Award No. 1839
Docket No. 1733
2-MP-FO-'54

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Firemen and Oilers)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(1) That under the current agreement Engine Watchman Ed Loyd was improperly compensated for service performed during the period July 26, 1950 through and including August 27, 1950, and denied expenses during this period while working as Engine Watchman at Charleston, Missouri.

(2) That accordingly the Carrier be ordered to additionally compensate the aforesaid Engine Watchman in the amount of $165.55, which represents the total amount of claim for compensation and expenses due.

EMPLOYES' STATEMENT OF FACTS: Ed Loyd (hereinafter referred to as the claimant) was employed by the Missouri Pacific Railroad Company at Poplar Bluff, Missouri on July 20, 1950, (See Poster submitted herewith and identified as Exhibit A).

The claimant, after being hired, worked as firebuilder at Poplar Bluff until July 26, 1950 when he was instructed by General Foreman Hixson to go to Charleston, Missouri as engine watchman. The claimant reported to Charleston as instructed and worked at that point as engine watchman until and including August 27 and returned to Poplar Bluff on August 29 and worked as laborer icing cars at the passenger station. The carrier declined to pay the claimant the proper rate for assignment, overtime rates for hours in excess of eight (8) hours and expenses incurred while at Charleston (See Exhibit B submitted herewith which is a breakdown to support the claim for $165.55).

The agreement effective September 1, 1949, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that when the claimant working at Poplar Bluff as an engine watchman and holding seniority at that

this period, Schalk was sent to Charleston as engine watchman. At the time he was asked to go to Charleston, there was a considerable amount of extra work to be performed. The records indicate that he could have worked regularly at Poplar Bluff if he had not been sent to Charleston. Before paying part of Schalk's claim, that is, for the difference between the shop laborer's and engine watchman's rate which is 5 cents and his expenses, we checked the payrolls and found that, during the period Schalk was at Charleston, the employe next junior to him did work regularly at Poplar Bluff at the higher rate. This claim was paid and accepted in 1952, two years ago.

Although Schalk was not regularly assigned and therefore not entitled to the benefit of Rule 7, still because "we believe Mr. Schalk was regularly employed at Poplar Bluff," we were agreeable to paying his claim for the difference in the rates and expenses.

This claim differs from the Schalk case because claimant voluntarily accepted the position knowing the conditions pertaining to the job of engine watchman at Charleston and because he was not working regularly at the time he took the job nor could he have worked regularly during the time he was at Charleston. This fact is clearly shown in Exhibit A of this submission. The figures are taken from the payroll. These figures differ from those shown in the claim as the hours claimant worked and we call upon the employes for strict proof of the accuracy of their figures where a discrepancy appears. Claimant was obviously not regularly assigned and the above mentioned exhibit shows that he was not and could not have been regularly employed at Poplar Bluff. The records show that claimant earned in August of 1950 $406.84 compared with $212.96 for the man next junior to him who picked up what extra work was available at Poplar Bluff.

In both the Schalk case and this case, the claim includes a request for time and a half after 8 hours for work performed as engine watchman. This portion of the claim was not paid in the Schalk case and since the employes accepted the decision, we assume that the employes agree that this part of the claim is unsupportable. For your Board's convenience so that all the facts may be before you, Rule 25 was quoted in paragraph 3 of the carrier's statement of facts which provides that "Hours worked in excess of eight (8) hours on any day shall be considered overtime and paid at the pro rata rate." During conferences on the property, the employes made the assertion that pro rata overtime means punitive overtime rather than straight time. Pro rata overtime is a terminology that is very common on this property and other railroads particularly in the operating crafts. An example of the use of this term is the rate sheets for the operating crafts which always carry the pro rata overtime rate which is straight time. An example of a request to do away with pro rata overtime through the proper procedure of negotiation, whatever the merits of the case might be, is found in the present arbitration proceedings between the Pullman conductors and the Pullman Company. As stated above, we do not understand that there is any dispute concerning this phase of the case in the face of the decision in the Schalk case.

This dispute centers around the facts. The employes rely on Rule 7 (a) contending that claimant was regularly assigned. We have shown the facts to be that claimant was not regularly assigned but only working extra and we have shown further that claimant was not regularly employed on July 26, 1950, the day the position of engine watchman at Charleston became vacant. On these proven facts, this claim is not supported by the collective bargaining agreement.

This claim must be denied.

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.

The Firemen and Oilers of System Federation No. 2 contend carrier improperly compensated Ed Loyd during the period from July 26 to August 27, 1950, both dates inclusive, when he was employed as an Engine Watchman at Charleston, Missouri.

The claim is for additional compensation and is divided into three parts. The first is a claim of five cents an hour which is the difference in the hourly rate of roundhouse laborers and engine watchmen. The second is for an additional one half times the regular rate on the basis that 163 hours of service performed by claimant at Charleston should have been paid for by carrier at the time and one-half rate instead of the regular rate. The third is for the cost of his meals while working at Charleston.

Claimant was employed by carrier on July 20, 1950 at Poplar Bluff, Missouri, as a Roundhouse Laborer who are Class "C" employes. See Rule 11 (b) of the parties' effective agreement. Claimant worked as such at Poplar Bluff on July 20-23-25, 1950, receiving pay therefor as a laborer at the rate of $1.21 per hour. On July 26, 1950 claimant was advised there was a job of engine watchman open at Charleston, Missouri, which he could have and which would provide him with regular employment. He accepted the opportunity to do so and was assigned to fill this job and did so during the period from July 26 to August 27, 1950, both dates inclusive, being paid therefor at the rate of engine watchman, or $1.16 an hour. After August 27, 1950 he returned to Poplar Bluff.

Parts one and three of the claim for compensation are based on the contention that Rule 7 (a) of the parties' effective agreement has application to the situation herein involved. Rule 7 (a) provides:

> "(a) Employes regularly assigned to work at a roundhouse, shop or on repair track, required by direction of proper officer to leave home station for road work, will be allowed the rate of the position to which temporarily assigned (but not less than the rate of his regular position at the home station), and will be paid for all time worked, subject to a minimum of eight (8) hours for each day so used or held in temporary service. Travel time outside of the regular hours at the home station will be additionally paid for at the pro rata rate. Where meals and lodging are not provided by the railroad company actual necessary expense will be allowed."

This rule relates to regularly assigned employes at a roundhouse, shop or on repair tracks when they are required to leave their home station to perform emergency road work. Claimant was neither regularly assigned nor employed at the time he was sent to Charleston to fill the position of engine watchman, nor was he required to do so, nor can it be said that the work he performed comes within the classification of "Emergency Road Service." We find Rule 7 (a) has no application.

On each of the 27 days claimant worked as an engine watchman at Charleston he was on duty in excess of eight hours. The total of this excess amounted to one hundred sixty three hours. The organization contends carrier should have paid claimant at time and one-half for these hours. It relies on Rule 25 of the parties' agreement to support this contention.

Rule 25, relating to engine watchman at outlying points, provides:

> "(a) Engine watchmen at outlying points shall be paid an hourly basis. A day's work shall be not less than eight (8) hours.
>
> (b) The provisions of Section 2 of Rule 2 of this agreement establishing a five-day week shall be applicable to engine watchmen at outlying points.

(c) Hours worked in excess of eight (8) hours on any day shall be considered overtime and paid at the pro rata overtime rate. Employes worked more than five (5) days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work week, except where such work is performed by an employe due to moving from one assignment to another or where days off are being accumulated under paragraph (g) of Section 2 of Rule 2."

Parts (a) and (b) of this rule provide that the five-day week shall be applicable to engine watchmen at outlying points; that they shall have a day of not less than eight hours; and that their work is to be paid for on an hourly basis. It then provides in (c) that hours worked in excess of eight on any day shall be considered overtime and be paid for at the pro rata overtime rate. It then provides as to what is to be paid an employe if he is required to work on the sixth and seventh day of his work week, which is one and one-half times the basic straight time rate. While it can be said there is some ambiguity about the meaning of the language "pro rata overtime rate," we are, however, of the opinion that the meaning and intent of the rule, taken as a whole, is abundantly clear and that it means such employes are to be paid at the rate of time and one-half for all time worked in excess of forty hours in any work week of five days. Such being the case, carrier improperly paid claimant for 163 hours of work for which he should be paid an additional fifty-eight cents an hour, or $94.54.

Much is made of the fact that carrier passed on the claim of George Schalk, whose claim involved a somewhat similar situation, without paying him at the rate of time and one-half for all such overtime. The organization took no appeal therefrom. Such settlement is, of course, evidence of what the parties understood the agreement to mean but is in no way conclusively binding and controlling on the parties or this Board unless accepted and agreed to by the parties as a proper interpretation thereof. The mere failure to appeal to this Board does not have that effect. In fact there is evidence in the record that carrier did, in 1951 and 1952, pay time and one-half in similar situations.

AWARD

Claim denied in part and sustained in part as per findings. Claimant awarded additional compensation in the sum of $94.54.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September, 1954.

DISSENT OF CARRIER MEMBERS TO AWARD 1839

We, the undersigned, dissent in part from the Findings in this Division's Award 1839.

The record shows all letters of the organization, in progressing this case on the property, to the Mechanical Department and to the Chief of Personnel's office, relied on Rule 7 of the agreement to support their claim.

The carrier's submission, Page 4—

"Claim appealed to Chief Personnel Officer T. Short 11-2-50 by General Chairman. Exhibit F.

"Claim denied 11-27-50 by Mr. Short. Exhibit G.