Award No. 4835
Docket No. CL-4844

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee.

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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

(a) Carrier violated the Clerks' Agreement and Letter of Understanding dated December 9, 1942, when it failed to pay Colleen Moore at the rate of time and one-half for service performed 4:00 P.M. to 12:00 midnight on December 31, 1948; and,

(b) Colleen Moore shall now be paid the difference between the pro rata rate she was paid and time and one-half for all time in excess of eight (8) hours, within a spread of twenty-four (24), computed from 6:00 A.M. December 31, 1948.

EMPLOYES' STATEMENT OF FACTS: Miss Colleen Moore, a so-called extra employe in the Eastern Lines Relay and PBX Office seniority district, Topeka, Kansas, was used to fill a vacancy on Messenger Position No. 324 from 6:00 A.M. to 2:00 P.M. on December 31, 1948. She was again recalled the same day, December 31, 1948, to fill a vacancy on Messenger Position No. 163 from 4:00 P.M. to 12:00 midnight, thus resulting in Miss Moore performing sixteen hours' service in a twenty-four hour period measured from the starting time of her first tour of duty, 6:00 A.M. December 31, 1948. Carrier compensated Miss Moore at pro rata rate for the second tour of duty instead of at the time and one-half rate as here claimed and as required by the rules.

POSITION OF EMPLOYES: There is in evidence an Agreement between the parties bearing effective date October 1, 1942, in which the following rules appear and there is also in evidence Letter of Agreement dated December 9, 1942, which is quoted below:

ARTICLE VI

"Section 1. Except as otherwise provided in these rules, eight (8) consecutive hours' work, exclusive of the meal period, shall constitute a day's work."

ARTICLE VII

"Section 1. Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, continuous with and outside of regular assigned hours, on any day, will be considered

rary vacancy after having completed another temporary vacancy. Regardless of what is contained in former General Chairman Meskimen's letter of December 16, 1942 (Carrier's Exhibit "A"), and of which the Carrier has no knowledge whatever until that letter was presented by the Brotherhood representatives in their submission to the Third Division in Docket CL-3994 (Award 4201), the fact remains that the employes have not and cannot present any evidence that claims of the nature involved in this dispute in behalf of off-in-force-reduction employes had either been presented to the Carrier's highest officer of appeal or were under consideration in the conference which resulted in the letter agreement of December 9, 1942. It must, therefore, be apparent to all reasonable minded persons that there was not and could not have been any occasion or reason for the parties to include so-called extra or off-in-force-reduction employes in the scope of the letter agreement, hence the term "any employe" as used in the second paragraph of the December 9, 1942 letter agreement, and upon which the employes rely for support in the instant claim, could only have had reference to **regular assigned employes**, all contentions of the employes, including Mr. Meskimen's letter of December 16, 1942, to the contrary notwithstanding. Furthermore, it is clearly evident that the Board would have found in Award 4201, upon which the Employes also rely for support of the instant claim, that the letter-agreement does not apply to so-called extra or off-in-force-reduction employes, such as the complainant in the instant dispute, who work two non-continuous assignments in any day, but for a misunderstanding as to the facts contained in the record of that dispute. There was no violation of the letter-agreement.

In conclusion, the Carrier wishes to also state that the use of a so-called extra or off-in-force-reduction employe to protect two temporary vacancies on the same date does not, as might be inferred, involve an occasional or isolated instance, but such use is frequent. It is, therefore, of the utmost importance to the Carrier that the Employes' claim does not result in the modification or revision of the agreement rules involved, thereby assessing the Carrier with greater penalties than it agreed to assume when the overtime rule of the December 1, 1929 agreement was incorporated without change in the present agreement as Article VII, Section 1. In the instant dispute the Employes are calling upon the Board to perpetuate the erroneous finding of Award 4201 in the principle involving payment for the second of two non-continuous assignments in any day by so-called extra or off-in-force-reduction employes. Clearly a sustaining award in the instant dispute would not only result in revision of the agreement rules, something which the Board has steadfastly recognized it does not have the authority to do under the Railway Labor Act, but it would also be inconsistent with the true findings of the Board in Docket CL-3994 (Award 4201) "that where an extra employe works two non-continuous assignments in any day, the Carrier may not be required to compensate him at punitive rate for the second assignment", and a finding which would there undoubtedly have prevailed but for a misunderstanding concerning the letter-agreement of December 9, 1942, as heretofore pointed out. Nor is there any support in equity for the instant claim. Surely the Employes should not be permitted to reap the continuing benefit of a finding which was plainly a mistake, and thereby saddle the Carrier with penalty payments which are definitely not required under the terms of the current agreement, or otherwise. A denying award in the instant claim is clearly indicated and the Carrier respectfully requests that the Board so find.

The Carrier is uniformed as to the arguments the Brotherhood will advance in their ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are required in reply to the Brotherhood's ex parte submission or any subsequent oral argument or briefs presented by the Brotherhood in this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant is an extra employe who was used to protect temporary vacancies when furloughed employes were not available. On December 31, 1948, she was used to protect Position No. 324 in the Relay and PBX Office at Topeka, Kansas, from 6:00 A.M. to 2:00 P.M. After completing

this tour of duty, she was used to protect a second temporary vacancy in the same office in Position No. 163 from 9:00 P.M. to 12:00 P.M., commencing at 4:00 P.M. on December 31, 1948. Claimant was paid for these two eight hour shifts at the straight time rate. She contends that she is entitled to time and one-half for the second eight hours. The Organization upon Article VI, Section 1 and Article VII, Section 1, which provide:

> "Section 1. Except as otherwise provided in these rules, eight (8) consecutive hours work, exclusive of the meal period, shall constitute a day's work."

ARTICLE VI.

> "Section 1. Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, continuous with and outside of regular assigned hours, on any day, will be considered overtime and paid on the actual minute basis, at the rate of time and one-half."

ARTICLE VII.

Employes also rely upon a Letter Agreement under date of December 9, 1942, which states in part:

> "Without repeating all of the features considered in our discussion, it seems sufficient to say that we mutually agreed that, effective December 1, 1942, the practice established by the referred to decisions of the United States Railroad Labor Board would be abandoned and that thereafter any employe who works to complete assignments on any day shall be paid the higher of the two rates, where different rates are involved, with time and one-half for the second assignment."

We think the foregoing provision, to-wit: "any employe who works two complete assignments on any day shall be paid the higher of the two rates, where different rates are involved, with time and one-half for the second assignment.", clearly includes extra and furloughed employes. We have so held in Awards 4201, 4202 and 4203, involving the identical agreement. The words "any employe" includes extra employes. We find no reason for departing from the previous holdings of this Division which we have cited. An affirmative award is in order.

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 was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of April, 1950.

DISSENT TO AWARDS 4835, 4836, 4837, DOCKETS CL-4844, 4848, 4849.

This Award cites and relies upon the erroneous interpretation of the letter agreement of December 9, 1942, contained in Awards 4201, 4202, and 4203. If

there was ambiguity concerning that letter of agreement and subsequent correspondence when presentation was made in Awards 4201, 4202, and 4203, it has been completely and thoroughly explained in this dispute and should have been given recognition.

It is not necessary to here recite the details as the Carrier's position shown above is a complete refutation of the erroneous construction placed on the letter agreement of December 9, 1942, in Awards 4201, 4202, and 4203 and here repeated. An analysis of this subsequent evidence will convince anyone that the letter of agreement applied only to regular assigned employes and required a denial of this claim.

/s/ A. H. Jones
/s/ C. C. Cook
/s/ R. H. Allison
/s/ C. P. Dugan
/s/ J. E. Kemp