

Award No. 1440
Docket No. CL-1431

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

**STATEMENT OF CLAIM: "CLAIM OF THE SYSTEM COMMITTEE
OF THE BROTHERHOOD THAT:**

(1) Carrier violated and continues to violate Clerks' Agreement by requiring Mrs. Dora Gaddy, whose seniority rights are confined to the Accounting Department, to relieve P. B. X. Operator, whose seniority rights are confined to the Transportation Department from 1:00 P. M. to 2:00 P. M. each regularly assigned work day.

(2) That Mrs. Gaddy shall be paid the established differential in rate of pay existing on the P. B. X. Operators' position over and above her regular rate of pay for each hour she has been required to perform work on the P. B. X. Operators' position, retroactive to December 15, 1938, and

(3) That regular P. B. X. Operator, Transportation Department, be allowed one hour's pay for each day when she has been relieved by Mrs. Gaddy, retroactive to December 15, 1938."

EMPLOYEES' STATEMENT OF FACTS: "Position identified as P. B. X. Operator is rated at \$80.20 per month, the assigned hours of service being from 8:00 A. M. to 1:00 P. M. and 2:00 P. M. to 5:00 P. M. This position is located in the Transportation Department, which in the application of seniority is a separate and distinct seniority district.

"Mrs. Dora Gaddy, classified as Office Helper, is regularly assigned 8:00 A. M. to 12:00 Noon and from 1:00 P. M. to 5:00 P. M. This position is located in the Accounting Department, which is also a separate and distinct seniority district, and the rate of pay for this position is \$2.76 per day. Effective on or about December 15, 1938 and subsequent thereto Mrs. Gaddy was required to relieve P. B. X. Operator each day between the hours of 1:00 P. M. and 2:00 P. M. on all days except Saturday, for which service she has been paid rate ordinarily applying to her position as Office Helper."

POSITION OF EMPLOYES: "The rules involved in this dispute are as follows:

'ARTICLE III—SENIORITY

'RULE 3—SENIORITY DATUM.—Employees' seniority begins at the time their pay starts in the respective seniority district and in the respective seniority group in which employed.'

29 and 30 provide for that. There was never any contention the P. B. X. operator should not be allowed a lunch period. Nor was there any complaint except that an employe from the Accounting Department was used to operate the board, whereas the committee thought some employe from the Transportation Department should have been used. There was never any contention that it made any difference to the P. B. X. operator who worked the board while she was at lunch. From the beginning this complaint has been presented as a seniority complaint, but with no contention that the regular P. B. X. operator was involved in the complaint.

"The committee complained formerly when the regular P. B. X. operator was allowed to work during her lunch period, although paid for such overtime at the rate prescribed by the agreement. They now complain because the carrier relieves her during that period. There is no question of seniority involved, as there is no other employe in her seniority group holding rights to her position. In fact she is the only employe on her roster. If she is to be relieved at all, it must be by some one from another roster.

"As to the claim for Mrs. Gaddy, no rule or practice exists under which regularly assigned employes performing service during their regular tour of duty are required to be paid at a different rate for a period of one hour, according to the nature of the work performed.

"The facts show there is no merit in the contention of the employes and it should be denied.

"Carrier's Exhibit A is attached hereto.

"Since this is an ex parte case, this submission has been prepared without seeing the employes' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission."

OPINION OF BOARD: The parties to this dispute are in agreement as to the important facts. Mrs. Dora Gaddy, whose seniority rights are confined to the accounting department, was regularly assigned to relieve P. B. X. operator, whose seniority rights are confined to the transportation department, from 1:00 P. M. to 2:00 P. M. each week day, except Saturday. Rules 3 and 5 of the Working Agreement establish and define the seniority rights of the employes. Rule 3 states that employes' seniority rights begin at the time pay starts in the respective seniority district and group in which employed. Rule 5 defines the seniority district and clearly shows that the accounting and transportation department comprise separate and distinct seniority districts. Therefore, when the carrier, assigned Mrs. Gaddy from the accounting department to perform work in the transportation department, which was in another group or class of service, carrier violated the seniority rules of the current Agreement.

It is next contended that the carrier violated Rule 39 of the Agreement which is as follows:

"PRESERVATION OF RATES.—Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced.

"A 'Temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employe. Assisting a higher rated employe due to a temporary increase in the volume of work does not constitute a temporary assignment."

The parties agree that the employe in the transportation department who Mrs. Gaddy relieved is rated at \$80.20 per month whereas the rate of pay of

Mrs. Gaddy in the accounting department was \$70.38 per month, or \$2.76 per day. Clearly, under this record, carrier violated the provisions of Rule 39 which specifically provides that, when an employe is temporarily or permanently assigned to a higher rated position, the employe will receive the higher rate while occupying such position. Mrs. Gaddy is therefore entitled to receive the higher rate of pay.

The third part of this claim asks that the regular P. B. X. operator be allowed one hour's pay for each day when she was relieved by Mrs. Gaddy. There is no claim made that the P. B. X. operator worked overtime. She worked her regular assigned hours which were from 8:00 A. M. to 1:00 P. M. and from 2:00 P. M. to 5:00 P. M., with lunch hour from 1:00 P. M. to 2:00 P. M. The claim, as far as she is concerned, is asking that she be paid for the time that she was relieved by Mrs. Gaddy, in other words, for her lunch hour. It is not disputed that a few years ago the incumbent of the position of P. B. X. operator was required to work during the lunch period, to wit, from 1:00 to 2:00 P. M. and was paid overtime therefor at the rate prescribed in the Agreement. Upon the complaint of the Chairman of the Committee representing the employes relative to the working of the P. B. X. operator during the lunch period, the overtime practice was discontinued and P. B. X. operator was assigned as set out above and she was relieved from working during her lunch hour. There is no question of seniority involved as there is no other employe in her seniority group holding rights to her position. In fact, she is the only employe on her roster. She is being paid for her regular assigned work, and does not work overtime. Under the particular facts set out in this record the P. B. X. operator is not entitled to the claim made in her behalf.

Carrier attempts to nullify the claim for compensation by contending that Rule 24, sometimes referred to as a cut-off or statute of limitations rule, bars recovery for compensation unless the claim is made within the time specified in the rule. This identical question, involving the same rule and the same carrier, was decided adversely to carrier's contention in Award 1403 and we therefore do not find it necessary to re-discuss this question.

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 Item 1 of the claim should be sustained because of carrier's violation of Rules 3 and 5; that Item 2 should be sustained because of carrier's violation of Rule 39; that Item 3 should be denied because of the particular facts set out in this record; that Rule 24 has no application in the instant case.

AWARD

Claims 1 and 2 sustained; claim 3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of May, 1941.

Dissent to Award 1440, Docket CL-1431

This award declares Rule 24 not applicable to this dispute, as had been declared in Award 1403. Award 1403 holding that Rule 24 was not a cut-off rule in that case, states that decision was reached because former Award 1060 was followed.

There was dissent to Award 1403 and reference therein to Award 1060; *reference is made thereto as expressing our dissent to the holding in the instant case.*

S/ C. P. Dugan
S/ C. C. Cook
S/ R. H. Allison
S/ A. H. Jones
S/ R. F. Ray