

Award No. 1399
Docket No. MW-1414

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Royal A. Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: "Claim that Messrs. Walter Castagnetto, V. Vandiver, L. Witt, W. A. Dawdy, T. Adams, J. P. Tilson, W. A. Marlow, C. F. Nelson, S. Strasser, F. E. Apple and R. Gibson, employes of Bridge and Building Gang No. 104, Sacramento Division, be paid time and one-half for six (6) hours, 6:00 P. M. to 12:00 midnight, January 17, 1938, under the provisions of Rule 26 of Agreement, effective September 1, 1926."

EMPLOYEES' STATEMENT OF FACTS: "Employees involved in this dispute are members of a Bridge and Building Gang assigned to outfit cars. Regular assigned working hours are 7:00 A. M. to 4:00 P. M., with one hour off for lunch. Employees are paid on an hourly rate basis.

"On January 17, 1938, the foreman was notified that his outfit cars and employes were to be 'picked up' by a work train and moved to another point, (Cantara) where they were needed to clear a slide. The employes involved continued working until 5:00 P. M. when the work train not having arrived, they were told by their foreman to eat their evening meal and be ready to move upon arrival of the train. The work train arrived and 'picked up' the outfit cars and the employes at about 6:00 P. M. The train arrived at Dunsmuir, a point near the slide at 12:00 Midnight and the employes involved immediately engaged in work of clearing the slide.

"The employes have claimed time between 6:00 P. M. and 12:00 Midnight under the provisions of Rule 26 of the current Agreement between the Organization and the Carrier, reading:

'Rule 26. Except as otherwise provided in these rules, the ninth and tenth hours when worked continuously with regular work period shall be paid for at pro rata hourly rate; beyond the tenth hour shall be paid for at the rate of time and one-half time on the minute basis.'

"The Carrier denied employes' claim."

POSITION OF EMPLOYES: "On January 17, 1938, at about 11:00 A. M., the foreman of this gang received instructions to load tools and equipment and prepare outfits to be ready to move from Los Molinos to or near Cantara, where the employes were needed to assist in the work of clearing a slide. Advice was that a work train would pick up this gang at about 3:00 P. M.

"The employes worked through until 5:00 P. M., or one hour overtime, and, as the work train had not arrived, were told by the foreman to eat their evening meal as the train should be there soon to take them to the slide. Time was allowed from 4:00 P. M. to 5:00 P. M.

and commenced work at 12 Midnight, for which they have been properly compensated for service performed on that date in accordance with the provisions of Rules 23 and 26, which are:

'Rule 23—Except as otherwise provided in these rules, eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work.'

'Rule 26—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 the rate of time and one-half time on the minute basis.'

The claim for additional compensation as now before the Board is devoid of merit, and should be denied."

OPINION OF BOARD: This claim goes to decision on Rules 26 and 35.

Rule 26, as to these employees, requires that "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 the rate of time and one-half time on the minute basis."

Rule 35 reads thus: "Employees required . . . to travel on or off their assigned territory in boarding cars will be allowed straight time travelling during regular working hours, and on Sundays and holidays during hours established for work periods on other days."

The case is not within Rule 26 because the hours for which additional compensation is wanted were not "worked" continuous with regular work period or at all. The time was spent in waiting for the train which was to move them and in travelling. The waiting was at the employees' home station under Rule 39. They were held not for work but for travel.

The travelling is beyond the reach of Rule 35 because it was not done "during regular working hours."

In short, the two rules are so worded that in their mutual operation they exclude compensation in this case.

The result is not altogether equitable but the referee feels that if compensation, particularly on the overtime basis, is to be allowed for such an unusual case as this, it should come as a result either of concessions or the negotiation of an appropriate amendment to the rules.

In the opinion of the Referee, the case is not controlled by Rule 31 which applies only when employees are "notified or called to perform work not continuous with the regular work period." In such case, overtime is to be paid as stated.

With Rule 31 should be read Rule 36 which, by its own limitation, applies only when employees are required "to leave their home station." Rule 36 has been interpreted (see Page 19 of printed copy of Agreement, effective Sept. 1, 1926) to mean under section (b) thereof "that where an employe is required to report in excess of two (2) hours in advance of his regular work period that he will be compensated for travelling or waiting time as provided in section (c)."

The whole point of what has just been written is simply this. The Agreement has special and explicit provisions assuring compensation for waiting and travel time. They do not include this case. By interpretation, to make the Agreement cover it would be by so much an amendment rather than a fair construction of the contract.

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 for the reasons stated, no violation of the Agreement has been found.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of April, 1941.