Award Number 365
Docket Number MW-352

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
GRAND TRUNK WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM.—

"Claim for time and one-half time rates for that part of work performed between 3:00 P. M., Sunday, December 22, 1935, and 5:00 P. M., Monday, December 23, 1935, which was paid for by carrier at pro rata rate."

STATEMENT OF FACTS.—In their ex parte submission the employes stated the facts as follows:

"On Sunday, December 22nd, a derailment occurred on the Grand Trunk lines at Lowell, Michigan. Seven (7) track foremen and nineteen (19) track men were called into service for this emergency at 3:00 P. M., Sunday, December 22nd, and remained in service, engaging in this work until 5:00 P. M., December 23rd, making a total of twenty-six (26) hours of continuous service. In compensating these employes for this service the carrier paid them at the overtime rate for the service rendered up to the beginning of their regular work period on Monday, December 23rd, and thereafter at the pro rata hourly rate." In the carrier's submission the facts were stated more concretely as follows: "Detroit Division Welder and Section Gangs at Grand Rapids, Ada, Muir, Ionia, and Saranac were called out Sunday Dec. 22, 1935, to assist section gang at Lowell, Mich. to repair track damaged by derailment. These men worked together from about 3:00 P. M. Sunday Dec. 22 until about 5:00 P. M. Monday Dec. 23, also on subsequent days repairing track and with the exception of Foreman T. Shepard, and men assigned to Section No. 23, at Lowell, they claimed pay at overtime rate for the entire period, including their regular assigned hours on Dec. 23. Supervisor of Track corrected the time sheets and overtime tickets of the welder and the men from Grand Rapids, Ada, Muir, Ionia, and Saranac Sections to call for straight time for eight hours on Dec. 23 and all the men were paid straight time for their regular assigned 8 hours Dec. 23 and overtime for all time worked outside of regular assigned hours, including traveling time and time taken for meals. Their regular assigned hours are from 7:00 A. M. to 4:00 P. M. Central Standard Time, daily except Sundays, with one hour for meal, usually taken between 11:00 A. M. and 12:00 Noon, but on Dec. 23 and 24 their work required constant application and the meal hour was not taken. Claim is made by the organization for overtime rate rather than pro rata or straight time for the regular assigned hours worked Monday Dec. 23, 1935, by the 26 men (including Foreman T. Shepard and men of Lowell section who did not originally claim it) who were under pay continuously from afternoon of Dec. 22 to afternoon of Dec. 23."

An agreement between the parties as to hours of service and working conditions bearing effective date July 1, 1921, was placed in evidence, and the following paragraphs of Article V of that agreement were specifically cited as bearing upon the disposition of this dispute:

Basic day.—Except as otherwise provided in these rules, eight (8) consecutive hours service, exclusive of the meal period, shall constitute a day's work.

When nature of work requires constant application for eight (8) consecutive hours, employees so affected will be allowed not to exceed twenty (20) minutes for lunch with no reduction in pay.

Overtime.—Except as otherwise provided in these rules, the ninth and tenth hours when worked continuous with regular work period shall be paid for at pro rata hourly rate; beyond the tenth hour shall be paid for at rate of time and one-half time on the minute basis.

NOTE.—Effective January 1, 1930, Mr. W. R. Davidson, then Assistant General Manager, authorized payment of overtime to regular forces at time and one-half after eight hours.

Traveling or detained on orders of the company.—(a) Employees, when detained for conveyance and while waiting or traveling (except in their regular boarding and sleeping cars), on orders of the company to and from work outside of their regular sections or headquarters after regular hours shall be allowed straight time.

(b) When traveling on orders of the company in their regular boarding and sleeping cars on Sundays or the specified holidays, and during their regular assigned hours for week days shall be allowed straight time, for week day assignment.

Beginning and end of day.—Track service employees' time will start and end at tool houses. All other employees will start and end at designated work. The hours of commencing and quitting work will be at the discretion of the management. Day assignment commencing generally between 6:00 a. m. and 8:00 a. m. Where more than one shift is employed the hours of duty may be arranged to conform with the requirements.

Emergency service.—Employees taken off their assigned work temporarily in emergency cases and handling snow plows, flangers, and service at accidents, will be furnished meals and lodging at company's expense, if not accompanied by their outfit cars.

Notified or called.—Employees called for service after released from duty shall be allowed a minimum of two hours at overtime rate, for which two hours service may be required, if held on duty in excess of two hours shall be paid at the overtime rate on minute basis until relieved, provided, however, such call is not cancelled before employee leaves home.

Employees notified when relieved from duty on day previous to report for service on following day less than two hours in advance of regular starting time such service may be computed continuous with day's assignment at pro rata rate.

Service in advance of work period.—Except as otherwise provided in these rules, employees will be allowed overtime rate on minute basis for service performed continuous with and in advance of starting time for regular workday assignment.

Primarily the dispute centered about the question as to whether the "Notified or Called" provisions or the "Service in Advance of Work Period" provisions above set forth should appropriately govern the rates of pay here at issue.

POSITION OF EMPLOYES.—The employes contend that they are entitled to time and one-half time rates for the entire period of service involved in this dispute, since the conditions under which that service was rendered correspond precisely to those specified in the "Notified or Called" rule, which expressly and without qualification provides that "Employes called for service after released from duty * * * if held on duty in excess of two hours shall be paid at the overtime rate on minute basis until relieved"; and they further contend that insofar as the "Service in Advance of Work Period" rule may appear to be in conflict with the "Notified or Called" rule, since the former rule provides that "employees will be allowed overtime rate on minute basis for service performed continuous with and in advance of starting time for regular work-day assignment" and does not embrace the regular work-day period, its applicability is neutralized by the fact that it is introduced by the words "except as otherwise provided in these rules."

POSITION OF CARRIER.—The carrier contends that it is the general intent of the agreement that straight time rates be paid for regular working hours and overtime rates for all time outside of such hours: that the rates here paid, which carried out this intent, complied with all the provisions of the agreement above cited, including the "Service in Advance of Work Period" rule, except those of the "Notified or Called" rule as interpreted by the employes and read separately from the other relevant provisions of the agreement;

that that rule, which is not the standard rule governing calls but includes the phrase "until relieved" only in case of the instant carrier, had its origin in the National Agreements of December 16, 1919 and Decision No. 501 of the U. S. Railroad Labor Board of December 12, 1921, neither of which extended the overtime provisions to the entire service continuous with the regular work day period; that this restriction of overtime rates to service in advance of the regular work-day period was upheld by the U. S. Railroad Labor Board in its Decision No. 1182, rendered August 11, 1922, which is the only dispute authoritatively adjusted involving directly the question here at issue; that the inclusion of the phrase "until relieved" in the rule as negotiated between the parties as well as any other changes in the wording thereof that may have been made in these negotiations were not intended to alter the accepted practice under it of restricting overtime rates to service in advance of the regular work-day period; and that this interpretation of the "Notified or Called" rule had been uniformly applied by the carrier throughout the fifteen years of the operation of the agreement, with protest against such application submitted by the employes in only a single instance, in the fall of 1932, which protest the carrier then held not to be justified.

OPINION OF BOARD.—The claim of the employes is based upon a provision of the agreement which in express and unequivocal terms provides that where the employe called is held on duty in excess of two hours "he shall be paid at the overtime rate on minute basis until relieved." Where there is no ambiguity in the language of a provision it is unnecessary to go outside of that language to construe its meaning. The language here involved is clear and certain: it covers in terms the entire period from the time the employe is called until he is relieved, and there is no distinction drawn between service concluded before the beginning of the regular work-day period and service which is continuous with that period.

Furthermore, the considerations urged by the carrier to show a contrary intent fail to bring conviction. The call rule of the National Agreements as promulgated and applied by the U. S. Railroad Labor Board was a different rule from that involved in this dispute. That rule was applicable to "employes notified or called to perform work not continuous with the regular work period", which provision is not included in the rule here in dispute, and the period for which overtime was stipulated on a minute basis was not defined as extending "until relieved," which provision is included in the rule here in dispute. To contend that the call rule prevailing on the property of this particular carrier must necessarily be taken to reflect the same intent as the call rule of these other determinations which generally prevails elsewhere is to base one's insistence on a mere naked assumption. The fact that the call rule of this agreement is not the standard rule governing calls tends to support the position of the employes rather than that of the carrier. We have here a distinctive rule operative on the property of this carrier which was freely negotiated, and the carrier cannot reasonably insist that that rule be given the same meaning as the rules dealing with this general subject matter, differently worded in essential respects, which prevail on other properties. If this rule is unduly burdensome, a procedure is provided in the agreement for the negotiation of a new rule; but as long as this rule remains operative it must be given such meaning as its express terms appear to justify.

It is true, of course, as contended by the carrier, that the provisions of the call rule must be construed in conjunction with the provisions of the other rules of the agreement, and particularly of Article V, captioned Hours of Service, of which it is a part. The carrier points out that it has complied with these other rules, particularly with those set forth in the Statement of Facts under Basic Day, Overtime, Traveling or Detained on Orders of the Company, Beginning and End of Day, Emergency Service, and Service in Advance of Work Period. With respect to the matters embraced under each of these captions except the last, however, there is no dispute between the parties. Only the "Service in Advance of Work Period" rule offers difficulty, and it must be conceded that a precise line of distinction between that rule and the call rule is hard to draw. It is conceivable, in other words, that an extreme interpretation of the call rule might render the other rule not applicable under any circumstances. But there are distinctions between the two rules, and under the circumstances of this case the call rule appears to be clearly applicable. Among these distinctions the following may be noted: The call rule is stated in mandatory terms without reservation, while the other is prefaced by "except as otherwise provided in

these rules", the call rule is made applicable to service rendered "after released from duty", while the other refers to service performed "in advance of starting time"; the call rule, at least by implication, apparently contemplates special or emergency service, while the other applies to service performed in advance of starting time "for regular work-day assignment." It is neither necessary nor intended in this opinion to indicate, as a general matter of principle, just when the one or the other of these two rules of the agreement should govern the payment of overtime where the service rendered turns out to be continuous with the regular work-day period; it is merely being held that under the circumstances of this case, involving the performance by crews from various localities of a single emergency service which was started 16 hours before the beginning of the regular work-day period and continued without interruption for a period of 26 hours, the call rule, interpreted in conformity with its express terms, appropriately governs the payment of overtime.

Finally, the evidence as to past practice is not sufficient to establish any intent to change the meaning of the express terms of the call rule. Such departures from these terms as may have been made prior to 1932 are not specifically cited; the protest of 1932, prior to the establishment of this Board, does not lose its significance merely because the carrier declined to recognize the claim of the employes, since no tribunal was then available for the adjustment of the dispute; and the instances of departure specifically cited as occurring subsequent to the establishment of this Board all took place in the year 1936, after the dispute in the instant case had originated. Under the circumstances disclosed, however, it would seem to be equitable that the interpretation placed upon the relevant provisions of the agreement in this case be not made retroactive to situations having their origin prior to the date of the violation herein involved.

FINDINGS.—The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein;

That under the circumstances of this case the express terms of the "Notified or Called" rule are applicable and entitle the employes to overtime for the entire period involved; and

That the holding in this case be not made retroactive in principle to situations having their origin prior to the date of the violation herein involved.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 27th day of January, 1937.