NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

John P. Devaney, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM.—

"Claim of warehouse employes performing work classified as truckers (callers or stowers*), F. W. Wojahn, Robert Buchda, Charles Kriesel, William Rau, Eric Linstad, Peter Roberts, Carl Shaffer, O. E. Hettman, Earnest Rick, and Fred Harm, for payment of eight hours (8) at pro rata rate each work day, retroactive to August 1st, 1933, less compensation already received LaCrosse, Wisconsin. (*Corrected at hearing.)"

STATEMENT OF FACTS.—The following statement of facts was jointly certified by the parties:

"LaCrosse, Wisconsin, would be an established terminal point for train and engine men and where yard switching crews would be employed, located on the main line as between Chicago, Minneapolis, and Western points. Operating units known as the Dubuque Division and the Southern Minnesota Division enter LaCrosse and terminals there which produces a connection with the main line gateway to the Northwest.

"The employes involved in this dispute constitute a group working 2:00 p. m. to 6:00 p. m., i. e., dependent upon the volume of work there would be 8 employes some days in comparison with 10 employes other days."

At the oral hearing, by way of explanation, the complainant party stated: "The Joint Statement of Fact contains this language: 'dependent upon the volume of work there would be eight employes some days in comparison with ten employes other days.' This statement is not intended to indicate that a lesser number of named employes would be used some days in comparison to other days, but that dependent upon business there would be a lesser number of named employes confined to a four hour day on some days as compared to other days."

There is in evidence an agreement between the parties bearing effective date of November 1, 1929, and the following rules thereof are cited:

"RULE 7. *Reducing forces.*—In reducing forces twenty-four (24) hours advance notice will be given and preference for employment shall be based on seniority, fitness and ability, fitness and ability being sufficient, seniority shall have preference, provided the employe exercises seniority within fifteen (15) days from date of force reduction.

"If forces are increased within a period of one (1) year, employes will retain seniority and be returned to service in the order of their seniority, provided they have filed their address with the proper officer at the time of layoff, advise of any change of address, renew the address each ninety (90) days, and return to service within seven (7) days after being notified by mail or telegram sent to the address last given, or give satisfactory reason for not doing so."

"RULE 8. *Positions abolished.*—Employes whose positions are abolished may exercise their seniority rights, consistent with ability, over junior employes, provded seniority is exercised within fifteen (15) days from date of position abolished. Employees thereby displaced may exercise their seniority in the same manner."

The carrier violated the intent and plain provisions of Rule 42 in that it abolished established positions by reducing them to four hours per day, thereby evading the application of rules calling for full-time employment to these employees, which they would have enjoyed had the force been properly reduced, and reducing employees' rate of pay or earnings below eight hours per day.

These ten employees are regularly assigned as part of a regular force required to report for work at a regular starting time each day engaged in the handling of regular business of the carrier. Such employees, therefore, are not engaged to handle fluctuating or temporarily increased work. We contend that these regular employees are entitled to a minimum of eight hours' work per day in accordance with the provisions of Rule 15, and we request that payment claimed be allowed.

POSITION OF CARRIER.—LaCrosse, Wisconsin, is a station where the greater volume of warehouse employees' work would be unloading and reloading freight for the purpose of making carload shipments and L. C. L. shipments for departure on the four operating units, namely, the River Division, Southern Minnesota Division, Dubuque Division, and LaCrosse Division.

Representative of the employees involved in this dispute engaged to take care of fluctuating work which cannot be handled by the regular forces, the volume of tonnage regularly arriving in trains is outlined throughout the twenty-four hour period. Approximately 80% of the total daily tonnage originating at LaCrosse is delivered to the warehouse after 3:00 p. m.

Employees involved in this dispute are additional to the regular force for the purpose of transferring freight tonnage arriving in carload shipments from stations such as Chicago, Milwaukee, Davenport, Dubuque, and Galewood, Illinois, transfer platform. At LaCrosse the volume of freight transferred represents an average of approximately ten cars per day, inclusive of L. C. L. carload shipments of varied tonnage in comparison with carload shipments with full tonnage.

Undoubtedly you will each readily realize and understand that the basic measure of eight hours for the purpose of applying payment for overtime is quite uniformly expressed and contained in each of the several labor organizations' schedules in effect on different railroads. The carrier contends that Rule 15 does not guarantee the employees involved in this dispute payment for eight hours, as claimed, for each day work performed; this from the fact that prior to 2:00 p. m. on the dates involved their employment would not be required, which determines that they would not be paid; moreover, they would be hourly rated employees in and around warehouses and thereby within the scope of Rule 17.

Rule 17 manifestly determines that Rule 15 cannot be regarded or apply as a guarantee of eight hours' pay each day work is performed; consequently Rule 15 would be nothing more than a basic measure of eight hours for the purpose of arriving at overtime payment.

The location of LaCrosse on the railroad is suitable for unloading and reloading transfer of merchandise carload shipments originating at other stations and the carrier should not be required to arrange for the employees involved in this dispute commencing work at 8:00 a. m. under the conditions of the regular warehouse force being sufficient to handle the volume of business up to 2:00 p. m., at which time carload merchandise shipments would be placed at the platform and the normal delivery of outbound merchandise shipments originating at LaCrosse would commence, all of which would fluctuate in volume; moreover, irregular with respect to outbound business originating at LaCrosse and carload shipments placed for unloading.

OPINION OF BOARD.—In our opinion, the evidence of the record in this case sustains the contention of petitioner that the employees involved herein are not engaged in fluctuating or temporarily increased work which cannot be handled by the regular forces within the meaning of Rule 17 (d). Whatever fluctuations there is in the work in question is merely fluctuation during the day, which results primarily from a practice by the carrier of accumulating tonnage until 2 p. m. of each day, at which time a peak is reached. The work does not fluctuate and does not "temporarily increase" within the meaning of Rule 17, as it is regular from day to day.

Definitions of terms seem unnecessary in this instance, since the terms are almost self-defining. It is clear from the record that the ten employees involved herein are used with regularity and constitute a part of a normal force.

It follows that as Rule 17 (d) is not applicable, that Rule 15 is applicable, and we, therefore, hold that under said Rule the employees involved would be entitled to work on an eight (8) hour basis and that the carrier is violating Rule 15 by confining these employees to work on a four (4) hour day basis.

In reaching this conclusion we have been in part persuaded by the decision of this Division in Award No. 330. We believe that the instant case is for all significant purposes analogous to the case presented in that award. We therefore reach the same result.

We hold from the facts that appear in the record, which have been carefully considered by the Board, that the ends of justice as between the parties would be best served by returning this dispute as far as it concerns compensation for settlement by negotiation between the parties on the property. In reaching any adjustment the parties will have in mind the opinion of this Board as to the application and effect of the rules in question and will endeavor to apply the same. With our opinion as to the application of the rules under consideration before the parties, this Board has confidence that they can accomplish this result with fairness to all.

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 employees involved in this dispute are, respectively, carrier and employees 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; and

That Rule 15 is controlling herein and under that Rule the employees involved are entitled to a minimum of eight (8) hours per day.

AWARD

Claim remanded for adjustment on property as to compensation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 7th day of May, 1937.

DISSENT

The opinion of the Board, expressed by the referee in this award, stated to be on the evidence of the record in the case, holds that the employes involved are not engaged in "fluctuating or temporarily increased work which cannot be handled by regular forces within the meaning of rule 17 (d)." The opinion further declares that whatever fluctuation there is results primarily from a practice by the carrier of accumulating tonnage until 2:00 p. m. of each day, at which time a peak is reached, and that the work does not fluctuate and does not "temporarily increase" within the meaning of rule 17 "as it is regular from day to day." The Opinion further states that definitions of terms seem unnecessary since the terms are almost self-defining, from which we may take it that there is not in the Opinion of the Board any definition of the terms of the rule. What then, we ask, is the foundation for the award, and what does the first paragraph of the Opinion mean? The reasonable assumption that the parties to the agreement had some purpose in view in writing rule 17 (d) seems to be completely discarded in reaching the conclusion stated in the Opinion. No effort is apparent to accord to the language of the rule the plain meaning of the language employed nor to consider the purpose for which it was incorporated in the agreement.

If the language of the Opinion is to be read as meaning that where it is possible to employ regular forces of men working in eight-hour shifts to handle a given volume of business, without regard to the fact that a large portion or even a major portion of the time of some of the shifts or of all of the shifts will be spent in idleness, fluctuating force may not be employed, then we submit rule 17 (d) is not interpreted but is destroyed. Such a prescriptive and limiting definition of this rule is not justified by the record of this case or by any

prior decisions of this Division in cases cited, one of which at least (Award No. 330—Docket CL–338), rendered by this Division without a referee, was considered to have sufficient analogy to warrant deduction of logical conclusions therefrom that could lead to award in the instant dispute consistent therewith.

The opinion further states that "whatever fluctuation there is in the work in question is merely fluctuation during the day which results primarily from a practice by the carrier of accumulating tonnage until 2:00 p. m. on each day at which time a peak is reached." The facts of record in this case, as hereinafter illustrated by summaries thereof, will not support that statement of the only fluctuation there is in the work in question. There is no reference in rule 17 (d) to the periodicity of the fluctuation, nor are we informed by what process of logical reasoning a conclusion can be reached that a daily fluctuation in business forbids the application of the rule.

The record contains two tabulated statements, one presented by the petitioner giving the names of employes and hours worked each day, September 1933, and one by the respondent giving the tonnage of freight and the time of its arrival on respective trains each day of the same month, September 1933. The basic facts of these statements were accepted as being correct.

The first statement showed five men, explained to be daily-rated employes, working regularly 8 hours each of the 25 working days of the month. It showed 12 other men, explained to be hourly-rated employes, working 4 hours each of those 25 working days, but with notable fluctuations for various ones on certain days working mostly 7 hours and 8 hours, it being explained that the men working 7 hours usually extended their time after the 4-hour period, and the men working 8 hours being engaged prior to the 4-hour period. The names of four other men working respectively on but 2, 10, 12, and 19 of the 25 working days of the month were given in the statement; they too worked periods of 4 hours per day on certain days but also had varying periods of 6, 7, and 8 hours on other days.

It is sufficient to say that such regularity of work as this statement disclosed for other than the five men working regularly 8 hours each day was exhibited for the group of 12 men who were used during most of the working days of the month for a 4-hour period. To discard data relating to the additional work performed by these 12 men on certain days both prior and subsequent to the 4-hour period, and the additional work performed by the 4 other men who worked on but 2, 10, 12, and 19 days respectively is to ignore evidence essential to correct understanding of rule 17 (d) which deals with fluctuating or temporarily increased work. Then to proceed to hold applicable Rule 15, the 8-hour *rule of measurement of a day's work but not a guarantee of same*, despite the fact that said rule gives particular exception to the provisions of Rule 17, is simply to pyramid error of assumption in accomplishment of erratic interpretation of rules.

The second statement referred to shows the tonnage and the hour of its arrival and placement each of the working days of September 1933. The placement for handling was dependent upon train schedules and arrival and in lesser part upon freight originating in the city, 80 per cent of which was delivered after 3:00 p. m. There was apparent also in the details of that statement the facts below summarized. There is shown the minimum tonnage and the maximum tonnage for the day of the month when such minimum and maximum respectively occurred and the average daily tonnage for the 25 working days placed at 8:00 a. m. and upon arrival of two certain trains (Nos. 83 and 89), the average hour of placement also being shown:

	Minimum	Maximum	Daily average
Placed at 8:00 a. m.	17.5T.	63T.	34.6T.
Placed at 11:40 a. m. (Average arrival, train No. 83.)	32 T.	62T.	43.2T.
Placed at 1:37 p. m. (Average arrival, train No. 89.)	3 T.	16T.	8 T.
Other freight placed before 3:00 p. m. (20% of freight originating LaCrosse.)	3 T.	6T.	4 T.
Other freight placed after 3:00 p. m. (80% of freight originating LaCrosse.)	12 T.	25T.	17 T.
Total daily average			106.8T.

That is to show that only one-third of the average daily tonnage was available for handling at 8:00 a. m., and that there was a fluctuation in quantity placed at that hour ranging on one day from a minimum of but one-half the average for the month to a maximum on another day of eighty per cent above the average. Further, it shows that approximately two-thirds of the daily average tonnage was placed after 11:40 a. m. and that there was a fluctuation in quantity placed after 11:40 a. m. ranging on one day from a minimum slightly less than one-half the average to a maximum on another day of fifty per cent above the average. From whatever reasonable base of normalcy as to quantity of freight and hours of regularity that may be assumed as normal it is evident from this summary as it was from the statements in the record that there was fluctuating and temporarily increased work necessary, and that such extremes of variation as this record thus shows arose from conditions which the carrier could not as a practical matter of operation control or regulate so as to enable it to be handled by full daily 8-hour assignments of all the forces, claimants in this case, declared by the award to be regular forces, except through excess and unwarranted payment to at least a material number of such claimants for idleness—payments wholly unjustified under the terms of rule 17 (d) as applied to this case and equally unjustified under the obligation upon the management to operate its property efficiently and economically.

To say that the conditions at the freight house at LaCrosse and the work there required and performed as represented by these two statements does not represent temporarily increased or fluctuating work is to ignore the meaning of words and the very clear intent and purpose of the rule.

It is to be borne in mind that the award in this case declares there was no fluctuating or temporarily increased work within the meaning of rule 17 (d) and limited the remand of the claim for adjustment to the matter only of compensation. This record proves conclusively there were uncontrollable conditions which required fluctuating and temporarily increased work within the meaning of rule 17 (d) to a major degree within the working hours of each day and in a measurable degree as to the variable quantity of work available during the successive days of the month. To the extent that such fluctuation exists, the direction of the remand limitation excluding consideration of such fluctuation does violence to the terms of the agreement. Such award does not interpret the rule; it gives such new meaning to the rule as to render it a change or revision, an action that is without the jurisdiction of this Board to enforce upon the parties.

If in the light of the Opinion in this case the respondent can conceivably find an application of rule 17 (d) to a practical situation, then it may be admitted that the award in this case is an interpretation of the meaning of the rule. But if, on the other hand, in the light of the Opinion no application to a practical situation is possible, then the Opinion in this case does not interpret the rule but destroys it and takes it out of the agreement, an unwarranted and unjustified invasion of the rights of the parties to the agreement.

Further error in this Award arises from limiting the remand of this claim to the question of compensation only, thus implying that no fluctuating or temporarily increased work was at any time or in any manner performed by any of the claimants in this dispute. The record sustains no such conclusion, and adherence to such decision has but one effect, viz., to revise the agreement by eliminating rule 17 (d) as it relates to fluctuating or temporarily increased work, an action which this Board is not legally empowered to take.

C. C. COOK.
R. H. ALLISON.
GEO. H. DUGAN.
A. H. JONES.
J. G. TORIAN.