

Award No. 817

Docket No. 773

2-N&W-EW-'42

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Bruce Blake when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (ELECTRICAL WORKERS)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: (a) That under the controlling agreement—Dumper Operator U. G. Downs be compensated on Sunday, June 15, 1941, at rate and one-half from 11:00 P. M. to 7:00 A. M., less the amount paid, one and one-half hours at rate and one-half.

(b) Dumper Operator R. R. Williams, Elevator Operator J. M. Jones, Conveyor Car Operators E. C. Harrison and R. E. Vest, be compensated on December 25, 1941, at rate and one-half from 11:00 P. M. to 7:00 A. M., less the amount paid, two and one-half hours at rate and one-half.

EMPLOYEES' STATEMENT OF FACTS: (a) Claimant Downs is regularly employed at Lambert Point Coal Piers, Norfolk, Va., on the 3:00 P. M. to 11:00 P. M. shift 6 days per week. This claimant worked his regular shift, Sunday, June 15, 1941, and was also instructed to double over on the third shift, from 11:00 P. M. to 7:00 A. M. in place of B. R. Hart. Claimant Downs worked in place of B. R. Hart until 12:30 A. M. Monday June 16, 1941, and was then arbitrarily released, for which he was paid at rate and one-half for only one and one-half hours.

B. R. Hart was regularly employed on the third shift and whenever necessary protected the work on that shift on both Sundays and holidays.

(b) Claimants Williams, Jones, Harrison and Vest are regularly employed at the aforesaid coal piers on the 11:00 P. M. to 7:00 A. M. shift 6 days per week.

On Christmas, December 25, 1941, these claimants were called out to and did work the second shift from 3:00 P. M. to 11:00 P. M. in place of employees regularly assigned to work said shift, who also were instructed to double over and work their own shift from 11:00 P. M. to 7:00 A. M.

Said Claimants worked on their own shift from 11:00 A. M. to 1:30 A. M., December 25, 1941, and were then arbitrarily released, for which they were paid at rate and one-half for only two and one-half hours.

The claimants filled places of employees regularly employed on the second shift and who protected the work on both Sundays and holidays.

Lambert Point Coal Piers operate three shifts on Sundays and holidays whenever it is necessary to load coal. Coal was loaded on June 15 and December 25, 1941.

III—The Men Were Worked Overtime in Accordance With Rule 11

As is shown in Exhibit A, dumper operators were worked overtime on June 15, strictly in accordance with the overtime rosters maintained to give effect to Rule 11.

If Downs had the right to complete the third shift under the alleged application of Rule 8, then Lowry would have been released at 12:30 A. M. Yet under Rule 11 providing for the equalization of overtime, Lowry stood ahead of Downs on the dumper operators' overtime roster. The opposing claims of Downs and Lowry make it apparent that Rule 8 and Rule 11 are in conflict unless the carrier is under obligation to use both men. The undeniable fact of record in this case is that men on the piers on Sundays and holidays are only used as needed. Only one man was needed. Therefore, we look to past practice to determine the ambiguity brought about by the alleged conflict of rules. Since the agreement was negotiated in 1938 (and long prior thereto) men have always been used for overtime when needed in accordance with Rule 11 and have never been permitted to complete the balance of the day as is now claimed. There is submitted as Exhibit D the affidavit of Asst. Superintendent of Terminals Thompson in support of this statement.

When it was found that Hart (who had already worked the 1st shift) could not be located, it was apparent that a second shift man would have to work through the third shift to supplement the third shift men. Mr. Lowry, working on Pier 4 stood first out on the overtime roster. In order to avoid unnecessary interruption of the work, Lowry remained at Pier No. 4 for the duration of the shift. Downs who stood second out on the overtime roster was sent over to Pier No. 5 for an hour and a half until the vessel at that pier was loaded. It is a matter of conjecture where Hart would have worked had he reported for duty. The employees, however, contend that Hart would have been sent to Pier No. 5. Based upon this conjecture the employees assert that Downs took Hart's place. However, if instead of sending Downs to Pier No. 5 as was done, Lowry had been sent and thereafter returned to Pier No. 4, there would be no possible claim for the man who allegedly took Hart's place because then that man (Lowry) would have completed the balance of the shift. It is submitted that Claim A is based entirely on supposition and is in conflict with Rule 11.

What has been said of the conflict between Rules 8 and 11 is of equal application to Claim B. It was not the intent of Rule 11, providing solely for the equalization of overtime, to place the employer in a position where a penal application of Rule 8 as now suggested would be unavoidable.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Since there were no **regular** Sunday assignments, it cannot be said that claimant "doubled over" for B. R. Hart on the 11:00 P. M.-7:00 A. M. shift in contemplation of Rule 8. The fact that Hart customarily "protected" that shift did not make it a regular assignment in contemplation of the rule.

The Division is of the opinion that claimant Downs was, on the date in question, properly paid on a continuous time basis.

It is conceded that claimants Williams, Jones, Harrison and Vest were properly compensated for all work performed on December 25, 1941.

AWARD

Paragraph (a)—claim denied.

Paragraph (b)—claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 6th day of August, 1942.