Award No. 870
Docket No. 864

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Robert T. Drake when award was rendered.

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Railroad Yardmasters of America that:

> Yardmaster A. R. Siebert, Herington, Kansas, be allowed one day's pay at the time and one-half Yardmaster rate account an employe outside the scope of the effective Yardmaster Agreement performing Yardmaster work on October 20, 1951, the regularly assigned rest day of Yardmaster A. R. Siebert.

EMPLOYES' STATEMENT OF FACTS: On October 20, 1951 Clerk Z. W. Hall, an employe without Yardmaster seniority was used to fill a Yardmaster vacancy at Herington, Kansas, in violation of Article 1 of the effective Yardmaster Agreement.

Yardmaster A. R. Siebert was qualified and available but was not called to fill the above mentioned vacancy.

POSITION OF EMPLOYES: The pertinent rules of the effective Yardmaster Agreement are quoted here for ready reference:

"ARTICLE 1. SCOPE.

SECTION 1.

> This agreement governs rates of pay, hours of service and working conditions of yardmasters. Except as otherwise agreed, the term, "yardmaster," as used herein, means yardmasters of all grades, including relief and extra yardmasters, but not including footboard yardmasters."

"ARTICLE 2. BASIC DAY.

> Eight consecutive hours' work or less shall constitute a day except in terminals where there is less than continuous yardmaster service. In such terminals assignments may be for eight hours within a spread of nine hours. Time worked in excess of eight hours will be considered overtime and paid for on the minute basis at the rate of time and one-half on positions covered by this agreement.

Time consumed in making transfers shall not be considered as overtime. Such transfer time shall not regularly exceed thirty (30) minutes.

Any yardmaster requesting relief before working eight hours will be paid only for time actually worked."

"ARTICLE 3. RELIEF DAY.

(b) If a yardmaster is required to work his rest days, he will be paid therefor at the rate of time and one-half in addition to his monthly rate."

"ARTICLE 7. SENIORITY.

(g) Yardmasters having once established seniority under this agreement must, while they are in the service of the Carrier in any capacity, thereafter protect all yardmaster service available to them or forfeit such seniority, except this requirement will not apply to those on bona fide leaves of absence or holders of official positions with the company or organization." (Underscoring ours)

All correspondence had during the progression of this claim on the property is quoted here chronologically:

"RAILROAD YARDMASTERS OF AMERICA
537 South Dearborn Street
Chicago 5, Illinois

Kansas City, Mo.
September 10, 1951

Mr. B. R. Dew, Superintendent
C. R. I. & P. R. R.
14 Wyoming
Kansas City, Mo.

Dear Sir:

It has been brought to my attention that extra Yardmaster Ward at Harrington, Kansas, is being required, while filling temporary vacancies, to work the seventh day at the pro rata rate. I think you will agree that relief or extra yardmasters used on relief jobs will take the same conditions, hours of service and rate of pay as the yardmaster relieved.

Article 1. Scope

This agreement governs rates of pay, hours of service and working conditions of yardmasters. Except as otherwise agreed, the term "Yardmaster" as used herein, means yardmasters of all grades, including relief and extra yardmasters but not including footboard yardmasters.

Article 9. Paragraph B.

Temporary vacancies of unknown duration shall be protected on a day to day basis by the senior qualified and available yardmaster not working as such for a period of five (5) days, after which the senior qualified yardmaster making application for same shall be assigned. When other qualified yardmasters, not working as such, are available, yardmasters shall not be permitted to work two tricks in a twenty-four (24) hour period except when changing from one shift to another.

Paragraph C.

The senior qualified yardmaster making written application for same will be immediately assigned to temporary vacancies known to be more than five (5) days duration. In the event no application is received for such vacancy, the senior qualified yardmaster not working as such shall be assigned.

Article 3. Paragraph B.

If a yardmaster is required to work his rest days, he will be paid therefor at the rate of time and one-half in addition to his monthly rate.

While Extra Yardmaster Ward is working a temporary vacancy and is used on the seventh day as a yardmaster, he should be paid at the overtime rate. Also should an extra yardmaster be used on one trick and doubled over to cover the next trick which would be 16 hours, he should be paid for the second eight (8) hour shift at the overtime rate.

I will be glad to be advised that you have corrected this situation at Harrington before it is necessary to file claims.

Respectfully yours,

N. L. Eberts
Grand Vice-President
Railroad Yardmasters of America

cc: Mr. M. G. Schoch
Mr. R. Randolph, Gen. Chairman
Mr. A. R. Siebert"

"CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

B. R. Dew
Superintendent

Kansas City 7, Mo.
September 13, 1951

File A—103—50

SUBJECT: Yardmasters' Agreement.

Mr. N. L. Eberts,
Grand Vice-President
Railroad Yardmasters of America,
110 South Van Brunt,
Kansas City, Missouri

Dear Sir:

Acknowledging your letter of September 10th, relative extra yardmaster Ward, Herington, Kansas, being required, while filling temporary vacancies, to work the seventh day at pro rata rates.

I am glad you brought this to my attention, as I was not aware of this situation prevailing at that terminal and assure you that if such condition exists it will be corrected.

Yours truly,

/s/ B. R. Dew
Superintendent"

BRD*wk

"RAILROAD YARDMASTERS OF AMERICA
537 South Dearborn Street
Chicago 5, Illinois

Kansas City 1, Mo.
January 2, 1952

Mr. B. R. Dew, Superintendent
C. R. I. & P. R. R.
14th and Wyoming
Kansas City 7, Mo.

Dear Sir:

I have copy of time claim made by Yardmaster A. R. Siebert of Herington, Kansas, dated October 20, 1951 account yard clerk working as yardmaster on date mentioned. Neither has this claim been paid, nor has Mr. Siebert received your rejection.

I have information that Mr. G. F. Ward assigned to position as extra yardmaster under Train Master Bollings. Bulletin dated July 20, 1950 has not been available to fill vacancies.

I think you will agree that it is the Company's obligation to see that enough extra yardmasters are available to protect vacancies.. This apparently is not understood by your forces at Herington.

You will agree also that only yardmasters holding seniority as such are permitted to perform service as yardmasters.

Will you please allow claim mentioned or give me your rejection that I may handle further.

Yours truly,

N. L. Eberts
Vice President
110 South Van Brunt
Kansas City 1, Mo.

cc: Mr. A. R. Siebert"

"RAILROAD YARDMASTERS OF AMERICA
537 South Dearborn Street
Chicago 5, Illinois

Kansas City, Mo.
March 11, 1952

Mr. B. R. Dew, Superintendent
C. R. I. & P. R. R.
14th & Wyoming
Kansas City, Missouri

Dear Sir:

On January 2, 1952, I wrote you concerning time claim dated October 20, 1951 made by Mr. A. R. Siebert of Harrington, Kansas, in which the fifth paragraph reads as follows:

'Will you please allow claim mentioned 'or give me your rejection that I may handle further.'

To date, I have not received your answer.

Yours truly,

N. L. Eberts
Vice President

cc: Mr. A. R. Siebert
Mr. R. Randolph, Gen. Chairman"

"CHICAGO ROCK ISLAND AND PACIFIC RAILROAD COMPANY
Office of Division Superintendent
Kansas City, Kansas

March 17, 1952
File: H 103-25

Mr. N. L. Eberts, Vice President
Railroad Yardmasters of America
110 South Van Brunt
Kansas City 1, Mo.

Dear Sir:

Your letter of March 11th which refers to yours of January 2nd relative claim A. R. Siebert, Herington, Kansas. This became lost in the file and, therefore, I failed to answer it.

When the Yardmasters' Agreement was consummated and pursuant to understanding between their representatives and the representatives of the Switchmen's Union of North America, one position of extra yardmaster was established in each terminal and notice of establishment of such position posted at the terminal where established for a period of three days, during which time switchmen who desired to be considered for appointment to such position gave written notice of their desire, which was addressed to officer in charge.

I believe this was done at Herington and I do not feel that, under the circumstances, your Agreement has been violated because no Switchman desired to do this work; therefore, we are privileged to get someone outside the scope of the Switchmen's Agreement to perform this service.

Very truly yours,

/s/ B. R. DEW
Superintendent"

WKB:lv

"RAILROAD YARDMASTERS OF AMERICA
537 South Dearborn Street
Chicago 5, Ill.

Kansas City, Mo.
April 23, 1952

Mr. B. R. Dew, Superintendent
C. R. I. & P. R. R.
14th & Wyoming
Kansas City, Missouri

Dear Sir:

Referring to your letter of March 17, 1952, File H-103-25, concerning time claim of Mr. A. R. Siebert for one days pay October 21, 1951 account of clerk working as Yardmaster on date mentioned.

You state that bulletin was posted at Harrington for extra Yardmasters and due to no Switchman desiring this work, you are privileged to get someone outside the scope of the Switchman's agreement to perform this service. This may privilege you to allow someone outside of the scope of the Switchman's Agreement and accept written notice of their desire to be considered in appointment to position of Yardmaster, but it certainly does not privilege you to use someone who has not been appointed by bulletin as Yardmaster. The action that has been taken is clearly a violation of our agreement and the position you are taking is not in accord with our agreement.

Again I ask that you allow claim mentioned or it will be necessary to handle with Mr. Mallery for correction.

Yours truly,

N. L. Eberts, Vice President
110 South Van Brunt
Kansas City 1, Missouri

NLE:me
cc: Mr. A. R. Siebert
Mr. R. Randolph, Gen. Chairman"

"Kansas City—April 29, 1952
File: H 103-50

SUBJECT: Claim Yardmaster A. R. Siebert Herrington one day October 20, 1951 account using clerk as Yardmaster.

Mr. N. L. Eberts, Vice Pres.
RYA
110 So. Van Brunt
Kansas City 1, Mo.

Dear Sir:

This refers to your letter of April 23.

We do not feel that schedule was violated when Clerk Z. W. Hall was used as Yardmaster October 20, 1951 and the claim is declined.

Yours very truly,

B. R. Dew"

"May 11, 1952
Kansas City, Mo.

Mr. G. E. Mallery, Manager of Personnel
Chicago Rock Island & Pacific R. R. Co.
La Salle Street Station
Chicago 5, Illinois

Dear Sir:

I am referring to you for consideration the following claim made by Yardmaster A. R. Siebert of Harrington, Kansas. Claim one days pay at one and one-half time rate for October 20, 1951 account of Yard Clerk working as Yardmaster on date mentioned.

This has been handled with Superintendent Dew at Kansas City, Mo. through correspondence dated January 2, 1952, March 11, 1952, and April 23, 1952. In letter dated April 29, 1952, Superintendent Dew denied claim wherein he states:

'We do not feel that schedule was violated when Clerk Z. W. Hall was used as Yardmaster on October 20, 1951 and claim is denied.'

Certainly you will agree that only Yardmasters are permitted to perform service as such.

Superintendent Dew has stated in his letter dated March 17, 1952:

'That due to no switchman desiring this work, he is privileged to get someone outside the scope of Switchmen's Agreement to perform this service.'

This is not a claim account of not using a switchman as Yardmaster. Our claim is based on fact that Yardmaster was not used.

I have been informed that Mr. G. F. Ward was assigned to position as extra Yardmaster under Trainmaster Bolling's bulletin dated July 20, 1950. Also, in connection with this, that Ward verbally agreed to work all Yardmaster vacancies at Harrington at straight time rate if Bolling would not bulletin for additional extra Yardmasters. When this matter was brought to my attention, I wrote to Superintendent Dew under date of September 10, 1951 stating that our Agreement was being disregarded by his forces at Harrington by requiring or allowing extra Yardmaster Ward to fill temporary vacancies and work the seventh day, also double from one trick to another at pro rata rate. In letter dated September 13, 1950 Superintendent Dew stated that if such condition existed, it would be corrected. Shortly after that time seems extra Yardmaster Ward was not available for the extra Yardmaster work. Nevertheless, after the above claim was presented, bulletin was posted for extra Yardmasters at which time I am informed some number of bids were received from Yardmen. Apparently Superintendent Dew had been misinformed as to no switchmen desiring this work.

I will look forward to your reply that you have instructed your forces at Harrington to allow claim.

Yours truly,

N. L. Eberts, Vice President
110 South Van Brunt
Kansas City, Mo.

NLE:ME
cc: Mr. M. G. Schoch
Mr. A.: R. Siebert
Mr. R. Randolph, Gen. Chairman"

"CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

La Salle Street Station
Chicago 5, Ill.
May 22, 1952
File: L-128-15

Mr. N. L. Eberts, Vice President
Railroad Yardmasters of America
110 South Van Brunt
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of May 11 appealing claim in behalf of Yard master A. R. Siebert for one days pay

at time and one-half account yard clerk working as yardmaster on October 20, 1951.

My investigation developed that on the date in question extra Yardmaster Ward was not available to perform this work due to illness, and not having an extra yardmaster available a clerk by the name of Z. W. Hall was used to fill this vacancy.

I am agreeable in order to dispose of this particular claim to pay Mr. Siebert a days pay at the straight time rate of a yardmaster at Herington. You understand the National Railroad Adjustment Board has consistently held that the penalty for time not worked in such cases should be at straight time rate.

Yours truly,

/s/ G. E. Mallery"

"Kansas City, Mo.
June 18, 1952

Mr. Guy E. Mallery, Manager of Personnel
Chicago Rock Island and Pacific Railroad Co.
La Salle Street Station
Chicago 5, Illinois

Dear Sir:

Referring to your letter dated May 22, 1952 File L-128-15 in answer to mine of May 11, 1952 concerning time claim of Yardmaster A. R. Siebert at Harrington.

Our claim for time and one half is proper and justified and is supported by Fourth Division Awards 594 and 766. Therefore, your offer to pay the claim at the straight time rate is not acceptable and we think, not proper.

Accordingly I am turning the case to the Grand Lodge for further handling before the Fourth Division of the NRAB.

Yours truly,

N. L. Eberts, Vice President
110 South Van Brunt
Kansas City, Mo.

cc: Mr. M. G. Schoch
Mr. A. R. Siebert"

Inasmuch as the Carrier elected to assign an employe outside the Scope of the effective Yardmaster Agreement to perform the work of the Yardmaster craft or class in violation of Article 1 when a Yardmaster with seniority as such was qualified and available, this claim should be allowed.

All that is contained herein has been available to the Carrier.

Oral hearing is requested.

CARRIER'S STATEMENT OF FACTS: On October 20, 1951 at Herington, Kansas, the Carrier being in need of a yardmaster, Mr. Ward, not being available to perform this work due to illness, and not having another extra yardmaster available, a clerk, Z. W. Hall, was used to fill this temporary vacancy.

POSITION OF CARRIER: An agreement between the Carrier and the employes of the Carrier represented by the Railroad Yardmasters of America, bearing an effective date of May 20, 1944, is on file with your Board and by this reference is made a part hereof.

We have carefully re-examined the articles contained in the agreement referred to above and nowhere do we find a provision that the employes will be paid for work not performed. However, under date of May 22, 1952, the following letter was directed to Mr. Eberts by Carrier's Manager of Personnel:

"May 22, 1952
File: L-128-15

Mr. N. L. Eberts, Vice President
Railroad Yardmasters of America
110 South Van Brunt
Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of May 11 appealing claim in behalf of Yardmaster A. R. Siebert for one day's pay at time and one-half account yard clerk working as yardmaster on October 20, 1951.

My investigation developed that on the date in question extra yardmaster Ward was not available to perform this work due to illness, and not having an extra yardmaster available a clerk by the name of Z. W. Hall was used to fill this vacancy.

I am agreeable in order to dispose of this particular claim to pay Mr. Siebert a day's pay at the straight time rate of a yardmaster at Herington. You understand the National Railroad Adjustment Board has consistently held that the penalty for time not worked in such cases should be at straight time rate.

Yours truly,

/s/ G. E. Mallery"

The offer of payment of the claim at the straight time rate of pay was rejected by the Organization in a letter to the Carrier by Mr. Eberts under date of June 18, 1952. In this letter the Organization demanded that the claim be paid at the punitive rate of pay.

In view of the fact that Carrier's offer to pay the claim at the straight time rate of pay has not been withdrawn, we will not argue the merits of the case. The only question here before the Board for decision is whether the penalty shall be at the straight rate or the punitive rate of pay.

In their letter of June 18, 1952 rejecting the Carrier's offer, the Organization referred to Awards 594 and 766 of this Division as sustaining their position that the penalty in this case should be at time and one-half the claimant's rate of pay.

The first of these, Award 594, is the result of a dispute on the Terminal Railroad Association of St. Louis property. The claim there was for the punitive rate of pay and the Carrier in defending itself against that part of the claim relied upon the provisions of Rule 4 (i) of its Agreement with its Yardmasters. They emphasized, in their defense, that the rule referred to "a yardmaster **who works**. . ." This is the only attempted defense by the Carrier we find in the printed record of the dispute. Further, we find, upon a thorough reading of the opinion of that Award, the Referee did not, or at least there is no evidence in the Opinion that he did, give any con-

sideration to Carrier's defense of the matter of penalty. In fact, it appears the Opinion of the Award is more intent upon establishing that there was a violation of the Agreement than dealing with the penalty involved. We believe the Referee, in that case, having sustained the claim of a violation of the Agreement merely went along with the entire claim including the request for punitive time. Not dealing specifically with the question of penalty—straight time as opposed to punitive time—we do not believe Award 594 established a precedent to be followed by your Board in the adjudication of disputes involving that question.

The second Award relied upon by the Organization—Award 766—is the result of a dispute on the property of the Seaboard Air Line Railroad Company. Again, a study of the printed record of the dispute reveals that, although the Carrier in its "Position of Carrier" cited several Awards by various referees outlining the fact that the right to work is not the equivalent of work performed so far as the overtime rule is concerned, there is no evidence in the Opinion of the Award that the Referee gave any consideration to Carrier's citation of these Awards or to Carrier's attempted defense against a punitive rate of pay. In fact, nowhere in the Opinion is there any attempt made by the Referee to justify his allowance of the punitive rate of pay.

We further point out that part of the Dissenting Opinion of Carrier Members to Award No. 766 reading:

> "Part 2 of the award is patently erroneous. Article 3 (a) of the agreement provides for penalty payment only when the rest day is worked by the occupant of the position. In this case if the yardmaster was needed a relief yardmaster would be used and paid at the pro-rata rate of the position. This part of the award is in direct oppostion to the provisions of the agreement and numerous awards of this Board as pointed out by the carrier in its Ex Parte Submittal."

It is quite clear from the foregoing that Award 766 does not establish a pattern to be followed in this case. In fact, it must be held that there is serious doubt as to the basis of sustaining the claim in that dispute. Again, as in Award 766, there is no handling of the specific question of penalty and as a result we believe the Award to be of little value here.

There have been a number of disputes before the several Divisions of the National Railroad Adjustment Board in which the matter of penalty has been before them for decision. The Opinions of many of these Awards arising from these disputes detail a thorough probing of this question and contain ample facts of a nature similar to these before this Board to form a standard upon which a decision in this case may be founded. One of these is Award 4244 of the Third Division decided by Referee Carter. This Award contains in its very well reasoned Opinion ample justification for its holdings. Referee Carter in Award 4244 said:

> **"OPINION OF BOARD:** There is no dispute as to the facts in the present case. Claimant was improperly denied the right to work on his rest day, the work having been given to one not covered by the Telegraphers' Agreement. The only question is whether claimant should be compensated at the pro-rata or time and one-half rate of the position.
>
> **The right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned.** Whether the overtime rate be construed as a penalty against the employer or as the rate to be paid an employe who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. **One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing**

that makes the higher rate applicable. One who has been deprived of work is not entitled to recover penalties accruing to the employe who actually performs the work where such penalties arise from the fact of his actually performing it. They are personal to such employe and are not a part of the loss sustained by the employe deprived of the work. **The latter's loss is the rate the regularly assigned occupant of the position would have received if he had performed the work in the regular course of his employment.** The reasoning contained in Award 3193 supports this holding and is reaffirmed. See Awards 2695, 3049, 3222, 3251, 3271, 4196. Awards by other referees to the same effect are: 2346 (Burque), 2823 (Shake), 2859 (Youngdahl), 3232 (Thaxter), 3371, 3375, 3376 (Tipton), 3504, 3505 (Douglas), 3609 (Rudolph), 3745, 3770, 3837 (Wenkle), 3876, 3910 (Yeager), 3890 (Swain), and 4037 (Parker).

The position of the Carrier is correct. An affirmative award at the pro-rata rate is in order." (Emphasis added).

This award has been reaffirmed in a number of subsequent awards by various Referees and may be said to have settled the matter of penalty in disputes similar to the instant case.

How then, do the facts of the instant case compare to the pattern outlined by Referee Carter?

First, it is admitted by the Carrier that the claimant may have had the right to perform the work but, "The right to perform work is not equivalent of work performed." Therefore, the claimant in this case who is making claim for payment as though he had performed the work is forwarding a claim for which there is no base.

It is fully understood that the claimant in this case performed no work; as a result, the statement in Award 4244 reading, "One who claims compensation for having been deprived of work that he is entitled to perform, has not done the thing that makes the higher rate applicable", applies very well to this dispute. We believe the quoted statement above is one of its most important and also most well reasoned statements.

The Award goes on to say, "The latter's loss (in this case, the claimant's loss) is the rate of the regularly assigned occupant of the position would have received if he had performed the work in the regular course of his employment." Here we refer the Board to Carrier's Statement of Facts wherein we have shown that the regular occupant of this position would have been Extra Yardmaster Ward had it not been for his illness. Extra Yardmaster Ward would have been paid at the straight time rate of pay—again proving that the proper penalty in this dispute must be the straight time rate of pay.

Before concluding our submission, we direct the Board's attention to the many awards by the various Referees relied upon by Referee Carter as support of his holdings in Award 4244. We would add that these findings have been, time and again, reaffirmed by subsequent Referees deciding disputes of a similar kind.

For the foregoing reasons, we respectfully petition the Board to deny the claim.

It is hereby affirmed that all data herein contained is, in substance, known to the Organization and is hereby made a part of the question in dispute.

Oral hearing is desired.

(Exhibits are not reproduced).

OPINION OF BOARD: The issue in this case is simple and clearcut. The claimant, Yardmaster A. R. Siebert, was regularly assigned as Yardmaster at Herington, Kansas. October 20, 1951, was his regularly assigned rest day. Extra Yardmaster Ward, who was regularly used to fill Siebert's assignment on Siebert's rest day, was not available on October 20, 1951, due to illness. Another extra Yardmaster not being available, the Carrier called and used Z. W. Hall, a clerk, in place of Ward, to work the regularly assigned rest day of Mr. Siebert's position, October 20, 1951. Hall was paid for such service of eight hours at the Yardmaster rate of pay.

The Carrier offered to, and is still agreeable to, pay Siebert on a straight time basis. The Agreement provides: "If a yardmaster is required to work his rest days, he will be paid therefor at the rate of time and one-half in addition to his monthly rate." It is clear that had Siebert worked he would have received pay at the rate of time and one-half.

The Carrier has declined to make this additional payment for several reasons:

1. National Railroad Adjustment Board decisions have held that the penalty for time not worked in such cases should be at straight time rate.

2. One who does not "work" should not get a penalty rate.

3. The loss of the person deprived of work is the rate the regularly assigned occupant of the position would have received if he had performed the work in the regular course of his employment.

The Organization presents the following arguments:

A. Fourth Division Awards 594 and 766 support a time and one-half rate.

B. Third Division awards are in conflict.

C. For a breach of contract the measure of damages is what a man would have received had the contract not been violated.

D. Statement 2 above of the Carrier's contentions is true but irrelevant.

E. Statement 3 above of the Carrier's contentions is not true because in contract law a person's damages are measured by his loss and not by the loss of someone else.

F. In industries other than the railroad industry the rule is that a claimant should receive damages or compensation on the basis of what he would have earned and this is reflected in various arbitration awards.

The decision of the Board is for the Organization and the points made by the two parties will be taken up seriatim.

1. The Carrier's position that many awards have been made sustaining its point of view is correct and these have been clustered particularly in the awards of the Third Division, the awards of the Fourth Division being few and in conflict. Fourth Division Awards are 594, 766 and 802. Numerically on the Third Division the awards and the Referees deciding them are greatly in favor of the Carrier's position. Among the best considered are Awards 4244 (Carter), 4447 (Wenke), 4571 (Whiting), 4728 (Robertson and 5978 (Messmore). First and Second Division awards appear to be inconclusive.

2. The statement appearing in many of the awards that one who does not "work" should not get the penalty rate assumes that a rate of time and one-half for overtime is punitive or a penalty. It might equally be called liquidated damages to the employe or compensation for his added burdens. The time and one-half rate usually has both aspects—a deterrent to the Carrier and an award for especially laborious service to the employe. As a matter of law the principle stated by the Carrier has no basis in the books outside of the awards, particularly on the Third Division.

One thing should be noted, however, and that is that the Agreement does not squarely cover the controversy. It does not expressly tell us what a man should get who does not work. It only tells us what he would get if he did work. Contract law has always provided the span over the gap, that is the principle that what he would have gotten is the measure of damages.

3. The rate the regular occupant of the position would have received has no more to do with the claimant's loss than the rate which would be received by someone not covered by the contract. The claimant's rate for overtime is the only rate to be considered.

A and B. As stated above, Fourth Division awards are of little help and Third Division awards are for the most part in conflict with this award.

C. A person injured in any Anglo-American jurisdiction is, so far as possible to do so by a monetary award under the law of damages, to be placed in the position he would have been had the contract been performed.

D. The Carrier's contention that one who does not "work" should not get a penalty rate is answered above.

E and F. The contentions of the Organization are borne out by what is said above and by the facts.

The position of the Organization is correct. An affirmative award at the time and one-half rate is in order.

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

The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: R. B. Parkhurst
Secretary

Dated at Chicago, Illinois, this 30th day of March, 1953.