Award No. 1803
Docket No. CL-1616

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad Company, that the Carrier violated the Clerks' Agreement:

1. When effective March 1st, 1941, it changed the assigned hours of

   (a) Porter-messenger position at Council Grove, Kansas, occupied by C. C. Smith, from the established assignment of eight (8) hours per day, 9:00 P. M. to 5:00 A. M., seven (7) days per week to new and reduced hours of 9:15 P. M. to 1:15 A. M.—2:15 A. M. to 4:55 A. M., 6'40" per day, seven (7) days per week.

   (b) Janitor at Topeka, Kansas, occupied by C. J. Jones, from the established assignment of eight (8) hours per day, 6:30 A. M. to 3:30 P. M., exclusive of one hour meal period, six (6) days per week, to new and reduced hours of 6:30 A. M. to 10:30 A. M.—11:30 A. M. to 2:10 P. M., 6'40" per day, six (6) days per week.

   (c) Station helper at Paola, Kansas, occupied by R. O. Mortimer, from the established assignment of eight (8) hours per day, 4:00 P. M. to 1:00 A. M., exclusive of one hour meal period, seven (7) days per week, to new and reduced hours of 6:30 P. M. to 10:30 P. M.—11:30 P. M. to 2:10 A.M., 6'40" per day, seven (7) days per week.

   (d) Station helper at Lindsborg, Kansas, occupied by H. G. Johnson, from the established assignment of eight (8) hours per day, 10:00 P. M. to 7:00 A. M., exclusive of one hour meal period, seven (7) days per week, to new and reduced hours of 10:45 P. M. to 2:45 A. M.—3:45 A. M. to 6:25 A. M., 6'40" per day, seven (7) days per week.

   NOTE: Mr. Johnson in filing claim indicated his new hours were actually 10:30 P. M. to 5:10 A. M., which would reflect an assignment of 6'40" without meal period.

(e) Station helper at LaCrosse, Kansas, occupied by D. D. Burton, from the established assignment of eight (8) hours per day, 10:00 A. M. to 7:00 P. M., exclusive of one hour meal period, seven (7) days per week, to new and reduced hours of 11:20 A. M. to 3:20 P. M.—4:20 P. M. to 7:00 P. M., 6'40" per day, seven (7) days per week.

(f) Station helper at Leoti, Kansas, occupied by R. H. L. Sanders, from the established assignment of eight (8) hours per day, 2:00 P. M. to 10:00 P. M., seven (7) days per week, to new and reduced hours of 2:50 P. M. to 6:50 P. M.—7:50 P. M. to 10:30 P. M., 6'40" per day, seven (7) days per week.

(g) Station helper at Ransom, Kansas, occupied by L. R. Stevenson, from the established assignment of eight (8) hours per day, 10:45 P. M. to 7:45 A. M., exclusive of one hour meal period, seven (7) days per week, to new and reduced hours of 11:00 P. M. to 3:00 A. M.—4:00 A. M. to 6:40 A. M., 6'40" per day, seven (7) days per week.

2. That the positions enumerated herein be restored to an assignment of eight (8) hours per day, either consecutive or exclusive of the meal period, and

3. That the occupant or occupants of the positions involved in or affected by this violation of agreement be reimbursed for the wage loss sustained representing the difference in amount received at .36¢ per hour for six hours and forty minutes (6'40") per day, and eight (8) hours per day at .36¢ per hour, or for one hour and twenty minutes (1'20") additional service, or .48¢ per day retroactive to and including March 1st, 1941.

EMPLOYES' STATEMENT OF FACTS: The positions involved in this dispute were regular and established by bulletin for many years pursuant to the rules of the clerks' agreement on the Missouri Pacific Railroad, dated August 1st, 1926, which establishment when the positions were bulletined was upon a daily stipulated assignment of either eight (8) hours consecutive, or eight (8) hours exclusive of the meal period.

In the event of changes in the occupant of any position involved, except in instances of senior employes exercising seniority rights over a junior employe, the vacancy thus created has in every instance, without exception, been bulletined to work eight (8) hours per day. The employes filing application for or exercising their seniority upon said positions were assigned to work eight (8) hours per day and were paid for eight (8) hours each day they worked unless they laid off of their own accord prior to the completion of a full day's service.

On February 27th, 1941, the Superintendent of the Central Kansas-Colorado Division posted Station Bulletin No. 6, 7, 8, 9, 10, 11, 12 and 13, dated February 27th, 1941, (Exhibit "A") addressed to "All concerned" and copy was furnished Mr. F. A. Conley, Division Chairman, which bulletin advised the occupants of the positions here involved that effective March 1st, 1941, their assigned hours were changed and reduced from eight (8) hours per day to six hours and forty minutes (6'40") per day.

On February 27th, 1941, the Division Chairman wrote to the Superintendent and filed a formal protest to the action of the Superintendent in reducing the assigned hours below eight (8) hours per day, supporting his position with a citation of certain rules of the agreement and advising that claims would be filed for the difference involved between eight (8) hours pay at thirty-six cents (.36¢) per hour and the amount paid for six hours and forty minutes (6'40") per day at thirty-six cents (.36¢) per hour, which equalled $2.40 per day. (Exhibit "B").

The rates of pay for these positions were established by mutual agreement on November 1, 1928 to which 40¢ per day was added in the application of Mediation Agreement A-395 effective August 1, 1937, thus producing the daily rates named above.

POSITION OF CARRIER: The Employes have cited, in the handling of this case with the Management, Rule 45 of agreement dated August 1, 1926 to support their position that these employes be assigned and required to work eight hours exclusive of the meal period for a day's work, whereas the Carrier's position is that this rule does not say that employes MUST work eight (8) hours a day for which they shall receive as their wage for the day the wage established by agreement for a day's work. The rule reads:

> "Rule 45. Except as otherwise provided in this Article eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work."

This rule, as is evident, is plain and not ambiguous. It says that eight hours shall constitute a day's work. Its application in conjunction with other rules of the agreement means that overtime allowances shall not begin to accrue until after eight (8) hours service in a day has been rendered. The rules of the agreement, effective August 1, 1926 do not cover rates of pay. They govern the hours of service and working conditions only of employes. Rates of pay for these positions were, as stated in Carrier's statement of facts, established by mutual agreement effective November 1, 1928 and grew out of mediation proceedings identified as United States Board of Mediation file C-337, Exhibit "A." There is no requirement in this agreement that the employes would be required to work eight (8) or any other number of hours to receive the wage per day established in its application.

The intent of Rule 45 of the agreement dated August 1, 1926, during the period of years (since 1926) that it had been a part of the rule governing working conditions of the employes specified in the scope rule thereof can best be demonstrated by the accepted practices thereunder of the Carrier permitting these employes to be off on Saturday afternoons in the various offices, particularly in the general office at St. Louis and the district and division offices out on the line. The employes who are permitted to be off on Saturday afternoons are not compensated for the hours they actually work on those days, which, in most instances are four, but are given a day's wage because our agreement with the Employes specifically provides they will be paid so much per day. The Carrier could, if it so elected, and if it followed the contentions of the Employes in this dispute, exact eight (8) hours service daily from the employes for the daily wage established by the agreement of November 1, 1928, but this has not been the Carrier's practice.

What the Employes are contending for in this case is seeking an award from the National Railroad Adjustment Board that would, in effect, make the Fair Labor Standards Act of 1938 a part of the agreement between the Carrier and its employes that became effective November 1, 1928 and established rates of pay for certain classes of employes. The application of this Act (Fair Labor Standards Act) is, we feel, of no concern to the National Railroad Adjustment Board under provisions of the Railway Labor Act.

The Carrier feels that it has not, as asserted by the claimants, violated the terms of its agreement covering working conditions of August 1, 1926 or rates of pay of November 1, 1928 and additions made thereto by Mediation Agreement A-395 of August 1, 1937, and that the claim of the Employes is devoid of merit and should be denied.

OPINION OF BOARD: This case involves the interpretation of Rule 45 of the current Clerks' agreement which reads as follows:

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

The rates of pay of the employes here involved were fixed by two mediation agreements, the first effective November 1, 1928, the second August 1, 1937. The latter granted an increase of five cents per hour or forty cents per day. Under this the daily rates of pay of the employes here concerned on October 23, 1939 were as follows: porter messenger at Council Grove, Kansas, and janitor at Topeka, Kansas, $2.40; station helpers at Paola, Lindsborg, LaCrosse, Leoti, and Ransom, $2.15. On October 24, 1939, there became effective under the provisions of the Fair Labor Standards Act, a minimum wage for all of the above positions of 30¢ per hour. Effective as of such date the carrier increased the rates of pay of the station helpers to $2.40 per day, so that thereafter all of the employes here concerned received wages for an eight hour day of $2.40 or 30¢ per hour as required by the statute. March 1, 1941 under the provisions of the Act and a wage order issued in accordance with its terms, there became effective a minimum wage of 36¢ per hour, which for eight hours work for these employes would have meant a daily rate of $2.88. Thereupon the carrier reduced the hours of work to six hours and forty minutes a day, so that figured on a daily basis the employes were paid the same amount as they had been.

Without doubt the purpose of this readjustment was to meet the requirements of the Fair Labor Standards Act with respect to minimum hourly pay without raising the total amount per day paid in wages to these particular employes. Whether or not the arrangement meets the requirements of the statute is not our problem. The question before us is whether under the provisions of Rule 45 of the current agreement the employes were entitled to be paid for a minimum of eight hours work. The carrier's contention is that the agreement provides for a daily rate of $2.40 per day and that it meets its obligation to the men if it pays them this amount for eight hours work or less. The employes contend that they are entitled to pay for eight hours at such rate as may be agreed upon by the parties or as may be required by law.

In construing the meaning of this rule we must in the first place read it in connection with the agreement as a whole. If that procedure does not settle the question, we may then look to see what interpretation the parties by their acts have placed on it. We should also give respectful consideration to the awards of this Board where this or similar rules have been examined.

Rules 46 and 47 throw considerable light on the meaning of Rule 45. Rule 46 relates to intermittent service during a twelve hour period. It provides that "eight (8) hours actual time on duty within a spread of twelve (12) hours shall constitute a day's work." The last paragraph of the rule then requires that "Employes covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours." If the interpretation of Rule 45 contended for by the carrier is correct, we therefore find that the intermittent employes, who are guaranteed pay for eight hours, are placed on a very much better basis than those who are employed on a regular assignment. There seems not the slightest purpose in such a distinction. And the only reason in our opinion why such a guarantee was specifically mentioned in Rule 46 and not in Rule 45 is because the parties assumed that Rule 45 by its very terms clearly implied such a guarantee. Rule 47 provides for minimum pay for hourly rated employes whose seniority entitled them to regular employment. This rule provides in part that, if these men are held on duty over three hours and are required to work any part of the time so held and are released through no fault of their own before a full day's work is performed, they will be paid for not less than eight hours. Again it may be asked, why should employes covered by this rule be placed on a so much better basis than those covered by Rule 45? And again the answer seems to us plain, that it was assumed by all parties that Rule 45 provided for a minimum of eight hours pay for the employes covered by its terms.

The application by the carrier of the terms of the Mediation Agreement effective August 1, 1937, is very significant. An advance of 5¢ per hour was

agreed upon and the carrier immediately translated that into an increase of 40¢ per day, obviously on the basis that both parties understood that the employes were entitled to be paid for eight hours work. Surely while these negotiations were carried on no one doubted that the hourly increase would be applied to an eight hour day. Likewise when the provisions of the Fair Labor Standards Act became effective on October 24, 1939 establishing a minimum rate of 30¢ per hour, the carrier raised the daily rate of pay to $2.40 of the employes who had been receiving $2.15 per day. This change was obviously to comply with the minimum hourly rate on the basis of an eight hour day. Though all these actions of the carrier are not in themselves controlling, they are potent evidence of the construction which the carrier has itself placed on the meaning of Rule 45.

The interpretation which in this instance we feel compelled to give to the rule is in accord with a number of awards rendered by this Board.

In Award 342, the question was whether a clerk who had been worked a number of days in one month for periods of less than eight hours a day should, as claimed by the carrier, be compensated as a fluctuating employe only for the time worked or on the basis of Rule 43 which is practically identical with the rule before us. This Division held that he was not a part of the fluctuating force "and should have been compensated for not less than eight hours at rate of position occupied on each of the days he was used under Rule 43 * * *."

In Award 438, Employes were assigned to work for less than eight hours. The carrier claimed that Rule 15 of the agreement there involved, which is the same as that before us, did not guarantee the employes' payment for eight hours. In deciding that Rule 15 applied to the claimants, the opinion holds that they were entitled to pay on an eight hour basis. It is true that there is a dissent, addressed primarily to the contention that the claimants were not covered by Rule 15, which does suggest that in any event Rule 15 is not a guarantee of eight hours pay.

In Award 516, one question before this Board was the interpretation of a rule similar to the one before us now. It was held that eight hours constituted a day's work and that employes who had not been permitted to work for that time were entitled to pay for eight hours.

Awards 1047 and 1127 are to the same effect. See also Award 1570.

Awards 1228 and 1229 are cited by the carrier as decisive of this case. A careful reading of these opinions and of the record will indicate that this Board was not there concerned with the effect of an increase of the hourly rate of pay on the daily rate of the employes, who, the opinion is careful to point out, were paid a monthly salary which was in no way affected whether they worked eight hours or less than eight hours per day. We think that the cases are readily distinguishable from the one before us.

In the light of the construction which we place on Rule 45, the issue before us seems substantially the same as that before this Board in Award 1714, and we hold that the employes here concerned are entitled to be paid for a minimum of eight hours for each working day. We are forced to this conclusion when we read the rule in connection with Rules 46 and 47, to say nothing of the fact that the parties seem to have so construed it in applying the terms of the mediation agreements. Furthermore, repeated awards of this Division have so construed it. It makes no difference whether the hourly rate is fixed by agreement of the parties or by operation of law. Here it is fixed in accordance with the provisions of the statute at 36¢ per hour.

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 provisions of Rule 45.

AWARD

Claims 1, 2 and 3 are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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