Award No. 4201

Docket No. CL-3994

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, 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) Caller C. W. Leep, Argentine, Kansas, be compensated in the amount of eight (8) hours at pro rata rate and eight (8) hours at punitive rate of the regular Caller's rate of pay, $5.93 per day, on October 13, 1944 and November 1, 1944 less amount of sixteen (16) hours at pro rata rate of $5.93 per day he was paid on each of these dates and that he be compensated in the amount of eight (8) hours at punitive rate of regular Caller's rate of pay, $5.93 per day, on October 25, 1944, less amount of eight (8) hours at pro rata rate of $5.93 per day he was paid account required to perform service in excess of eight (8) hours on each of the above days for which he was compensated at pro rata rate; and,

(b) Caller R. B. Dwyer, Argentine, Kansas, be compensated in the amount of eight (8) hours at pro rata rate and eight (8) hours at punitive rate of the regular Caller's rate of pay, $5.93 per day, on October 31, 1944 and November 2, 1944, less amount of sixteen (16) hours at pro rata rate of $5.93 per day he was paid on each of these dates account required to perform service in excess of eight (8) hours on each of the above days for which he was compensated at pro rata rate.

EMPLOYES' STATEMENT OF FACTS: This dispute arose as a result of Carrier's refusal to pay so-called extra and/or off-in-force-reduction employes at the rate of time and one-half for time in excess of eight hours on any day. So far as the Employes have been able to develop, Carrier paid all employes time and one-half for time in excess of eight hours on any day under the provisions of the current Agreement from its effective date up until about October 1, 1944, at which time they took the position that extra and/or off-in-force-reduction employes were not entitled to punitive rate for time in excess of eight hours.

C. W. Leep and R. B. Dwyer entered the service of the Carrier October 13, 1944 and October 31, 1944, respectively, at Argentine, Kansas. They were used to protect various short vacancies occurring on regular established positions until the latter part of November, 1944, when they were assigned to permanent positions. During the short period these two employes were thus engaged as extra Callers on regular established positions, they were

porary vacancy and still assigned thereto, the employe is used in an emergency to protect a second vacancy **before completing the original vacancy.** In these circumstances, the hours of assignment of the original vacancy are the employe's regular assigned hours as referred to in Article VII, Section 1, of the agreement pending the completion of protection of the original temporary vacancy. In other words, under such conditions, and such conditions alone, the employe assumes the same status as the regularly assigned employe as concerns the hours of assignment and other working conditions of the position and retains that status so long and only so long as he continues to hold rights to the original vacancy. That, however, was not the case in the instant dispute, for Messrs. Leep and Dwyer, as previously shown in this submission, after **completing** the protection of each of the temporary vacancies, and resuming the status of an off-in-force-reduction employe, it so happened were thereafter recalled to service, in conformity with the provisions of Article III, Section 10-a on another or second temporary vacancy within twenty-four (24) hours. They clearly had no assigned hours between the completion of the first vacancy and the start of the second vacancy, and the letter-agreement could not by any possible conception have had application in the instances covered by this dispute.

In conclusion, the Carrier desires to reassert that the Third Division's determination of this dispute must necessarily be based on the language of the agreement rules (Article VI, Section 1 and Article VII, Section 1) of the current Clerks' Agreement in effect between the parties to this dispute and **not upon the language of the differently worded overtime rules heretofore interpreted in prior awards of the Third Division and which rules did not include the language "continuous with and outside of regular assigned hours" which appears in the overtime rule (Article VII, Section 1) relied upon by the Brotherhood in this dispute.** The Board's determination of the Brotherhood's claim in this dispute on the basis of the language contained in the overtime rule (Article VII, Section 1) of the agreement in effect between the parties to this dispute will clearly warrant a complete denial of the Brotherhood's claim whereas a sustaining award would constitute a modification or revision of the agreement rule (Article VII, Section 1) which the parties had agreed to in good faith. Such a revision can only be accomplished through the process of negotiation as required by the amended Railway Labor Act.

The instant dispute is clearly without merit or schedule support and must be denied.

The Carrier is uninformed 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 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.

OPINION OF BOARD: Succinctly stated, the claim herein is based upon refusal of the Carrier to compensate claimant, an extra or off-in-force-reduction employe, at punitive rate for second assignments worked on the days listed in the claim. The Employes rely upon Article VI, Section 1, and Article VII, Section 1, in the Agreement between the parties bearing effective date October 1, 1942, which rules read as follows:

"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 overtime and paid on the actual minute basis, at the rate of time and one-half."

The Carrier cites the same rules and, in effect, states that Article VII, Section 1, does not apply to extra or off-in-force-reduction employes who work two complete assignments in any day. It is clear that the dispute herein turns upon the proper interpretation to be given the rules quoted above. In this connection, the Employes claim that any time in excess of 8 hours on any day should be considered overtime and paid for at the rate of time and one-half and, in support of that position, cite a long line of awards of this Division interpreting the term "on any day" as meaning a 24-hour period computed from the starting time of a previous assignment. We have no quarrel with the holding of the awards cited by the Employes in this connection but, without exception, the rules construed in those awards were differently worded than the rule under consideration herein and did not have the qualifying language "continuous with and outside of regular assigned hours". The language of Article VII, Section 1, standing alone is clear and unequivocal and must be considered as expressing the intention of the parties unless some other provisions of the Agreement render it ambiguous. The Employes argue, in effect, that Article VI, Section 1, defining the work day is sufficient to create this ambiguity because it follows necessarily that if 8 hours constitute a day's work, then compensation at punitive rate should be paid for work in excess of 8 hours in any day, and that the phrase "continuous with and outside of regular assigned hours" is used in Article VII, Section 1, purely for the purpose of distinguishing that type of overtime work from that which may be performed under other provisions of the Agreement. We are not persuaded that this contention is entirely correct. In defining the work day in Article VI, Section 1, there is no provision for payment for overtime. It does not necessarily follow that merely because 8 hours constitutes the basic work day, that time worked in excess of 8 hours must be paid for at punitive rates. That this is true is borne out by the fact that some Agreements have provided for pro rata rate for a ninth hour worked even though containing a definition of 8 hours as constituting a work day. (See provisions of Agreements involved in Awards 1817 and 2053.) We have little doubt, therefore, that if Article VII, Section 1, were the only rule in the Agreement providing for overtime, service would have to be **continuous with and outside of regular assigned hours** in order to entitle an employe to time and one-half for hours worked in excess of 8 in any day. As to whether or not that Article applies to extra employes who have completed one assignment on a temporary vacancy and immediately commence work on another assignment on a temporary vacancy, we believe that it does. In this connection, we point out that the Carrier in its submission contends that Article VII, Section 1, has no such application, but does admit that it does apply in a case where an extra employe, while occupying a temporary vacancy and still assigned thereto, is used in an emergency to protect a second vacancy before completing the original vacancy. We fail to see a distinction between completion and non-completion of an assignment where two complete assignments are worked continuously. If, as the Carrier admits, the extra employe retains the status of a regularly assigned employe so long as he holds rights to the original vacancy, we don't believe that he loses it merely on the completion of the original assignment when the service on the second immediately follows thereupon. The construction placed on the rule by the Carrier leads to rather anomalous results in the computation of compensation. Under such a concept an employe who works a temporary assignment with scheduled hours 4:00 P. M. to 12:00 midnight, and who is called off the same at 11:00 P. M. to work until 7:00 A. M. on another assignment, would receive 19 hours' pay for 15 hours' work, while another employe who works from 4:00 P. M. to 12:00 midnight on one assignment, and 12:00 midnight to 8:00 A. M. on another, works 16 hours and receives only 16 hours' pay. We don't believe that such inequities were contemplated by the rule and, accordingly, hold that Article VII, Section 1, requires payment of time and one-half for the second assignment worked by an extra employe where it is continuous with the first.

It is apparent, therefore, 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 unless Article VII, Section 1, has been modified by the letter-agreement cited in the record, and which was negotiated by Carrier's representative Kirkpatrick and General Chairman Meskimen and dated December 9, 1942. In attempting to determine this issue, we find that there are many perplexing factors appearing in the record. The Carrier claims the letter-agreement applies only to regularly assigned employes. The Employes, on the other hand, claim that it applies to any employe, whether regularly assigned or not. In this respect, the letter-agreement itself is somewhat confusing. The letter opens with a paragraph stating:

> "During our conference of December 8-9, 1942, we discussed in considerable detail certain claims arising out of the use of regularly assigned employes to protect all or part of their own assignments in addition to all or part of some other assignment,"

and then in the second paragraph thereof, after introductory matter, the following language appears:

> "* * * **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.**" (Emphasis supplied.)

and then goes on to state other conclusions reached at the meeting referred to in the first paragraph. The Carrier claims that this letter clearly applied only to regularly assigned employes because the introductory reference paragraph thereof indicates that that was the only group of employes who were involved in the discussions, but it does not explain why the language "regularly assigned employes" was dropped in the second paragraph. Reading on further in the letter-agreement, its is to be noted that clearly the other paragraphs thereof apply to regularly assigned employes and in the final paragraph the writer again uses the words "regularly assigned employes". In our opinion, this is sufficient to have created an ambiguity in the letter-agreement and we are required to look to the actions of the parties in order to determine the interpretations which they themselves have placed upon said agreement. In this respect we note that the employes cite that payments of time and one-half were made to extra employes who worked second assignments in any day and particularly to employes at Argentine during the period October 1, 1942 to October 1944. The Carrier admits some payments were made as contended by the Employes, and asserts that at other points on the system no such payments were made, and that scattered mistakes by clerical help in the applicability of the rules should not be considered as changing the clear language of the rule. We look to these actions not from the standpoint of operating to change the effect of Article VI, Section 1, which we have already indicated is clear and unequivocal and, hence, could not be changed by the actions of the parties without negotiation, but we do look to them for an explanation of the ambiguity which we feel is contained in the letter-agreement. We note that Mr. Meskimen, the Employes' General Chairman, after the consummation of the letter-agreement, sent a copy of the same to all Local and Division Chairmen, Secretaries and Presidents, Local Lodges and Auxiliaries, with a covering letter in which he stated among other things, "This interpretation applies to 'any employe' who may work two complete shifts, **whether regularly assigned or not,** on 'any day' (twenty-four hour period) thus disposing of the troublesome question of whether an 'extra man' is entitled to time and one-half for time in excess of eight hours. He is." (Emphasis as appeared in letter.)

Now we do not in any way consider Mr. Meskimen's ex parte interpretation as binding upon the Carrier in any respect. We do, however, observe in the record a statement by the Carrier as follows:

> "In passing, the Carrier cannot refrain from pointing out that the so-called 'interpretations' of the then General Chairman as they appear in his letter of December 16, 1942 (Employes' Exhibit 'A'), and for which no plausible basis exists in the letter-agreement nor

in the deliberations of the parties preceding its enactment, **apparently set the stage for any erroneous payments which may have been made to employes at Argentine during the period October 1, 1942 to October 1944 mentioned by the Employes, and under the circumstances such as are found in the instant dispute.** There definitely was no change in the Carrier's practice over the years, nor any occasion therefor, as previously stated herein." (Emphasis supplied.)

Now there is in this language, particularly the underscored portion thereof, an indication of the fact that the Carrier knew of the existence of Mr. Meskimen's letter and yet at no point in the record is there any evidence to show what the Carrier did to counteract the effect of his plain, unequivocal statement which, according to Carrier's present contentions, amounts to a gross misrepresentation. As tending to counteract Mr. Meskimen's letter, the Carrier points out instructions which were issued by Mr. Kirkpatrick to Carrier's General Managers and other departmental officers under letter-agreement in which he refers to regularly assigned clerical employes throughout. Only a part of these instructions are quoted. Why the instructions were not quoted in full does not appear in the Carrier's brief. All circumstances considered, we believe that the actions of the parties following the letter-agreement of December 1942 indicate that at that time the intention of the parties was to reach an agreement that any employe who works two complete assignments on any day would receive time and one-half for the second assignment. That, of course, would include extra or off-in-force-reduction employes and, hence, the claim should be sustained.

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 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 3rd day of December, 1948.