

Award No. 1398
Docket No. MW-1466

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Royal A. Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim that Mr. Fred C. Anderson, Pumper, Terminus and Grass, California, is entitled to adjustment in wages under the provisions of Rule 31 of the Agreement effective November 1, 1929, between The Western Pacific Railroad Company and employees represented by Brotherhood of Maintenance of Way Employees, account of hours of his assignment being increased on November 2, 6, 9, 10 and 11, 1938."

EMPLOYEES' STATEMENT OF FACTS: "Mr. Fred C. Anderson was the assigned Pumper at Terminus November 2nd and 11th, both inclusive. His assigned hours at that time were 2:00 P. M. to 10:00 P. M. daily. On November 2, 6, 9, 10 and 11 he worked as follows:

November	2—2:00 P. M. to 12:00 M	—10 hours
"	6—2:00 P. M. to 12:00 M	—10 hours
"	9—2:00 P. M. to 12:00 M	—10 hours
"	10—2:00 P. M. to 11:00 P.M.	— 9 hours
"	11—2:00 P. M. to 11:00 P.M.	— 9 hours

"This work in excess of eight hours was authorized by Mr. Anderson's supervisor, Mr. D. Coons.

"The reason for working in excess of his usual tour of duty was because of necessity to provide water for washing of celery by shippers of this perishable seasonable commodity.

"Rates of pay applicable to pumpers on The Western Pacific Railroad were arrived at through a Mediation Agreement of November 6, 1929, which provides in part as follows:

' 8 hours per day Pumper\$ 95.00 per calendar month
9 " " " " 106.88 " " "
10 " " " " 118.76 " " "
11 " " " " 130.64 " " "
12 " " " " 142.53 " " "

etc., no overtime'

"Another Mediation Agreement, effective August 1, 1937, increased basic rates 5¢ per hour, which for an eight-hour per day Pumper increased the rate from \$95.00 per calendar month to \$107.17 per calendar month.

"Rule 31 of the current Agreement, applicable in this case, provides in part as follows:

' . . . If assigned hours are increased or decreased the monthly rate shall be adjusted pro rata as the hours of service in the new assignment bear to the hours of service in the present assignment. . . . '

OPINION OF BOARD: Here is a case of seeming conflict between two rules, part of the same Agreement. Rule 31, applying to pumpers, assures them "a monthly rate to cover all service rendered," with the added promise that, "If assigned hours are increased or decreased the monthly rate shall be adjusted pro rata as the hours of service in the new assignment bear to the hours of service in the present assignment."

The memorandum, effective Nov. 1, 1929, after stating the rates applicable to 8, 9, 10, 11, and 12-hour days, has appended the cryptic notation, "No Overtime."

If that phrase is to operate in such a case as this to deny adjustment for additional hours promised by Rule 31, the two are in seeming but unintended conflict. It is our duty so to construe the two, if possible, as to remove that conflict and give effect to both provisions. We should not so apply one as to nullify the other.

The referee is of the opinion that the phrase, "No Overtime," as used after the schedule of monthly rates of pay means simply that no additional time will be paid for on the conventional and "penalty" basis of "time and one half." That purpose will be achieved if we apply Rule 31 so as to accomplish its plain purpose of proper adjustment for either increases or decreases of assigned hours.

In this case, for the five days in question, the claimant's assigned hours were increased by direction of superior authority. The adjustment required by Rule 31 should be made. That is, for the five days in question Mr. Anderson should be paid "pro rata" at the monthly rate applicable to the periods during which he actually worked.

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 employe involved in this dispute are respectively carrier and employe 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 to the extent indicated there has been a violation of the Agreement.

AWARD

Claim sustained as indicated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of April, 1941.