Award No. 1714
Docket No. MW-1771

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Carl B. Stiger, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY
ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY CO.

STATEMENT OF CLAIM: Claim of Employes' Committee:

First, that by assigning Earl Mitchell, Crossing Watchman, Burnham, Missouri, to seven (7) hours and twenty-five (25) minutes per day—week days—and paying him on the basis of such assignment, the Carrier violated Article V, Rule 1, and Article V, Rule 8 of the current Agreement.

Second, that by assigning Earl Mitchell to seven (7) hours and twenty-five (25) minutes on Sundays and paying him for that service at pro rata rate, the Carrier violated Article V, Rule 5 of the current Agreement.

Third, that Earl Mitchell and all other Crossing Watchmen on the St. Louis-San Francisco Railway and St. Louis, San Francisco and Texas Railway Company shall be restored to full time, eight (8) hours per day assignment and paid the appropriate rate applicable, 36 cents per hour.

Fourth, that Earl Mitchell and all other Crossing Watchmen on the St. Louis-San Francisco Railway and St. Louis, San Francisco and Texas Railway shall be paid on the basis of three (3) hours for two (2) hours' work or less for service performed on Sundays; and if worked more than two (2) hours on Sundays, pro rata rate for time worked in excess of two (2) hours up to ten (10) hours from time service begins, and time and one-half thereafter on the basis of 36 cents per hour, in conformity with 'NOTE' in Article V, Rule 5.

Fifth, that this employe and all other similar employes on the Railways above mentioned shall be paid the difference between what they have received and that which they should have received on the basis of Paragraphs 3 and 4 of this Statement of Claim, retroactive to March 1, 1941.

EMPLOYES' STATEMENT OF FACTS: Prior to March 1, 1941, Earl Mitchell was working eight (8) hours per day, every day in the week, for which service he was paid the rate then applicable.

Effective as of March 1, 1941, Earl Mitchell was assigned to seven (7) hours and twenty-five (25) minutes per day, every day in the week.

The Agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employes is, by reference, made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1 of Article V of the existing Agreement between the St. Louis-San Francisco Railway Company—St. Louis, San

OPINION OF BOARD: Rule 1, Article 5, of the agreement, effective September 1, 1937, reads:

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

Rule 8 provides that crossing watchmen et al. will be paid a monthly rate to cover all services rendered. The rule further states: "* * *. 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 hours of employes covered by this rule shall not be reduced below eight (8) per day for six days per week."

The NOTE to Rule 5 reads as follows:

> "Where employes are regularly assigned to work less than eight (8) hours on Sundays and legal holidays, they will be paid a minimum of three (3) hours for two (2) hours' work or less, and if assigned to more than two (2) hours' service or held on duty in excess of two (2) hours will be paid for such additional time at pro rata rate up to ten (10) hours from time service begins; time and one-half thereafter."

Under the wage agreement in force on and prior to March 1, 1941, crossing watchman Earl Mitchell, a monthly rated employe, was paid $83.09 per month for 8 hours per day, 7 days a week.

Effective March 1, 1941 the Fair Labor Standards Act of 1938 required the Carrier to pay this employe wages at the rate of not less than 36¢ per hour. This monthly wage of $83.09 was less than the minimum wage required to be paid Mitchell by the Carrier and on the same date, March 1, 1941, it reduced this assignment from 8 hours to 7 hours and 25 minutes per day, 7 days a week.

The position of the Carrier is that it continued to pay the employe $83.09 per month for 8 hours' work thus complying with the contract; and that said monthly wage complies with the Federal Act because it is more than 36¢ per hour for the reduced assignment of 7 hours and 25 minutes.

The position of the Carrier is untenable. Rule 1 and Rule 8, Article 5, read together, provide for a basic day of 8 hours and that the employe must be paid for not less than 8 hours' work.

The monthly wage was based on an 8 hour work day in compliance with the agreement. Prior to March 1, 1941 the employe worked 8 hours each day. After the Carrier reduced the assignment it recognized its obligation under the contract and continued to pay him $83.09 per month for an 8 hour work day.

The reduction of the assignment did not affect the contract between the parties. The Carrier has the right to require the employe to work 8 hours per day whenever it deems such service necessary or advisable and the employe must comply with the demand when made. The Carrier must pay wages for 8 hours' work and the Federal Act, acting on existing contracts under which an employe was receiving less than the minimum wage provided thereby, requires the wage must not be less than 36¢ per hour.

The 36¢ minimum rate applies to the contract 8 hour work day and not the number of hours of labor the Carrier may elect to require of its employes. It is the agreement as modified by the Federal Act that determines the wage to which the employe is entitled, and the Carrier cannot relieve itself from its obligation under the contract, as modified by the Act, by refusing to permit the employe to work the entire 8 hour work day.

The Carrier contends that Award 1228 compels a denial of this claim. The Division is of the opinion that the award is not in conflict with the conclusion it has reached in this award.

In Award 1228 the sole claim of the employe was that the Carrier violated a rule providing that 8 consecutive hours shall constitute a day's work by assigning crossing watchmen to 7 hours and 25 minutes per day and asked that the Carrier be required to restore the employes to an 8 hour day assignment. The position of the Carrier was "That as these crossing watchmen are paid on a monthly basis, the Carrier has the right to exact of these employes eight consecutive hours' work, exclusive of meal period, if such length of service is required, but it is not obligatory upon the Carrier to work such monthly paid employes the full eight hours, exclusive of meal period, if such service is not necessary, provided these employes are paid in full the monthly rate of pay named in the schedule, therefore, the Agreement was not violated."

In denying that claim Referee Ernest M. Tipton said:

> "The Board holds that the Agreement between the parties is that the employes are to be available to perform such work as might be demanded of them not to exceed eight hours per day, and the Carrier to pay them a stipulated sum per month, whether they are required to work the full eight hours or not. It follows that the Carrier did not violate the Agreement."

It will be observed that in Award 1228 the Carrier claimed that it had the right to exact 8 hours' consecutive work but the exaction was optional with the Carrier provided it paid the employes under the terms of the contract. This contention of the Carrier is sound subject to the qualification that it must pay wages under the terms of the contract as affected by the Federal Act.

Award 1228 holds that, though the Carrier is not compelled to work the employe 8 hours per day, it must pay him according to the terms of the contract, that is, according to the 8 hour work day provision. The award does not consider the effect of the Fair Labor Standards Act on the contract between the parties.

The claim of the Employes that the Carrier is obligated to work them 8 hours a day is denied.

The claim of the Employes that they are entitled to a monthly wage equal to 36¢ per hour for an 8 hour work day is sustained. The employe is entitled to wages under the NOTE to Rule 5 in harmony with this award.

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 employes involved in this dispute are respectively carrier and employes 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 carrier violated the agreement as modified by the Federal Act.

AWARD

Claim sustained to extent shown in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of February, 1942.