Award No. 1537
Docket No. CL-1425

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: "CLAIM OF THE SYSTEM COMMITTEE OF THE BROTHERHOOD THAT:

"Extra Yard Clerk W. D. McDermott was entitled to and shall be paid a minimum day's pay of eight (8) hours less compensation already received for services performed on February 9th and February 22nd, 1940."

EMPLOYES' STATEMENT OF FACTS: "Yard Clerk, D. O. Mikels, laid off his position 4:00 P. M. February 9th and was paid four (4) hours straight time, which was correct.

"The assigned hours of Mr. Mikels position on this date was 12:00 Noon to 9:00 P. M., one hour off lunch 4:30 P. M. to 5:30 P. M. Rate $5.40 per day.

"Extra Yard Clerk W. D. McDermott, was called to relieve Clerk, D. O. Mikels, 5:00 P. M. and worked to 9:00 P. M., for which he was paid four (4) hours straight time.

"Yard Clerk J. S. Bynum laid off his position 11:00 A. M. February 22nd and was paid (5) hours straight time, which was correct.

"The assigned hours of Mr. Bynum's position are 6:00 A. M. to 2:00 P. M. Rate $5.40 per day.

"Extra Yard Clerk W. D. McDermott, was called to relieve Clerk, J. S. Bynum, 11:00 A. M. and worked to 2:00 P. M., for which he was paid (3) hours straight time.

"It has been the practice to pay Clerks relieving other regular assigned clerks a full day for time worked and the Clerk laying off actual time worked.

"Yard Clerk Bynum and Mikels both laid off account sickness. Yard Clerks do not get sick leave or vacations."

POSITION OF EMPLOYES: "The following rules are involved in this dispute:

RULE 27 Day's work

'Eight consecutive hours, exclusive of the meal period shall constitute a day's work, except as provided in Rule 28.'

went to work on his regular shift at 6:00 A. M., but only worked until 11:00 A. M., being unable to complete his shift on account of illness. He was allowed pay for the time worked, or five hours.

"6. W. D. McDermott, holding seniority rights as yard clerk, but not regularly assigned, was called to finish the shift, and worked from 11:00 A. M. to 2:00 P. M., and in addition was used from 2:00 P. M. to 3:00 P. M., or one hour continuous with and following the regular work period. McDermott was allowed pay for three hours for the service rendered from 11:00 A. M. to 2:00 P. M., and was allowed one hour's overtime at pro rata rate for the work 2:00 P. M. to 3:00 P. M."

POSITION OF CARRIER: "The employes have cited no rule in the agreement to support the claim for eight hours' pay for four hours' service. In conferences it was alleged that it had been the practice to pay clerks relieving other clerks a full day's pay, but the carrier denies that there was any such practice established. An erroneous payment in an individual case does not constitute a new rule. The employes themselves contend that past practice does not modify the agreement, and have made that contention in other cases now pending before the Third Division.

"But there has been no such practice. With the single exception of an instance February 6, 1939, when there was an allowance of this kind by the timekeeper with no authority therefor recorded, there has been no allowance on the basis contended for in this case. Another instance alleged by the employes to have been paid August 16, 1939, was found to have been paid on an entirely different basis, and the employe was not allowed pay for any time not worked.

"But this is of no consequence, as erroneous and unauthorized payroll allowances could not possibly establish a new rule any more than an error in rate could establish a higher or lower rate of pay.

"There is no merit in the claims and they should be denied."

OPINION OF BOARD: On February 9, 1940, Extra Yard Clerk, W. D. McDermott relieved Clerk D. O. Mikels, a regularly assigned yard clerk at Muskogee ,at 4:00 P. M., who laid off on account of sickness after 4 hours' work. Mikels was paid for 4 hours' work. McDermott worked the remainder of the regular assignment from 5:00 P. M. to 9:00 P. M. and was paid for 4 hours of service.

On February 22, 1941, McDermott relieved Clerk J. S. Bynum, a regularly assigned yard clerk at 11:00 A. M., who laid off on account of sickness after 5 hours' work. Bynum was paid for 5 hours' work. McDermott worked the remainder of the regular assignment to 2:00 P. M. and was paid for 3 hours' work.

The employes contend that under Rule 27 of their agreement with the carrier McDermott should have been paid for a full eight hours on each of these days.

This rule reads:

> "Day's Work. Eight consecutive hours, exclusive of the meal period shall constitute a day's work, except as provided in Rule 28."

Neither Rule 28 relating to split tricks nor Rule 32 relating to calls is involved.

Among the awards submitted that most directly apply is No. 462, Docket No. CL-488. It is merely a coincidence that this award pertains to the same relieved clerk and the same carrier.

Award No. 462, determined by this Division without the aid of a Referee, was a re-submission of Award No. 272, Docket No. CL-276, in which Referee Hotchkiss sat.

Award No. 272 had to do with Mikels claim for a minimum of 8 hours' pay when called under a special temporary local agreement dated January 17, 1933 which provided for the use of extra men instead of regularly assigned clerks who had theretofore performed overtime service. This special agreement was terminated by the employes and the carrier claimed that termination could only be made in accordance with Section 6 of the Railway Labor Act. The carrier also maintained that Mikels was an extra employe and not a regular one.

The Board held that the arrangement of January 17, 1933 was not an agreement and remanded the claim for compensation for negotiation and agreement.

The Opinion of Board in Award No. 462 reads:

> "The evidence shows that during the period involved Mr. Mikels was not regularly assigned. On numerous occasions during said period he was used to relieve regularly assigned employes who laid off account sickness or for other personal reasons, and on some few occasions he was used for a full 8-hour period, and, further, on certain other days he was used on an exclusive call basis. On some of the days he was used on an exclusive call basis he was called twice, and for each of such calls was allowed a minimum of three hours.
>
> "Under the particular facts and circumstances existing in this case, the Board is of the opinion that Mr. Mikels should be allowed, for the period May 22, 1935, to September 10, 1935, both inclusive, 8 hours' pay for each of the dates on which he was used on an exclusive call basis, regardless of whether there was more than one call on such dates, not including the dates on which he relieved a regularly assigned employe, or on the dates he was used for a full 8-hour period and for which service he has been correctly compensated. Adjustment in his pay should be made for the particular days on which he was used exclusively on a call basis, May 22, 1935, to September 10, 1935, both inclusive, deducting from the 8-hour allowance such payments as have already been made for the calls on those days."

The Findings of the Board in this award included this statement:

> "That the claim for 8 hours for each call on days that the claimant was used to relieve a regularly assigned employe, and on days when he was used for a full 8-hour period and for which he was allowed 8 hours' pay, should be denied, and that on days when he was used on an exclusive call basis he should be allowed 8 hours' pay regardless of whether he was called for more than one tour of duty on such dates, deducting therefrom such allowances as have already been made for such dates."

The important language in the foregoing quotations is: "* * * not including the dates on which he relieved a regularly assigned employe."

It is true that Mikels' claim in Award No. 272 arose because of a difference of opinion as to the effect of the special arrangement. But in Award No. 185, Docket No. CL-127, involving warehouse employes who worked less than 8 hours and Rule 52 of the Northern Pacific agreement which embodies the same language as Rule 27 of the instant agreement, this Division held that, "No single rule or group of rules in the schedule sustains the employes' contention that there is a guarantee of eight hours for all employes." See also Award No. 1234, Docket No. MS-1321.

The agreement now under consideration does not contemplate that the carrier shall be required to pay for more than 8 hours for a regular day's work. Rule 30 throws light on the intent of the parties. It provides that "for regular operations requiring continuous hours eight consecutive hours

without meal period may be assigned as constituting a day's work." Overtime pay is provided for in Rule 31 and minimum pay in Rule 32.

The language of Rule 27 requires the contracting employe party to furnish eight consecutive hours of work for a day's pay either by a regularly assigned employe or his substitute or by a combination of both.

Under circumstances like those in the instant case which are beyond the control of the contracting employer party the carrier should not be penalized by requiring it to pay for more than 8 continuous hours for a regular day's work where overtime is not involved.

This is a case of relief work and not a case involving fluctuating or temporary increased work which cannot be handled by regularly assigned employes or a case of reduction by the carrier in hours of an extra or regularly assigned employe.

Principle 12 of "Exhibit B" referred to in and made a part of the contract says for "work requiring practically continuous application during eight hours" that "for eight hours' pay eight hours' work should be performed" by all employes except engine and train service employes.

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 the evidence does not show any violation of the agreement or any circumstances supporting the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 31st day of July, 1941.