Award Number 179
Docket Number CL-159

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

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

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON (AT UNION STATION, PORTLAND, OREGON)

DISPUTE.—"Claim of certain employees engaged in the handling of mail and baggage at Union Station, Portland, Ore., for compensation at the rate of time and one-half on the actual minute basis for all time in excess of eight (8) hours, exclusive of meal period of not to exceed one (1) hour, from the time first required to report for duty on any day to the time of final release, retroactive to January 11, 1932."

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

The carrier and the employees involved in this dispute are, respectively, carrier and employees 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.

This dispute being deadlocked, Wm. H. Spencer was called in as Referee to sit with the Division as a member thereof.

The parties have jointly certified the following Statement of Facts, and the Third Division so finds, to wit:

> "Prior to January 11, 1932, employes engaged in the handling of mail and baggage in the baggage room at Union Station, Portland, Oregon, were regularly assigned to and worked the following shifts: 5:00 a. m. to 2:00 p. m.; 6:00 a. m. to 3:00 p. m.; 3:00 p. m. to 12 midnight; and from 4:00 p. m. to 1:00 a. m., with one hour for lunch and one regular assigned day off duty in seven.
>
> "Effective January 11, 1932, bulletin No. 1241 was issued reading:
>
> "'THE NORTHERN PACIFIC TERMINAL COMPANY,
> "'OFFICE OF MANAGER,
> "'*Portland, Ore., January 5, 1932.*
>
> "'Bulletin #1241
>
> "'Effective January 11, 1932, Truckmen will work six days per week, as follows, and forces will be reduced accordingly: 8 men 5:00 a. m. to 2:00 p. m., 1 Hour Lunch; 9 men 6:00 a. m. to 3:00 p. m., 1 Hour Lunch; 8 men 2:00 p. m. to 10:00 p. m.; 7 men 3:00 p. m. to 11:30 p. m., 30 Minutes Lunch; 14[1] men 5:00 p. m. to 1:00 a. m. One Relief Man to work as follows: 1 Day 5:00 a. m. to 2:00 p. m., 1 Hour Lunch; 2 Days 6:00 a. m. to 3:00 p. m., 1 Hour Lunch; 1 Day 2:00 p. m. to 10:00 p. m.; 1 Day 5:00 p. m. to 1:00 a. m.; 1 Day 12:00 midnight to 9:00 a. m., 1 Hour Lunch.
>
> "'B. E. PALMER, *Manager.*

---

[1] "'Will work on call 6:00 a.m. as necessary alternating with 7 of the men assigned 2:00 p.m. to 10:00 p.m.; in order to divide the overtime. Present assignment and hours are cancelled. In applying for these positions show first, second, and third choice.
"'B. E. PALMER, *Manager.*'

"Employes were assigned accordingly, and have since worked under that assignment, except that the assignment of 14 men 5:00 p. m. to 1:00 a. m. was cancelled August 21, 1933, as per bulletin 1326 quoted below:

"'THE NORTHERN PACIFIC TERMINAL COMPANY,
"'OFFICE OF MANAGER,
"'*Portland, Oregon, August 18,1933.*

"'Bulletin

"'Effective August 21st the following assignments of hours and men will be made in Truckmen's forces:

Tuesdays to Saturdays, Inclusive

	Number of men	*Assigned hours*
Regular assignments	5	5:00 a. m. to 2:00 p. m.
Call Basis	20	6:00 a. m. to 8:15 a. m.
Regular Assignments	12	2:00 p. m. to 10:00 p. m.
Regular Assignments	15	4:00 p. m. to 12:00 p. m.
Regular Assignments	1	12:00 p. m. to 8:30 a. m.
Sunday Forces		
Regular	5	5:00 a. m. to 2:00 p. m.
Call Basis	20	6:00 a. m. to 8:15 a. m.
Regular Assignments	8	2:00 p. m. to 10:00 p. m.
Regular Assignments	7	4:00 p. m. to 12:00 p.m.
Regular Assignments	1	12:00 p. m. to 8:30 a. m.
Monday Forces		
Regular Assignments	5	5:00 a. m. to 2:00 p. m.
Call Basis	15	6:00 a. m. to 8:15 a. m.
Regular Assignments	12	2:00 p. m. to 10:00 p. m.
Regular Assignments	15	4:00 p. m. to 12:00 p. m.
Regular Assignments	1	12:00 p. m. to 8:30 a. m.

"The number of men regularly assigned to the various shifts has been subsequently changed from time to time to take care of service requirements. Both parties desire to be represented at the hearing of this case."

POSITION OF THE PETITIONER.—The petitioner contended that the carrier discontinued established positions previously included under the Clerks' Agreement, and created new ones of less than eight-hour duration covering relatively the same class of work for the "purpose of reducing the rate of pay or evading the application of these rules." In support of its positions, the petitioner cited and relied upon certain rules of the Agreement between the parties, effective June 1, 1926, a copy of which has been made a part of the record of this dispute.

"Rule 10. A new position or vacancy shall be promptly bulletined on bulletin boards accessible to all employes affected for a period of three (3) days, bulletins to show location, title, duties of position, hours of service, and rates of pay. Employes desiring such position shall file their applications with the designated official within that time, and assignments shall be made within three (3) days thereafter, the name of the successful applicant will, immediately thereafter, be posted for a period of five (5) days where the position was bulletined. Copies of bulletins shall be furnished General and Division Chairmen. Under this rule bulletining of truckers and laborers positions will not be required, however, it is understood that such senior employes will be shown preference, if qualified, in assignment to preferred positions of this class."

"RULE 27. Except as otherwise provided in this Article, eight (8) consecutive hours work, exclusive of the meal period, shall constitute a day's work."

"RULE 28. When service is intermittent, eight (8) hours actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours, and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

"Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the Management and duly accredited representatives of the employes. For such excepted positions the foregoing paragraph shall not apply.

"This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

"Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employes cannot otherwise be utilized.

"Employes covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours."

"RULE 30. Unless mutually agreed to by a majority of the employes and the employing officer in a department or a subdivision thereof, the meal period shall not be less than thirty (30) minutes nor more than one hour."

"RULE 36. Except as otherwise provided in these rules, time in excess of eight (8) hours, excusive 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."

"RULE 55. Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

POSITION OF THE CARRIER.—The carrier contended that it did not either by bulletin or otherwise create any new short-time positions; that it merely exercised its right under the Agreement to call regularly assigned employees for work outside their regular working hours; and that it paid such employees at the time and one-half rate for such extra work. In support of its position, the carrier relied principally upon Rule 37 which provides:

"RULE 37. Except as provided in second paragraph of this Rule, employes notified or called to perform work not continuous with, before, or after the regular work period or on Sundays or specified Holidays shall be allowed a minimum of three (3) hours for two (2) hours' work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

"Employes who have completed their regular tour of duty and have been released, required to return for further service may, if conditions justify, be compensated as if on continuous duty."

DISCUSSION OF EVIDENCE AND ISSUES.—In January 1932, when the present dispute had its origin, the carrier herein, as all other carriers in the nation, was undoubtedly suffering under the impact of the business depression. It had the right both under the law and under the Agreement between the parties to take appropriate measures in the reduction of operating costs. Its reorganization of the handling of mail and baggage at the Union Station in Portland, Oregon, was, of course, a measure taken in the interest of economy. Employees can offer no valid objection to such measures, if they are taken within the rules of the Agreement between the parties. The fundamental issue here presented is, therefore, whether the carrier acted within its contractual rights in the circumstances of this dispute.

The net effect of the carrier's bulletin of January 5, 1932, effective January 11, was to reduce the number of eight-hour positions of truckmen at the station in question from 68 to 47. But it is obvious from the record that the carrier could not have handled the work at this station with the reduced force without regularly calling upon some or all of the regularly assigned employees for work beyond their normal working day. The very announcement of the reorganization of work clearly indicates that the carrier planned to utilize regularly assigned men on short-time or "call" assignments. The record of assignments during the month of February 1932 shows that certain employees were responding to "call" assignments with unmistakable regularity. During the twenty-nine days in question 10 employees worked a call on 14 days, working an average of 2.83 hours for each assignment; five worked on a call on 15 days with an average of 2.88 hours for each call; and 3 worked a call on 16 days with an average of 2.69 hours for each call. The evidence is clear and indisputable that the carrier not only contemplated but actually required that certain

of the regularly assigned men should regularly respond to a certain number of "call" assignments during each month.

The carrier, however, contended that in doing this, it acted within its rights under the Agreement between the parties. In support of this position, it asserted that neither by bulletin nor otherwise did it discontinue any established position of truckman and substitute therefor under a different title a short-time position of truckman covering relatively the same class of work. This, in the opinion of the Referee, is not a tenable position. It is difficult to see how the carrier can deny that it has created a new type of position when it can, by economic pressure or otherwise, compel designated men to report regularly for short periods of work on regularly assigned days. Moreover, the record clearly indicates that the carrier instituted these regular call assignments for the purpose of reducing the rate of pay of the positions for which the call assignments were substituted.

In support of its position, the carrier contended in the second place, that under Rule 37 of the Agreement its right to call employees for extra work at the overtime rate is unlimited "except as provided in second paragraph of this Rule." With this contention, the Referee cannot agree. It is generally agreed that this rule, which commonly appears in collective agreements, was never intended to sanction overtime work as a systematic practice. Its purpose is not to reward the employee for overtime work, but to penalize the employer for requiring or permitting the employee to engage in it. To approve overtime work as a systematic practice would in many situations nullify the letter and spirit of the rule establishing eight hours as the normal work day.

It will be noted that the petitioner asks for compensation for the employees involved "at the rate of time and one-half on the actual minute basis for all time in excess of eight (8) hours, exclusive of meal period of not to exceed one (1) hour, from the time first required to report for duty on any day to the time of final release, retroactive to January 11, 1932." The member of the Third Division of the Adjustment Board representing the petitioner in the presentation of the dispute to the Referee proposed this award:

> "Employes involved in this dispute shall be allowed a minimum of one (1) day of eight (8) hours for each period worked. All time in excess of eight (8) hours, exclusive of the meal period, on any day (24 hours), shall be paid for at the overtime rate. Readjustments in pay shall be retroactive to and inclusive of January 11, 1932."

In the presentation of the dispute to the Referee it was stated by the member of the Division representing the petitioner that an arrangement might have been made between the parties under which the carrier could have worked the employees in question two eight-hour shifts within a given day at straight time.

In view of the Referee's conviction that to grant the claim as originally presented or to approve the award as proposed by the representative of the organization would unduly penalize the carrier for its violation of the Rules of the Agreement, the Referee concludes that the ends of justice will be met in this case if the carrier is required to pay the employees straight time for two eight-hour shifts on the days involved in this dispute.

CONCLUSIONS OF THE DIVISION.—On the evidence and the record, the Third Division arrives at these conclusions:

(1) The carrier, in violation of Rule 37 and 55 of the Agreement between the parties, on January 5, 1932, effective January 11, discontinued certain eight-hour positions of truckmen at the Union Station in Portland, Oregon, and created new ones under a different title "covering relatively the same class of work for the purpose of reducing the rates of pay."

(2) The employees involved in this dispute were regularly assigned to these "call" positions.

(3) The Rules of the Agreement make no provisions for positions of less than eight hours per day, exclusive of a meal period.

(4) The employees involved in this dispute were permitted or required to work two shifts on regularly assigned days.

(5) The employees are entitled to straight-time compensation for two eight-hour shifts on the days in question.

(6) The record contains some evidence tending to show that the carrier regularly worked certain furloughed employees on call assignments, paying them time and one-half for such work. The Division, however, passes no judgment

upon their right, if any, to additional compensation, since their claim, if any, is not included in the claim as presented by the petitioner herein.

AWARD

For the days on which the employees involved worked call assignments, in addition to their regular assignments, the carrier shall pay them the difference between what it did pay them and what it should have paid them for two eight-hour shifts on a straight-time basis. The adjustments in compensation shall be retroactive to and including January 11, 1932.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinos, this 24th day of January 1936.