

Award No. 1728

Docket No. MW-1767

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

STATEMENT OF CLAIM: Claim of Employees' Committee:

First, that by paying Crossing Watchman, T. A. Kitchen, Marietta, Georgia, at pro rata rate for the eleventh (11th) hour of his assignment, the Carrier violated Rule 19 (a) of the current Agreement.

Second, that T. A. Kitchen and all other employees shall be paid at the rate of time and one-half for all overtime worked in conformity with Rules 19 (a) and (b) of the current Agreement.

Third, that T. A. Kitchen and all over employees who have worked overtime and been paid at pro rata rate for such overtime work shall be paid the difference between what they have received on the basis of pro rata rate payment and that which they should have received on the basis of time and one-half rate, retroactive to March 1, 1941.

There is in evidence an Agreement between the parties effective November 1, 1940.

EMPLOYEES' STATEMENT OF FACTS: During the first half, or the first fifteen days of March, 1941, Crossing Watchman T. A. Kitchen was assigned to work eleven (11) hours per day. For the eleventh hour of his assignment, Kitchen was paid at the pro rata rate.

Under the provisions of the current Agreement, time worked after the 10th hour shall be paid for at time and one-half rate.

POSITION OF EMPLOYEES: Rule 19 (a) and (b) of the existing Agreement between the maintenance of way employees represented by the petitioning Brotherhood and the Nashville, Chattanooga & St. Louis Railway provides as follows:

"Rule 19 (a). Overtime made by pumpers and crossing and other watchmen will be paid at pro rata rate for the 9th and 10th hours of work on any day, and beyond the 10th hour, at time and one-half rate.

"(b). For all other employees, all time worked continuous with, and outside of the regularly assigned eight (8) hours will be paid for at time and one-half rate. This rule is not applicable to foremen and assistant foremen of water supply, cooks or to special service, travel time and make-up time."

and working conditions expressly provided in the agreement with its Maintenance of Way Employees, if it is found that such compensation does not yield the minimum of 36 cents an hour prescribed by the Wage Order effective March 1, 1941, issued by the Administrator in conformity with the "Fair Labor Standards Act," the compensation of each employe is adjusted so that he does receive the prescribed minimum of 36 cents an hour.

It is the Carrier's position that the procedure herein described is right and proper under the Act. But whether Carrier's contention that it is complying with the "Fair Labor Standards Act of 1938" is correct or erroneous is not a question for determination by this Division. The only question for this Division is whether the Carrier is complying with its agreement. As heretofore shown, the Carrier is fully and exactly complying with its agreement, paying the wage, including overtime, therein provided. That the petitioner's complaint is a claim of violation of the Fair Labor Standards Act and not of the contract is completely demonstrated by the fact that except for the "Fair Labor Standards Act of 1938," its interpretation and effect, the Carrier admittedly is complying with the agreement.

IV

The Third Division in its Award 1228 of November 14, 1940, recognized that it was without jurisdiction in questions involving compliance with or violation of the "Fair Labor Standards Act of 1938," wherein the Division stated in its findings in said award:

"... but this Board has no concern regarding the compliance with or violation of that Act."

It is the very definite opinion of the Carrier that it is fully and honestly complying with the provisions of the "Fair Labor Standards Act of 1938," and the Carrier respectfully submits that if the petitioner or any individual employe holds a contrary view, this is a question to be decided by a court of proper jurisdiction and not by the National Railroad Adjustment Board or any Division thereof.

V

The Carrier has shown that its contractual obligations under the applicable agreement of November 1, 1940 are being fully complied with. It is therefore obvious the claim is without merit and should be dismissed.

* * * * *

The Carrier also reserves the right to introduce and examine witnesses in support of its position in connection with all issues in this case and to cross-examine witnesses who may be introduced by the petitioner, as well as to answer any further or other matters advanced by such petitioner in relation to such issues, whether oral or written.

In consideration of all of which, the Carrier respectfully asks, first, that the purported claim be denied and/or dismissed for lack of jurisdiction, and, second, if considered on the merits, that it be denied in all respects.

OPINION OF BOARD: The Petitioner relies upon Rule 19 (a) and (b) of the current Agreement in support of its position. Rule 19, "Overtime," reads as follows:

"(a) Overtime made by pumpers and crossing and other watchmen will be paid at pro rata rate for the 9th and 10th hours of work on any day, and beyond the 10th hour, at time and one-half rate.

"(b) For all other employes, all time worked continuous with, and outside of the regularly assigned eight (8) hours will be paid for at time and one-half rate. This rule is not applicable to foremen and assistant foremen of water supply, cooks or to special service, travel time and make-up time."

It is the position of the Carrier that the agreed monthly salary of Kitchen was \$106.58 for 11 hours service per day, and 365 days per year, and that Claimant was paid upon the following basis:

For the first 15 days of March, 1941: 15/31sts of the negotiated rate of \$106.58 per month, amounting to \$51.56, which was adjusted to equal the rate of 36 cents per hour established by the Fair Labor Standards Act by adding \$7.84, making gross earnings \$59.40. From this 3 per cent, or \$1.78, was deducted for Railroad Retirement Tax, making the net cash wage paid Claimant \$57.62.

Under the rate fixed by the Fair Labor Standards Act, the Claimant was entitled to a wage of 36 cents per hour. He worked 15 days, 11 hours per day.

15 × 11 × 36¢ equals.....	\$59.40
Deduct 3% R. R. Retirement Tax.....	1.78

Net cash paid Claimant	\$57.62
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In previous Awards it was held that the Fair Labor Standards Act "modified the Agreement effective August 1, 1937, for persons who prior to that date were receiving a wage of less than 36¢ per hour." See Award No. 1699.

In Award No. 1712, Docket CL-1706, it was said:

"The wage of the employe in this case for overtime should be based on the modified agreement or at the rate of 54¢ per hour for all overtime worked since March 1, 1941."

The Fair Labor Standards Act does not affect agreements made between the parties concerning the method of paying for overtime. The question of overtime is governed entirely by the rules, and under the authority cited in this Award the employe is entitled to be paid at the rate of time and one-half for the eleventh hour worked each day, as is provided for under Rule 19 of the Agreement.

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 current agreement was violated by the carrier as contended by the petitioner.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1942.

Dissent to Award 1728, Docket MW-1767

The undersigned disagree with the conclusions reached and know of no reasons in the facts or the law supporting the award.

/s/	R. F. Ray
/s/	C. P. Dugan
/s/	A. H. Jones
/s/	R. H. Allison
/s/	C. C. Cook