AWARD NO. 481
CASE NO. CL-166-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Transportation-Communications International Union
and
Atchison, Topeka and Santa Fe Railway Company

QUESTIONS AT ISSUE:

1. Did Carrier violate the provisions of the February 7, 1965 Mediation Agreement, as amended, when it offset the guarantee of M. F. Lannan with overtime which he did not perform and to which she was not entitled under the Working Rules Agreement?

2. Shall Carrier now be required to compensate M.F. Lannan $322.26 for the month of January, 1987, the amount offset?

3. Shall Carrier now be required to pay a reasonable per annum interest on the amount wrongfully withheld from M. F. Lannan's protective guarantee for the month of January, 1987?

OPINION OF THE BOARD: In this case, Claimant, a former Toledo, Peoria and Western employee, who properly elected coverage under the February 7, 1965, as amended, on February 10, 1981, charges that the Carrier improperly deducted $322.26 from his monthly guarantee for January, 1987. Initially, the Carrier contends that the Organization withdrew this claim on the property. However, the Board's perusal of the record reveals that the Organization apparently withdrew a similar grievance but it involved Claimant's entitlement to protective benefits during May, 1987. In any event, the Carrier has not presented sufficient documentary evidence to show that the Organization

withdrew this particular claim.

Claimant's monthly guarantee of $2,867.09 was predicated on a monthly rated, six day agent-operator position which Claimant occupied before it was abolished on August 2, 1985. Subsequently, Claimant was displaced from several positions. At one point, Claimant voluntarily exercised his seniority to a position with a lower daily rate than another position available to him. As of January, 1987, Claimant occupied a crew clerk position with a daily rate of $105.74 but he was treated as occupying a position paying $107.42 per day which was offset against his monthly guarantee.

There were 22 work days in January, 1987. During the month, Claimant took bereavement leave on January 2 and marked off sick on January 28. In addition, the Carrier called Claimant to work eight hours of overtime on a position other than his regular assignment on January 7 and January 24. The record is unclear as to whether Claimant expressly declined the overtime opportunities or whether he was unavailable to work double shifts on the two dates. To determine the makeup allowance due Claimant, the Carrier divided his monthly guarantee by 213 hours (since the guarantee was derived from a six day position) to convert the guarantee to an hourly rate of $13.46. The Carrier then multiplied $13.46 by sixteen hours and deducted $215.37 from Claimant's monthly guarantee. The Carrier then subtracted an additional $2,470.66 from the guarantee. This sum represented 23

days of wages at the rate of the position ($107.42) Claimant was treated as occupying. Thus, Claimant received a makeup allowance of $181.06 ($2,867.09 less $215.37 less $2,470.66).

The Organization asserts that the Carrier shorted Claimant $322.26 for his January, 1987 monthly guarantee but it did not explain precisely how it arrived at this figure. Indeed, the record compiled on the property is confusing, misleading and vague. For example, on the property, the Carrier emphasized that it deducted two days of pay from Claimant's guarantee because he refused two opportunities to double over and perform overtime service. Ironically, in its submission to this Board, the Carrier stressed that it reduced Claimant's monthly guarantee because he was ill on January 28, 1987, and took a one day bereavement leave. Since the Carrier did not raise the January 2 and January 28 dates on the property, it is barred from raising Claimant's sickness and bereavement days as a defense for the first time before this Board. More importantly, the gravamen of this dispute joined by the parties on the property was whether or not the Carrier could deduct the sixteen hours of overtime Claimant could have worked on another position.

In Award No. 229, this Board ruled that the Carrier could offset overtime compensation earned by an employee filling a daily rated position but whose guarantee was fixed when the employee occupied a six day monthly rated position. However, the Board narrowly restricted its decision to those instances when the total number of hours worked per month did not exceed the

number of hours used for calculating the monthly salary. It would be inconsistent with Award No. 229 to permit the Carrier to offset overtime an employee earned, yet allow an employee to escape such an offset if the employee declined the opportunity to work overtime. If we were to decide that Claimant was entitled to two additional days of pay, we would effectively be overruling Award No. 229. Award No. 229 set a precedent which we are bound to follow to give predictability to labor-management relations. In this case, Claimant's guarantee was based on a monthly rate comprending 213 hours. The record does not disclose whether or not Claimant, if he had performed the sixteen hours of overtime service, would have worked more than 213 hours per month. The Organization argued that there should be no offset because the overtime Claimant had a chance to earn was on a position other than his own. However, Award No. 229 did not make such a distinction. Also, the Organization has not met its burden of proving that Grievant did not stand for the overtime work because he lacked sufficient seniority, or the incumbent was entitled to work the overtime or the Carrier improperly called Claimant to fill a short vacancy. The record here is very vague concerning the Carrier' application of overtime rules found in the working agreement.

While the Carrier properly deducted $215.35 from Claimant's monthly guarantee, the Carrier miscalculated the makeup allowance since it incorrectly multiplied $107.42 (which was the rate of the position Claimant was treated as occupying) by 23 when

January, 1987 actually contained only 22 work days. Thus, Claimant is entitled to receive $107.42.

AWARD

1. The Answer to Question at Issue No. 1 is No but the Carrier incorrectly computed the offset to Claimant's protective allowance for January, 1987.

2. The Answer to Question at Issue No. 2 is No but the Carrier shall pay Claimant $107.42 for the month of January, 1987 since the Carrier incorrectly computed the offset.

3. The Answer to Question at Issue No. 3 is No.

Dated: January 22, 1990

John B. LaRocco
Neutral Member

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Transportation-Communications International Union
and
The Atchison, Topeka and Santa Fe Railway Company

INTERPRETATION TO AWARD NOS. 444 and 449

In our Awards Nos. 444 and 449, this Board ruled that the Carrier breached the February 7, 1965 Job Stabilization Agreement, as amended. We were unable to fashion a complete remedy for the Carrier's contract violation because the record did not reflect if and when a position had become available to each Claimant. Thus, the Board remanded the two cases to the property.

The Carrier and the Organization successfully determined the proper payment, if any, to be accorded all but three Claimants. The Organization now petitions this Board to not only interpret Awards Nos. 444 and 449 but to also calculate the amount of protective pay due Claimants Lehman and Silva (Award No. 444) and Claimant Stubbs (Award No. 449).

The Organization asserts that the Carrier belatedly suspended Claimants' status as protected employees based on Rule 14-B after it received adverse rulings in Award Nos. 444 and 449. Rule 14-B was not an issue in dispute when the claims were progressed on the property. The Carrier counters that it was simply demonstrating that Claimants were unavailable because

Claimants had either withdrawn their Rule 14-B notices or they missed calls causing the Carrier to revoke their Rule 14-B notices.

After they filed their claims charging that the Carrier misapplied Rules 17-C(2) and 17-C(6), Claimants were under a duty to mitigate their damages. They may not allow their damages to unnecessarily accumulate when they have the ability to minimize their loss of compensation. Pending the outcome of their Rule 17-C grievances, Claimants should have taken advantage of any opportunity they had to perform compensable service. By withdrawing their Rule 14-B notices, the employees made themselves unavailable for service and thus, failed to mitigate their damages. Moreover, the record, as supplemented, demonstrates that the three remaining Claimants were treated no differently than other clerks whose claims were sustained in Award Nos. 444 and 449.

Finally, whether or not the Carrier properly revoked Claimant's 14-B notices is not a dispute before the Board in these two cases. See SBA 605, Award No. 458, No. 460, and No. 462. If any Claimant filed a claim alleging that Carrier impermissibly revoked his Rule 14-B notice, nothing in this Interpretation shall be construed to prejudice his claim.

The Carrier and the Organization shall dispose of the three remaining claims in accord with this interpretation.

Dated: January 22, 1990

John B. LaRocco
Neutral Member