Award Number 144
Docket Number CL–165

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE.—"Claim of L. H. Tupey, Chief Bill Clerk, Atchison, Kan., that he be compensated on the basis of time and one-half for meal period worked July 3, 6, and 7, 1933, as provided in Rule 51 of the Clerks' Agreement effective August 1, 1926."

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that—

The Carrier and the Employee involved in this dispute are respectively carrier and employee 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 Division being unable to reach a decision on the dispute, Wm. H. Spencer was called in as Referee to sit with this Division as a member thereof.

At the time this dispute arose, Mr. Tupey occupied the position of chief bill clerk at Atchison, Kansas, at a basic rate of pay of $5.64 per day. His hours of service were 9:00 a. m. to 6:30 p. m., with a meal period from 1:00 p. m. to 2:30 p. m. On July 3, Mr. Tupey worked from 9:00 a. m. to 6:30 p. m.; on July 6, from 9:00 a. m. to 6:30 p. m.; and on July 7, from 9:00 a. m. to 7:00 p. m. On each of the days in question, he worked continuously through his lunch period, and, in pursuance of Rule 51 of the Agreement between the parties, took twenty minutes for lunch at 3:30 p. m., which was his first opportunity to get away.

On the days in controversy Mr. Tupey worked five hours in excess of his regularly assigned hours. The carrier paid him for these five hours at the rate of time and one-half, but later deducted from his earnings a part of the payment so made.

The petitioner claims that Mr. Tupey should have been paid for five hours at the punitive rate, and that the deduction later made by the carrier was in contravention of the rules of the Agreement between the parties. In support of this claim the petitioner relied upon Rules 45, 48, 50, 51, and 54 of the Agreement.

The carrier, relying principally upon Rules 51 and 54, claims that, on the basis of a fair interpretation of the rules and its traditional practice, Mr. Tupey was paid strictly in accordance with the Agreement between the parties.

CONCLUSIONS OF THE BOARD.—Viewing the record as a whole, the Third Division arrives at these general conclusions:

(1) Mr. Tupey was entitled to be paid for all time worked in excess of eight hours, including the time he worked during his meal periods on the days in question, at the punitive rate.

(2) It was not permissible for the carrier, if this is what it attempted to do—and on this issue the record is inconclusive—to deduct from the time for which the Agreement obligated it to pay time and one-half, the twenty minute period which Tupey availed himself of for lunch on each of the three days in question.

DISCUSSION OF ISSUES AND EVIDENCE.—The carrier, in support of its position that under the Agreement it is merely obligated to pay straight or pro rata time for the lunch period when worked, traced the history of the rules involved and contended that their earlier interpretation substantiates its present position.

Without setting forth the carrier's arguments in detail, it suffices for the present purpose to say that the earlier interpretation of the rules in question tends, with almost equal cogency, to support the position of each of the parties to the present controversy. It follows, therefore, that the Referee, in his effort to arrive at a proper decision, is thrown back upon an interpretation of the rules as they now stand in the Agreement.

Rule 45 provides:

> "Except as otherwise provided in this Article, eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work."

This is the first rule in the agreement which defines the hours of service and the meal period of an employee. It is, therefore, basic and fundamental. All other rules in the Agreement relating to the issues in the present controversy are based upon it. The Division must, therefore, examine the other rules cited by the parties with a view of determining their meaning, significance, and relationship to this fundamental rule.

Rule 48, another rule cited and relied upon by the petitioner, provides:

> "Unless agreed to by a majority of employees in a department or subdivision thereof, the meal period shall not be less than thirty (30) minutes, nor more than one (1) hour."

In the controversy under consideration, it is conceded by the parties that Tupey was by special agreement under this rule assigned a lunch period of one hour and a half from 1:00 p. m. to 2:30 p. m.

Rule 50 provides:

> "When a meal period is allowed, it will be between the ending of the fourth hour and beginning of the seventh hour after starting work, unless otherwise agreed upon by the employees and employer."

It was conceded not only that Tupey worked during his regular lunch period, but also that he did not get an opportunity to avail himself of his abbreviated lunch period of twenty minutes until after the beginning of the seventh hour of service on each of the days in question. There is nothing in the record to indicate that any agreement had been entered into by the parties modifying the operation of Rule 50.

Rule 51, the rule principally relied upon by the employee in this controversy, provides:

> "If the meal period is not afforded within the allowed or agreed time, and is worked, the meal period shall be paid for and 20 minutes with pay in which to eat shall be afforded at the first opportunity."

It was conceded that Tupey, because of the exigencies of the carrier's business on the days in question, was unable to avail himself of his regular lunch period between the hours of 1:00 p. m. and 2:30 p. m.; and that he did work continuously during his regularly assigned lunch hour. Nor was it denied by the carrier that at sometime during the day he was entitled to absent himself for a period of twenty minutes in which to snatch a little food. Moreover, the carrier did not deny its obligation to pay the employee pro rata time for the abbreviated lunch period.

Rule 45, an important one in connection with the controversy, provides:

> "Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of the meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

Both parties rely upon this rule to sustain their respective claims. The carrier contends that the rule means that it is not required to pay overtime for the lunch period when worked. The petitioner urges that the rule means that the carrier shall pay for all time in excess of eight hours of actual work in a given tour of duty at the punitive rate.

It must be admitted that the phraseology of this rule is ambiguous. The phrase, "exclusive of the meal period", may mean, as the carrier contends, that in computing the total amount of overtime worked in a given tour of duty, the time worked during the meal period shall not be counted; but that such time shall be paid for at the pro rata rate. On the other hand, it is arguable that the phrase means—and this is the contention of the petitioner—that in computing

the eight hours of consecutive straight time for the purpose of determining what is overtime, the meal period shall be ignored.

The Referee, bearing in mind the purpose of the overtime rule, concludes that the contention of the petitioner in the absence of other controlling circumstances, is correct. The punitive rate of payment for overtime is included in collective agreement, not so much for the purpose of rewarding the employee, as it is for the purpose of discouraging the employer from forcing or permitting employees to extend themselves beyond the normal working day. It follows that the rule has a stronger application to a situation in which the employer requires or permits the employee to work during his lunch period than it has in a situation in which he requires or permits him to work overtime at the close of his regular working hours.

In further support of its position, the carrier urged that it had long been its practice to pay for the lunch period, when worked, at the pro rata rate. Aside from the carrier's assertion, however, the evidence in support of this position is tenuous. On the other hand, interestingly enough, the record before the Division discloses the fact that the carrier originally paid Mr. Tupey time and one-half for the lunch period on the days in question. It later deducted from his earnings twenty minutes of overtime. If the carrier had rigidly applied its interpretation of the overtime rule in this situation, it would not have recognized an obligation for any overtime on the days in question except the thirty minute period which Tupey worked on July 7 after the expiration of his regularly assigned hours. The record, however, clearly indicates that the carrier did pay Mr. Tupey for four hours at the overtime rate.

AWARD

The claim is sustained.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON.
Secretary.

Dated at Chicago, Illinois, this 20th day of January 1936.