

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 Marjorie E. Dial at the rate of time and one-half for service performed 8:00 A.M. to 4:00 P.M. on March 26, 1948; and,

(b) Marjorie E. Dial 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 4:00 P.M. March 25, 1948.

EMPLOYEES' STATEMENT OF FACTS: Mrs. Marjorie E. Dial, an off-in-force-reduction employee in the Eastern Lines Relay and PBX Office seniority district, Topeka, Kansas, on the dates here involved, was used to fill a vacancy on Position No. 116 from 4:00 P.M. to 12:00 Midnight on March 25, 1948. She was again recalled to fill a vacancy on Position No. 140 commencing at 8:00 A.M. March 26, 1948, and ending at 4:00 P.M. same day, thus resulting in Mrs. Dial performing sixteen hours service in a twenty-four (24) hour period computed from the starting time of her first tour of duty, or during the period 4:00 P.M. March 25, 1948 to 4:00 P.M. March 26, 1948. Carrier compensated Mrs. Dial at pro rata rate for the second tour of duty instead of time and one-half rate as here claimed and as required by the rules.

POSITION OF EMPLOYEES: 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 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

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 employees have not and cannot present any evidence that claims of the nature involved in this dispute in behalf of off-in-force-reduction employees 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 employees in the scope of the letter agreement, hence the term "any employee" as used in the second paragraph of the December 9, 1942 letter agreement, and upon which the employees rely for support in the instant claim, could only have had reference to regular assigned employees, all contentions of the employees, 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 Employees also rely for support of the instant claim, that the letter-agreement does not apply to so-called extra or off-in-force-reduction employees, 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 employee 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 Employees' 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 Employees 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 employees. 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 employee 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 Employees 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 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 may conclude are required in reply to the Brotherhood's ex parte submission or any subsequent oral agreement or briefs presented by the Brotherhood in this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute is similar to that presented in Award 4835. For the reasons therein set forth, 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 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 employees 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