., rate \$20.03 a day, was unable to fulfill his assignment on November 4 and 5, 1963 due to his own illness. He was, therefore, absent from duty on those two dates. Relief Clerk J. H. Withrow, the claimant, whose assignment included relieving the day yard clerk position, 12:00 midnight to 9:00 A. M., rate \$19.03 a day, on Monday and Tuesday, November 4 and 5, was used on the higher-rated Car Service Record Clerk position in the absence of the regular incumbent, Mr. E. S. Huffman, who was off duty account his own illness.

(Exhibits not reproduced.)

OPINION OF BOARD: On November 4 and 5 the Car Service Record Clerk was absent due to illness. Since there were no qualified extra men available, Carrier advanced Claimant to fill the position. Claimant's assignment was blanked.

The Clerks' contention that Carrier was obligated to fill Claimant's job is invalid. It is within management's prerogative to fill, or not to fill, a position unless some rules restrict this right. Awards 14253, 12358, 13175. Carrier's use of Claimant on the higher-rated job was proper and in line with past practice.

The Employees did not deny Carriers officer's statement on the property that:

"It must be conceded by you that it has been the accepted practice for many years to advance the incumbents assigned to lower-rated positions to higher-rated positions when necessary to fill such job due to vacation, illness, etc. of the assignees when no qualified extra clerks were available."

Once a practice is established and accepted by both parties in the application of the agreement, neither party can unilaterally change or abandon that practice. Awards 14229, 10585, 7806.

Rule 46 — Absorbing Overtime — does not support the claim. To find a violation of the rule the record must contain probative evidence showing either (a) that the Carrier suspended an employee during his regularly assigned hours to equalize or absorb overtime which he had already earned, or (b) that an employee may not be taken from his regular assignment and used on work of another position where it would result in depriving the employee of the other position of overtime which would otherwise have accrued. Awards 14952, 13218, 11406.

No such evidence is present in this case. Again, Claimant was used as had been the practice.

Rule 35 contemplates the use of an employee as in this instance and provided the method for the calculation of his pay.

Claimant received the highest rate of pay.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of December 1966.