

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYES
MIDLAND VALLEY RAILROAD COMPANY**

DISPUTE.—

"Claim of D. O. Mikels, Yard Clerk, Muskogee, Oklahoma, for a minimum of Eight (8) hours' pay, six days per week, except in a week in which holidays occur, effective April 22, 1935, and for each subsequent date on which he has been compensated less than a full Eight (8) hours per day and Six (6) days per week."

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

The carrier and the employee involved in this dispute are respectively carrier and employee 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.

As a result of a deadlock, Willard E. Hotchkiss was called in as Referee to sit with the Division as a member thereof.

Prior to January 17, 1933, regularly assigned yard clerks performed overtime service outside of their regular assignments and were compensated therefor on a call basis. On January 17th, 1933, an arrangement was entered into whereby extra men would be called to take care of overtime work. This arrangement was embodied in a letter from J. W. Womble, General Manager, to C. A. Malone, Chairman of the Brotherhood of Railway Clerks, and carried into effect by instructions which Womble gave to the Yardmaster at Muskogee, to wit:

"MIDLAND VALLEY RAILROAD COMPANY,

"MUSKOGEE, OKLA., January 17, 1933.—m.

"M-8-5

"Mr. C. A. MALONE,

"Chairman, Brotherhood of Railway Clerks,

"Muskogee, Oklahoma.

"DEAR SIR: Referring to your letter of January 11 in regard to time claimed by Mr. D. O. Mikels, extra yard clerk, at Muskogee, account regular assigned yard clerk in some cases called in advance of regular work period to perform service.

"It is the position of the company that the present practice is not in violation of Article 31 of the working agreement, however, if it is your desire that extra man be called in cases of this kind and paid in the same manner as the regular man, with view of being helpful to the man protecting the extra work at the yard office and as a temporary matter, we are agreeable to calling the extra man for this work when needed.

"Yours very truly,

"(Signed) J. W. WOMBLE, General Manager.

"W-1

"ccGTL—Yardmaster—Muskogee.

"In the future until further advised, in case clerk is needed in advance of the regular starting time, please arrange to call the extra man for this work instead of the regular man.

"It is understood that Mr. D. O. Mikels is the oldest extra man and will be available for this service.

"Copy-1. File B-584.

On April 22, 1935, Mr. Malone wrote to Mr. Womble as follows:

J. W. W."

"MUSKOGEE, OKLAHOMA,

"April 22, 1935.

"B. of R. C. Case No. 5

"Mr. J. W. WOMBLE,

"General Manager, Midland Valley Railroad Company,

"Muskogee, Oklahoma.

"DEAR SIR: Referring to your letter of April 12, 1935, file B-584, concerning B. of R. C. Case No. 5 in regard to overtime claim by D. O. Mikels, extra yard clerk at Muskogee.

"Will you kindly be referred to our Special temporary understanding and agreement, as expressed in my letter to you, dated January 11, 1933, and your reply and concurrence of January 17, 1933, file M-8-5.

"This Special temporary agreement was agreed to by myself and committee as a temporary measure, and I am therefore advising you that hereafter this temporary understanding is hereby withdrawn and cancelled and should be considered as no longer being in effect, and we will on and after this date, April 22, 1935, expect you to comply with the provisions of our agreement. Rules 27 and 34, which require the payment of a minimum day of Eight (8) hours for service performed by clerks on week days, and a minimum of Six (6) days' work per week except in weeks in which holidays occur.

"Effective April 22, 1935, we will expect you to pay Mr. D. O. Mikels a minimum of Eight (8) hours per day and a minimum of Six (6) days per week, as is provided in Rules 27 and 34.

"Please advise if this will be done.

"Yours truly,

"(Signed) C. A. MALONE,

"General Chairman."

(Copy.)

The petitioner claims that the arrangement of January 17, 1933, was merely a temporary waiver of certain conditions of the regular agreement, terminable by either party at will, and that the letter of April 22, 1935, was an effective termination of the arrangement.

The petitioner further claims that with the termination of the arrangement of January 17, 1933, Mr. Mikels was entitled to claim a minimum of eight hours pay six days per week. This claim the Referee understands to mean that the petitioner maintains that from April 22, 1935, Mr. Mikels was in fact a regular employe and entitled to all the privileges of a regular employe under the agreement, notwithstanding the fact that the carrier maintained that he was an extra employe.

The carrier claims that the arrangement of January 17, 1933, was an agreement terminable only in compliance with Section 6 of the Railway Labor Act.

The carrier further maintains as to the facts that Mr. "Mikels has not been called regularly one or more times each day" (Supplemental statement submitted April 2, 1936, page 47) and in the same statement, page 48, "an increase in one employe's earnings does not of itself represent a change in basic conditions." In other words, the carrier maintains that Mikels is an extra employe in fact as well as in rating.

There are two points before the Board. The first has to do with the status of the arrangement of January 17, 1933. The second with Mr. Mikels' status whether as a regular or as an extra employe. It is clear that the temporary arrangement of January 17, 1933, was not an agreement in the sense contemplated by Section Six (6) of the Railway Labor Act. With the termination of such a temporary arrangement, the parties would merely fall back on their regular agreement. The arrangement entered into on January 17, 1933, contained no fixed date of termination, and since it was not an agreement in the

sense contemplated in the Railway Labor Act, and, therefore, was not subject to the procedure stipulated therein, it could, therefore, only be presumed to be terminable upon due notice. The Referee does not think that a notice of immediate termination constitutes due notice, but he does not consider the point crucial.

As to the status of Mr. Mikels, the parties agree neither on the facts nor on the interpretation of the facts, but in view of his earnings in comparison with the earnings of regular employes, it is not clear that he has suffered material damage because of the error of the carrier in respect to the abrogation of the understanding of January 17, 1933. If the carrier had given him but few calls as an extra employe, his case for consideration as a regular employe would have had little standing and other employes who were listed as regular might have protested his sharing the work.

The Referee does not find in the record of the case any warrant under the Agreement for ordering the carrier to accord Mr. Mikels the status of a regular employe as of the date when the temporary arrangement was denounced. In the absence of such warrant and of evidence that Mr. Mikels suffered loss by the treatment accorded him by the carrier, no added compensation can be awarded. However, it will be competent for the Board to reopen this phase of the case if and when agreement of the parties as to facts or a weight of evidence which the record does not now show may justify such reopening.

AWARD

(a) Arrangement of January 17th, 1933, is not an agreement.

(b) Claim for compensation remanded to the parties for negotiation and agreement. If agreement is not reached the parties or either of them may resubmit the same.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary*.

Dated at Chicago, Illinois, this 22nd day of June 1936.