Award No. 5386
Docket No. CL-5330

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee.

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Eastern Lines)

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

(a) Carrier violated the Clerks' Agreement when it failed and refused to properly compensate W. W. Fisher for service performed on October 28, 1948; and,

(b) W. W. Fisher shall now be paid the difference between $10.69 and $9.21 he was paid for service performed on Position No. 38 from 8:00 A. M. to 4:00 P. M. on October 28, 1948, and the difference between time and one-half and the straight time he was paid, $10.69 per day, for service performed on Position No. 43 from 4:00 P. M. to 12:00 Midnight the same date, October 28, 1948.

EMPLOYES' STATEMENT OF FACTS: On October 28, 1948, Mr. W. W. Fisher was regularly assigned to Caller Position No. 38 at Argentine, Kansas, rate $9.21 per day, hours 8:00 A. M. to 4:00 P. M., and worked his regular assignment on that date. Due to illness of Mr. H. A. Moffett, the regular incumbent, Roundhouse Clerk Position No. 43, Argentine, rate $10.69 per day, hours 4:00 P. M. to 12:00 midnight, was vacant from October 28, 1948, to November 2, 1948, inclusive, and Caller Fisher, under provisions of Section 10-a of Article III of the current agreement, made application to fill the Roundhouse Clerk vacancy. This resulted in Mr. Fisher working two complete assignments, or sixteen hours continuous service, on October 28, 1948. He was compensated for eight hours at pro rata rate of his Caller position for the first assignment and eight hours at pro rata rate of the Roundhouse Clerk position for the second assignment, instead of the higher of the two rates for both assignments with time and one-half for the second assignment as provided 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:

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."

tended was in conflict with the provisions of Article XI, Section 3-a. It should, therefore, be obvious that there could have been no occasion or good reason for the Carrier to correct that conflict by agreeing, as the Employes contend it did, to an understanding which had never been requested by the Brotherhood representatives and which would have also been in conflict with the meaning and intent of Article XI, Section 3-a. In other words, it is plainly unreasonable to even assume that the Carrier would voluntarily agree to an understanding in the December 9, 1942 Letter of Agreement which would require the payment of a higher rate to an employe on his regular position or assignment than was required by the schedule rules and thereby create another conflict in the meaning and intent of Article XI, Section 3-a, in order to correct the conflict which previously existed as a result of Decisions Nos. 3663 and 3705.

The service performed by the claimant Mr. Fisher on his regular assignment of caller from 8:00 A. M. to 4:00 P. M. on October 28, 1948, had no connection whatever with that which he performed from 4:00 P. M. to 12:00 P. M. on the same date on the second assignment of roundhouse clerk, an assignment which, incidentally, he obtained at his own request. Looking at the factual situation here presented in the light of the historical background of the December 9, 1942 Letter Agreement it will be readily apparent that under the practice established by USRRLB Decisions 3663 and 3705, Mr. Fisher would have been entitled to payment on both his regular caller assignment and the higher rated roundhouse clerk assignment only at the lower rate of his own assignment. The December 9, 1942 Letter of Agreement nullified the principle established by the aforementioned decisions and provided for the payment of time and one-half at the higher rate of the two positions for work performed on the second assignment. That was all that the letter agreement was intended to do and that is all that it did in the premises, all contentions of the Employes to the contrary notwithstanding. The Letter Agreement of December 9, 1942 does not support the Employes' claim for the payment of the higher rate of $10.69 of Roundhouse Clerk Position No. 43 to Mr. Fisher **for service performed on his regular position of Caller 8:00 A. M. to 4:00 P. M. October 28, 1948, the established rate of which was $9.21,** and the Carrier respectfully requests that that phase of the Employes' claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: As originally presented, this case involved two issues regarding the compensation of an employe who works consecutively two 8-hour assignments; his own, followed by a higher rated assignment which he temporarily fills. Since the submission of this case to this Board, the Carrier has agreed that the claim for time and one-half at the higher rate for the second assignment is well founded and has indicated a willingness to pay the employe accordingly. The remaining issue is to determine whether the employe is entitled to receive for his regular assignment the higher rate of the second assignment, $10.69 instead of $9.21, the rate of his regular assignment.

In other words, may a claim be sustained for a higher rate for an employe's regular assignment because he works a temporary assignment in addition to his regular assignment.

The contractual provisions relevant to the issue are Article XI, Section 3-a of the Agreement between the parties, effective October 1, 1942, and a letter agreement dated December 9, 1942, interpreting Article XI, Section 3-a, both of which are set forth at length above.

Article XI, Section 3-a, sometimes referred to as the preservation of rates rule, is concerned with the rate which the employe is to receive when temporarily assigned to another position. In substance, it provides that if the employe is temporarily assigned to a higher rated position, he shall be paid the rate of that position while occupying the position; if the assignment is to a lower rated position, he is to receive not less than the rate of his regular position. It is clear that Article XI, Section 3-a fixes the rate for

the time an employe is occupying the temporary assignment. Article XI, Section 3-a makes no provision for the rate which an employe shall receive on his regular assignment.

Since the issue here is concerned exclusively with the rate to be paid the employe for his regular assignment, we must look to the letter agreement of December 9, 1942, interpreting Article XI, Section 3-a to determine whether it supports the claim herein.

The employes contend that the language of the letter agreement is plain and unambiguous and clearly supports their position in this case. The carrier on the other hand would have us construe the letter agreement in the light of the discussions preceding its execution and other related background material. The rule is, of course, that if the language of an agreement is plain and unambiguous, this Board should not seek to determine what the actual intent of the parties was by examining and considering discussions and background preceding the execution of the agreement. It is well to emphasize again the reasons for such a rule. This Board must always place paramount the parties' agreement. Our task is primarily that of interpreting and applying the agreement of the parties. We do not have the power to write an agreement for the parties, and should we depart from the language of an agreement which is clear and unequivocal, there would be a grave risk that we would in effect dictate to the parties our own ideas of rules to govern them. Such an action would run counter to all established concepts of free collective bargaining. It is important that we remind ourselves continuously that we play a subordinate role in so far as a collective bargaining process is concerned; that of articulating and giving effect to the agreement of the parties.

While it is true the letter of December 9, 1942, is referred to as a letter of interpretation of Article XI, Section 3-a, in fact upon examination it appears to be an agreement under which the parties reached certain results through the process of compromise, the results of which go beyond the provisions of Article XI, Section 3-a.

For example, while Article XI, Section 3-a, does not deal with the rate which an employe shall receive for his regular assignment, the Carrier has admitted that sub-paragraph (b) of the third paragraph of the letter agreement does change the rate received by an employe for his regular assignment when he has worked a portion of his regular assignment in addition to all of another assignment. Our first inquiry, therefore, is to determine what the language of the letter agreement provides in so far as this claim is concerned.

The significant language of the letter agreement of December 9, 1942, which we are called upon to construe is contained in the second, third and fourth paragraphs which read as follows:

> "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 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.
>
> After reaching the understanding stated above, and in consideration thereof, we then agreed upon the following interpretation of Section 3-a of Article XI of the Agreement effective October 1, 1942:
>
> (a) An employe who works all of his own assignment and part of another, either before or after his own assignment and continuous therewith, shall be paid the rate of his own assignment with time and one-half for time in excess of eight hours.
>
> (b) An employe who works a complete assignment other than his own, and in addition a part of his own assignment either before

or after and continuous therewith, shall be paid the rate of his own assignment or that of the other assignment, whichever is the higher, with time and one-half for time in excess of eight hours.

(c) An employe who works a complete assignment other than his own, and does not work any part of his own assignment, will be paid at the rate of his own assignment or that of the other assignment, whichever is higher.

Finally, it was understood that the use of a regularly assigned employe on a temporary assignment under the provisions of Section 3-a of Article XI does not affect the rate of pay of his regular assignment or his right to return to that assignment when released from the temporary assignment."

The Organization claims that the literal language of the second paragraph and sub-paragraph (b) of the third paragraph supports its claim. The Carrier argues that the second paragraph is concerned only with the rate for the second assignment and that it should be read as though the words "where different rates are involved" are deleted. It urges that the fourth paragraph which provides that the use of a regularly assigned employe on a temporary assignment does not affect the rate of pay of his regular assignment indicates that the parties did not contemplate that the agreement would be concerned with the rate to be paid for the regular assignment, and that this is consistent with the claims discussed at the time of the conference leading up to the agreement and the entire background of the agreement.

The Carrier concedes under sub-paragraph (b) of the third paragraph of the letter agreement, the employe who works a complete assignment other than his own and a portion of his own is to receive the rate of his own assignment or that of the other assignment, whichever is higher, for the hours which he works on his own assignment. If sub-paragraph (b) is compared with the second paragraph, the only difference in the wording is that instead of the words in the second paragraph "shall be paid the higher of the two rates, where different rates are involved", sub-paragraph (b) has the words, "shall be paid the rate of his own assignment or that of the other assignment, whichever is the higher,".

While the Carrier would have us construe the second paragraph by deleting the words "where different rates are involved" so as to support its contention that the higher rate is to govern only the second assignment, it does not make such a contention with reference to sub-paragraph (b) of the third paragraph. Logically the same contention could be made as to sub-paragraph (b) of the third paragraph if the comparable language were likewise deleted, but as we read the two paragraphs, the manner in which the higher rate is specified is substantially the same, a few more words being used in sub-paragraph (b) than in the second paragraph.

The Carrier is not helped particularly by its contention that the fourth paragraph of the letter agreement supports its position. The fourth paragraph merely provides that the use of a regularly assigned employe in a temporary assignment under the provisions of Section 3-a of Article XI does not affect the rate of pay of his regular assignment. Under this paragraph the Carrier contends that the parties made clear that they were not dealing with the regular rate of the employes and that that rate was to remain in effect by the letter agreement. This contention, of course, is in sharp conflict with the Carrier's own admission that the rate of pay of an employe working a portion of his regular assignment in addition to another assignment would be affected to the extent that he would receive a higher rate. Under sub-paragraph (b) of the third paragraph, it could be higher than the rate of his regular assignment.

As we read the fourth paragraph, it would appear that what the parties intended by that language when read together with all other provi-

sions in the letter agreement is that in no event should the rate paid to an employe under Section 3-a of Article XI be less than his regular rate.

The Carrier has attempted to explain away sub-paragraph (b) of the third paragraph by contending that sub-paragraph (b) should be read together with sub-paragraph (a). When so read together, the Carrier argues, the parties intended that the primary assignment should be controlling. Thus under sub-paragraph (a) when the primary assignment is the employe's own assignment and he works only a portion of another assignment in addition to all of his assignment, the rate of his own assignment is controlling; whereas under sub-paragraph (b) when the employe works all of another assignment and a portion of his own assignment, the primary assignment being the other assignment, the rate of that assignment is controlling if it is higher.

It is true that this may have been the intent of the parties, but that we do not know. The fact is that under sub-paragraph (a) the employes surrender a right which is guaranteed to them under Section 3-a of Article XI, to be paid the higher rate of the temporary assignment for the hours worked on that assignment. It is also true that the Carrier under sub-paragraph (b) went beyond the provisions of Article XI, Section 3-a, by agreeing to a higher rate for the regular assignment. But we do not see how these results affect the construction of the second paragraph of the letter agreement. It would not be inconsistent for the Carrier to also agree, as the second paragraph seems to clearly indicate, to pay the higher rate for all of a regular assignment worked when such assignment is worked in addition to all of the temporary assignment.

Considering the language of the letter agreement in its entirety, we do not see any ambiguity in its language and hence there is no necessity to have recourse to the discussions and claims which preceded the making of the agreement. The Carrier, however, asserts that the result claimed for by the Organization is inequitable. It is true that the claim of the employes would result in the Carrier's paying a penalty in addition to the time and one-half for the second assignment.

It is because of this additional penalty aspect that we have examined the background leading up to the letter agreement although under our rules no such examination is required. This background may be briefly summarized as follows:

In *USRRLB* decisions *3663* and *3705*, the issue arose as to what compensation employes were entitled to when working two consecutive eight-hour assignments, their own and a temporary assignment, the rate of pay for the second assignment being higher than the regular assignment. The Carrier contended that the employes were entitled to receive for the second assignment the pro-rata pay for the second assignment. The Organization contended that the employe should have received the lower rate for the second assignment, but at time and a half. No dispute existed as to the rate of pay which the employe should receive for his regular assignment. The decision of the labor board upheld the Organization's contention, the board holding that the employes should be paid at time and one-half the rate of their regular assignment whether higher or lower than the rate of pay attached to the second assignment, for the time actually worked on the second assignment. These decisions conflicted with Article XI, Section 3-a, which guaranteed to an employe the higher rate of the two assignments for work done on the second assignment. The Organization expressed dissatisfaction with these decisions.

Prior to the Agreement of December 9, 1942, the Organization also contended that when an employe was required to work under Article XI, Section 3-a, to temporarily protect an assignment other than his own, he was entitled to compensation for his regular assignment not worked in addition to compensation for the temporary assignment involved.

Three claims were pending at the time the parties met, involving: (1) the performance of a complete assignment by an employe other than his

own; (2) the performance of a complete assignment by an employe other than his own in addition to a portion of another assignment; and (3) the performance of two complete assignments, the second assignment having a lower rate than the regular assignment.

The Carrier contends that the letter Agreement was a compromise under which in consideration of the Organization's willingness to concede the Carrier's right to use regular assigned employes on other assignments under Article XI, Section 3-a, without penalty of loss of time on their own assignment, the Carrier agreed to surrender the advantages to the Carrier under USRRLB Decisions 3663 and 3705.

We have considered this contention in the light of the background material above summarized. We are also convinced that the letter agreement was obviously a compromise agreement. This does not in our opinion, however, help the Carrier in resisting the claims in this case. Whatever compromise was reached was expressed in the language of the letter agreement. The background which we have examined at the request of the Carrier does not exclude the possibility that the Carrier made the concession which appears in the second paragraph of the letter agreement; namely, the paying of the higher rate of the two assignments worked for the employe's regular assignment. There is nothing in the background which indicates that the Carrier did not intend to make this concession.

In the final analysis, we are governed by the language which the parties agreed upon in the letter agreement. This language supports the claims of the employes. Although the results may be inequitable as claimed for by the Carrier, this Board is without power to disregard the plain language of the agreement.

The only remaining contention of the Carrier is its claim that it has on some 179 occasions during the several years prior to and including the year 1949, refused to pay the higher rate for both assignments. In view of the fact that there are several thousand positions under the agreement, we cannot say that the number of instances developed constitutes a substantial showing of practice. In any event it is an established rule of contract construction that a practice will be disregarded if it is in contravention of the plain provisions of the agreement. See Awards 5100, 4501 and 4664.

This case has been fully and carefully presented by both parties. After a careful examination of all of the contentions, the agreement in question, and the background factors, we must sustain the claim.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 11th day of July, 1951.