

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Arthur M. Millard, Referee

PARTIES TO DISPUTE:

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

**THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY**

STATEMENT OF CLAIM: "Claim of employees Rock Island Freight House, Kansas City, Mo., for payment of a minimum of eight (8) hours per day for such days worked and paid less than eight hours, or those entitled to work, since June 23, 1936."

STATEMENT OF FACTS: "Prior to June 23, 1936, all employees covered by Working Rules Agreement of January 1, 1931, were paid a minimum of eight hours' pay for each working day they were assigned to perform work on the freight platform at Kansas City. Men other than regular men were assigned and worked on seniority basis from an established extra board created and operated under provisions of Rule 13 of Agreement of January 1, 1931. On the morning of June 23, 1936, the Foreman notified eight or ten of the extra employees who had reported for work that they would not be used on the morning shift account no work for them and if they would come back to the freight house about 3:30 P. M. or 4:00 P. M. that day he might be able to find a few hours work for some of them. He also notified these men that they would be paid straight pro rata rate for actual time put in if he did put any of them to work that afternoon. This practice has been followed each working day since June 23, 1936.

"Exhibit No. 1 (one page only) is a statement showing the number of men worked on 'short hour' assignments, or less than eight (8) hours a day, and paid for only actual hours worked, from day 'short hour' assignments were inaugurated (June 23, 1936) to date this check was made, i. e., September 10, 1936.

"Exhibit No. 2, Page 1, is a recap. of payroll of Kansas City freight platform, showing by classes the regular force employed and the number of extra truckers employed on each day of a three week period, one week in June (the week following the inauguration of 'short hour' assignments); one week in July and one week in August.

"Exhibit No. 2, Pages 2 to 19, inclusive, shows actual hours worked by force on platform for same period included in recap.

"This three week period is representative of the entire period since 'short hour' assignments were put into effect June 23, 1936.

"Exhibit No. 3—Recap.—is a recap. of Exhibit No. 3—Pages 1, 2, 3 showing the pounds of L. C. L. freight received at Kansas City Rock Island Freight House from the front doors (freight received from city doors from trucks, transfer and wagons) and L. C. L. freight received in railroad cars (railroad cars of L. C. L. freight switched to the freight house for transfer

"However, by 3:00 P. M. the warehouse supervisors are in a position to make a fairly accurate estimate of the volume of tonnage which may be expected for the balance of the day. They do this by taking the following factors into consideration:

"(a) Amount of freight received on the day in question to 3:00 P. M.

(a-1) Amount received on the preceding day and same day of past week to 3:00 P. M.

"(b) Amount received on preceding day and same day of past week after 3:00 P. M.

This basis of estimating the amount of tonnage is, of course, not infallible, but it is a yardstick which is advantageous to the employees as well as to the management.

"Effective as of June 23, 1936, extra men who reported between 9:00 and 10:00 o'clock in the morning as usual and were not needed and hence were not used, were notified that if they cared to return again at 3:00 or 3:30 P. M. there might be necessity for putting on additional force, and if so, a sufficient number of men would be selected from those available; and that those thus selected would be given an opportunity to work for a few hours, for which time they would be paid for the actual time worked. Men holding seniority did show up each afternoon and were used in their seniority order until about July 1, 1936, when of their own accord and for no apparent reason, they discontinued their attendance. This action on the part of the men holding seniority caused the warehouse supervisors after July 1st to go on the street and to neighboring industries and pick up any men available who desired to work. However, effective as of December 30, 1936, men who held seniority but who were not used when they showed up in the morning resumed the practice which they followed prior to July 1st, of showing up again in the afternoon; and since that time (December 30, 1936) they have been used in their seniority order for such time as their services have been required and have been paid actual time worked.

"The claim now before this Board, as understood by the carrier, is that employees on the Freight House platform who have no regular starting time, and who are not regularly assigned, but who show up in the afternoon of their own accord and are put to work handling fluctuating work, are entitled to payment of time for full eight hours, regardless of the fact that such a period of time is not worked. They further claim that all employees entitled to work by seniority and not used are entitled to eight hours' pay for the days their juniors worked."

"The employees are contending they are entitled to pay for time not worked. Theirs is the burden of proof. The contract specifies the rights of the employees. The right of fluctuating forces to pay for time not worked is not specified and hence the employees do not have the right. Therefore, they are entitled to hourly pay for the time worked, the same pay which an employee who lays off of his own accord is entitled to receive (see exception to rule 48).

"The carrier intends to continue to assign such portion of the force as is used with regularity to a fixed starting time and likewise to provide, wherever possible, full eight hours' work to those who are assigned temporarily from day to day, but maintains it has a right to work the remaining employees who are engaged to take care of the fluctuating or temporarily increased work, which cannot be handled by the regular forces, actual time necessary to handle such peak load of work and pay such employees for actual time worked as is clearly intended under Rule 48."

OPINION OF BOARD: In this claim of employees of the Rock Island Freight House at Kansas City, Missouri, for payment of a minimum of eight (8) hours per day for such days worked and paid less than 8 hours, or those

entitled to work, since June 23, 1936, various rules of the agreement between the parties effective January 1, 1931, together with various rulings and decisions have been cited by both of the parties at interest in support of their separate contentions.

With reference however to the rulings and decisions cited, each of these apply to the existing rules of the agreements and the conditions evidenced at the time such rulings and decisions were made and, while in some instances there is some similarity to the conditions of this instant claim, each claim must be decided on its merits and in accordance with the rules of the existing agreement between the parties and the conditions evidenced during the period at issue.

Among the rules cited by the parties, particular emphasis has been laid upon the proper application and interpretation of Rules 46 and 48, and which are respectively designated as the "Day's Work" and the "Reporting and Not Used" rules of the existing agreement.

Insofar as Rule 46 is concerned, this rule provides and establishes the period which constitutes a day's work for the class of employees designated in the scope rule of the agreement; with the exception that where the service is intermittent, as provided for in Rule 47, the established time for a day's work, or eight hours, may be performed within a spread of 12 hours.

Rule 48 covers employees who are required to report for work at a regular starting time, but who are prevented from performing service by conditions beyond the control of the Carrier. Where such conditions arise the rule provides that the employee will be paid for the actual time held, with a minimum of two hours.

The second paragraph of Rule 48 provides that employees who are required to report for work at a regular starting time and are worked for any portion of the day, "under such conditions," or prevented from performing a day's work by conditions beyond the control of the Carrier, shall be allowed a minimum of four hours for such portion of the day worked up to a total of four hours, and a minimum of eight hours for any portion of the day worked in excess of four hours.

A specific condition of this rule is that it does not apply to employees who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces. That is, the rule does not apply to extra employees who are put on in an emergency to care for increases that temporarily or from time to time exceeds the normal tonnage handled, and creates unusual increases in the work. This rule applies to employees required to report for work under the application of Rule 46, but who are prevented from working, or limited in the number of hours worked, by conditions beyond the control of the Carrier; and supports the contention that where employees are required to report for work and are not prevented from performing service by conditions beyond the control of the Carrier, or are utilized for work where the flow of tonnage is reasonably regular and not fluctuating or irregular, eight hours would constitute the day's work for such employees under the proper application of Rule 46.

In considering the several exhibits filed with respect to tonnage handled, and as certified to by representatives of the Employees and the Carrier, and which is said to be representative of the entire period from June 23 to September 30, 1936 the Board submits that while there will be instances or days when fluctuations will occur by sudden increases or decreases in the normal flow of tonnage, such instances are not generally evidenced in the examples cited and indicate, with few exceptions, a regular flow of tonnage which could not be considered as "fluctuating" or "temporarily increased" within the meaning of Rule 48; while a comparison of the number of men used and designated as "regular eight hour men" and "short time men" would indicate with few exceptions a comparatively regular requirement.

In connection with the Carrier's statement as to that portion of the claim reading "or those entitled to work," there is little doubt but that the men who prior to June 23, 1936, showed up for work each day and were used as needed in their seniority order, and who about July 1, 1936 discontinued showing up, did so because of the changes made by the Carrier in assignments and working conditions, and are made parties to the claim because of their seniority which was not respected by the Carrier in the changes referred to.

In view of the rules cited and the conditions outlined in this instant case the Board submits that Rule 46 of the existing agreement between the parties specifically provides for a day's work of eight hours, both in its own application and in the intermittent service outlined in Rule 47; and that Rule 48 applies only under the conditions outlined in the rule and the interpretation in this opinion.

In further connection with these conditions, and of the changes made by the Carrier in the service of men working on a seniority basis from an established extra board created and operated under the provisions of Rule 13 of the agreement between the parties, effective June 23, 1936, the Board submits that the Carrier violated the terms of the existing agreement between the parties, and rules that such portion of the force as worked on the seniority basis from the established extra board be compensated for the difference between eight hours and the amount paid for such days worked, and paid less than eight hours, and that such compensation be made retroactive to June 23, 1936.

With respect to those employees who were engaged to take care of fluctuating or temporarily increased work which could not be handled by the regular force, the Board rules that these were properly compensated, while insofar as this claim concerns the employees who may have been entitled to work because of their seniority rating but were not available and performed no work the claim is denied.

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 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 the claim of the employees is sustained as outlined in the final paragraphs of the opinion of the Board.

AWARD

Claim sustained for employees working on the seniority basis from the established extra board, and that these be compensated, retroactive to June 23, 1936, for the difference between eight (8) hours and the amount paid for such days worked and paid less than eight (8) hours; but disallowed as the claim applies to compensation for employees engaged to take care of fluctuating or temporarily increased work and those employees who were not available and performed no work.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 14th day of October, 1937.