Award No. 5415
Docket No. CL-5453

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the provisions of the Rules Agreement, effective May 1, 1942, particularly Rule 4-A-1(a), Passenger Station, Terre Haute, Indiana, October 5, 1947, by failing to pay W. E. Cox, Extra Mail Handler, at the rate of time and one-half for second tour of duty worked.

(b) W. E. Cox, Mail Handler, be paid the difference between straight time allowed and time and one-half for second tour of duty worked, October 5, 1947. (Docket W-564)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant in this case is an employe holding an extra list position of Mail Handler on the Extra List at the Passenger Station, Terre Haute, Indiana. Employes on this Extra List are employed for the purpose of filling vacancies in regular positions of Mail Handler at that station and for the purpose of augmenting the regular force when needed. On the date of this claim, October 5, 1947, the Claimant worked from 12:00 Midnight to 8:00 A. M., as a Mail Handler in augmentation of the regular force. In short, he filled no position, merely assisted with the overflow work on an extra basis. The Claimant was again used from 1:30 P. M. to 9:30 P. M., the same date to fill a regular position that was temporarily vacant.

negotiation and handling on the property. Your Honorable Board has held many times that it does not have the authority to change existing Agreements. In Third Division Award No. 4653 (Referee John M. Carmody) the following appears in the Opinion of the Board:

> "We do not have authority, however, to change agreements nor, by interpretation, to make them mean something other than the parties intended. * * *"

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement which constitutes the applicable Agreements between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the agreement between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that under the applicable Agreement, the Claimant is not entitled to the additional compensation which he claims.

Therefore, the Carrier respectfully submits that your Honorable Board should dismiss the claim of the Employes in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: The applicable facts are conceded to be those set forth in a joint submission formulated by the parties when the claim was handled on the property. That statement reads:

> "The claimant is assigned to an extra list at Terre Haute, Indiana. Employes assigned to that extra list are used for temporary vacancies on regular Mail Handlers' positions at the Terre Haute Passenger Station, and they are used as needed to augment the regular force of Mail Handlers.
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> On October 5, 1947, the claimant worked from 12:00 Midnight to 8:00 A. M., as a Mail Handler in augmentation of the regular force. In other words, the claimant was used during that period to assist in the handling of overflow work. The claimant was also used from 1:30 P. M. to 9:30 P. M., on October 5, 1947, on a regular position that was temporarily vacant and under advertisement.
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> A claim was made by W. E. Cox for punitive time for the second 8-hour shift worked on October 5, 1947. This claim was denied."

From the foregoing it is apparent the claim in this case involves the proper basis of payment to an extra clerk required to perform two tours of duty in a day or 24-hour period and the question to be determined is whether the claimant, who performed a tour of duty in purely extra service in augmentation of the regular force and a tour of duty in relief service

in place of a regular employe within the same 24-hour period is entitled, under the current Agreement, to be paid at the time and one-half rate for the second tour of duty instead of the pro rata rate as paid by the Carrier.

Technical objections to jurisdiction of the Board over the controversy are to be found in the Carrier's ex parte submission and have been examined, considered and denied on the same grounds stated in Award 4089 which deals with similar objections.

Primarily the Organization relies upon Rule 4-A-1 of the prevailing Agreement, dealing with day's work and overtime, and in particular subsection (a) thereof. Such subsection reads:

> "(a) Unless otherwise provided in this Agreement, eight consecutive hours on duty, exclusive of the meal period, shall constitute a day's work for which eight hours' pay will be allowed. Time worked in excess of eight hours in any twenty-four hour period will be considered as overtime and paid for at the rate of time and one-half. A relief or extra employe who performs relief work in two or more positions within a twenty-four hour period will be paid straight time for the first eight hours worked in each position. For time worked in excess of eight hours on any of the positions so relieved, he will be paid time and one-half."

When analyzed it is clear the above rule contains an overall provision that unless otherwise provided by the Agreement all employes are to be paid at the rate of time and one-half for time worked in excess of eight hours in any 24-hour period but that embodied therein is an exception as to relief or extra employes who **perform relief work** or are assigned to a **relief position** within the meaning of the terms just emphasized as used in the Agreement. It is clear the exception included within the rule has application only to extra employes who perform **relief work** on two or more positions. Therefore based on the Carrier's admission and applying the well established rule (see Awards 2009, 3825, 4551 and 4854) that where one or more exceptions to a provision are expressed no other or further exception can be implied, we are constrained to hold that unless modified and rendered inoperative because of interpretation, practice or subsequent agreement, or other rules of the Agreement, Rule 4-A-1(a) in and of itself requires a sustaining award.

The first ground relied on by Carrier as having the result just indicated is that Line Board Decision No. 109, agreed to by the parties on June 19, 1936, and holding that a furloughed clerk filling two positions under circumstances quite similar to those prevailing in the instant case was not entitled to pay at the overtime rate under the Agreement then in force and effect, is binding upon the parties, the present rule notwithstanding. In support of this position we are cited to numerous Awards, see e.g., Nos. 897, 1277, 3628, 4388 and 4616, holding in substance that the decision of an Adjustment Board is binding upon this Board and that this is true notwithstanding a new Agreement has been negotiated since its decision unless the new Agreement in some manner definitely indicates its interpretation has become obsolete. We have no quarrel with the rule announced in those Awards. The trouble is they have no application under the facts of this case. At the time Line Decision 109, supra, was decided the then current Agreement did not contain the last two sentences to be found in Rule 4-A-1(a), supra, now a part of a subsequently negotiated Agreement, effective May 1, 1942. Carrier was bound to know the established rule respecting exceptions to which we have heretofore referred. Nevertheless it consented to the inclusion of such exception within the involved rule with the result there was such a substantial change in the existing contract the interpretation announced in Line Decision 109 has no application to the new Agreement. This, may we add, without laboring the controverted question whether they were also agreed upon as a part of such decision, is true of questions and answers inserted in such decision indicating that as a general proposition other questions of like nature were to subsequently be decided in line with the conclusion therein

reached as to the particular claim in controversy. This it would seem is especially true in a case such as here where the new Agreement specifically provides that it supersedes all previous and existing agreements except such as are continued in effect by its specific provisions.

The Carrier also relies upon what is referred to in the record as Clerical Case No. 82, involving numerous claims arising between January 1, 1941 and March 30, 1941, only one of which will be specifically referred to because it is based upon facts very close to those involved in the instant claim. In that case one Lee, an extra clerk, worked the vacancy of a regular clerk from 3:30 P. M. to 11:30 P. M. on January 28, 1941. The same day he was called upon to work extra, augmenting the regular force 11:30 P. M. to 7:30 A. M., sixteen continuous hours in a 24-hour period. In that case the District Chairman, quite properly because it involved service performed under the old Agreement and was in conformity with Line Board Interpretation 109, settled the dispute on the pro rata rate. However, the fact that settlement was made on June 5, 1942, about a month after the new Agreement became effective, does not mean, as the Carrier suggests, that if such claim had been based on service performed subsequent to execution of that contract, the claim would have been adjusted on the same basis or that in so disposing of it the Organization or, for that matter, the Carrier, was indicating the terms of the new Agreement would compel a similar settlement on a like state of facts. Besides, the rule, as we understand it, is that the settlement of a specific case has application only to the case involved and is not to be regarded or treated as an agreement or understanding future cases will be disposed of on a like basis.

The next argument advanced by Carrier is that Rule 4-A-6(a) is an "otherwise provided" provision which limits the application of Rule 4-A-1(a). We do not agree. That rule deals with extra short hour or part time service performed by an extra employe when required to work less than eight hours. It does not even pretend to fix the rate of pay he is to receive when required to work more than eight hours in any 24-hour period.

Finally the Carrier insists there is what is referred to as "a Letter Agreement" between the parties, one written by the Carrier on May 17, 1944, and the other by the Organization's General Chairman on June 10, 1944. The parties in oral presentation of the cause before the Referee agreed that this Letter did constitute an agreement. However, they are far apart as to the construction to be given its terms. In the Letter first mentioned the Carrier sets out certain matters that were agreed to in a conference taking place at a System Conference on May 3, 5, and 16, none of which relate to the situation here involved. In the concluding paragraph of that Letter it is stated certain requests not here in question were made by the Organization at the Conference and that the Carrier accedes thereto. In the concluding two sentences of this paragraph this letter, without stating any agreement was reached thereon, goes on to say, "Under the existing rules it is the present practice to allow an extra employe time and one-half for the hours worked in excess of eight (8) on any particular position. However, when an extra employe is required to work two **separate and distinct positions** in a twenty-four-hour period, straight time was paid for the first eight (8) hours worked on each of these positions. This practice will be continued." The Organization answered this Letter by quoting it verbatim and then, without adding more and carefully refraining from approving everything set forth therein, said, "We concur in the Agreement reached at our meeting on May 16, 1944." The Carrier now argues that everything contained in its Letter, including the last two sentences thereof, must be regarded as agreed upon. On the other hand the Organization insists the most it agreed to was what the Carrier's Letter definitely states was agreed upon and emphatically denies it ever concurred in what was stated in the last two sentences thereof with respect to the Carrier's practice. In view of the Organization's limited and restricted concurrence, as found in the last sentence of its Letter, we believe the two letters should be construed as contended for by the Organization and therefore hold the so-called Letter Agreement does not show a meeting of the minds of the parties with respect

to what was to be paid an extra man for service performed in excess of eight hours within a period of 24 hours, where, as is conceded here, that service was not performed on relief work in two or more positions within that period of time.

Evidence of the fact the minds of the parties did not meet in the so-called Letter Agreement and support for the conclusion just announced is to be found in the last two sentences of the Carrier's Letter to which we have heretofore referred. The Organization insists assignment to an extra tour of duty augmenting the regular force is not "a separate and distinct position," under the Agreement. On the other hand the Carrier insists that it is. This question is, to say the least, highly debatable and while we are not here called upon to decide it and will refrain from doing so, nevertheless the mere fact that it is of that character adds weight and support to our conclusion the two Letters fail to show an understanding between the parties on the point in question.

In conclusion it should be added we have not overlooked the fact past practice is also relied upon by the Carrier as a ground for denial of the claim. This contention has little merit. The record is clear that since the effective date of the current Agreement the Organization has never receded from its position that in a situation such as is here involved employes should be paid at the rate of time and one-half.

Since we fail to find any other rule of the Agreement or any interpretation, practice, or subsequent agreement has rendered the plain and unequivocal provisions of Rule 4-A-1(a) inoperative the claim must 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 30th day of July, 1951.