Award No. 4837
Docket No. CL-4849

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 Alice M. Oman at the rate of time and one-half for service performed 4:00 P.M. to 12:00 midnight on August 14, 1948; and,

(b) Alice M. Oman shall now be paid the difference between time and one-half rate and the pro rata rate she was allowed for service performed 4:00 P.M. to 12:00 midnight on August 14, 1948.

EMPLOYES' STATEMENT OF FACTS: Mrs. Alice M. Oman was on off-in-force-reduction employe in the Eastern Lines Relay and PBX Office seniority district, Topeka, Kansas, on the date here involved, August 14, 1948, and was used to fill a vacancy on Position No. 303 from 12:00 midnight to 8:00 A.M. Mrs. Oman completed this assignment at 8:00 A.M. and was recalled the same day to fill a vacancy on Position No. 43 from 4:00 P.M. to 12:00 midnight. She was thus required to perform sixteen hours service in a twenty-four hour period measured from the starting time of her first tour of duty on that date, but was compensated 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. There is in evidence Letter of Agreement dated December 9, 1942, which is also 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 overtime and paid on the actual minute basis, at the rate of time and one-half."

ment 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 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 argument 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 were 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