

Award No. 2023

Docket No. CL-1964

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Elwyn R. Shaw, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

ST. JOSEPH UNION DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Mail Truckman F. R. Farris should be paid at straight time and proper overtime rates, from time first required to report for duty until finally released on December 14th, 15th and 16th, 1940, and that Mail Truckman W. B. Sexton be similarly paid for December 15th and 16th, 1940.

EMPLOYEES' STATEMENT OF FACTS: Mail Truckman F. R. Farris, seniority date August 21st, 1936, was worked and paid on dates shown as follows:

December 14th, 1940—8:30 A. M. to 12:30 P. M. and 3:30 P. M. to 5:00 P. M. 5½ hrs.

December 15th, 1940—8:30 A. M. to 1:30 P. M. and 4:30 P. M. to 7:30 P. M. 8 hrs.

December 16th, 1940—10:30 A. M. to 2:00 P. M. and 5:00 P. M. to 9:00 P. M. 7½ hrs.

all time at straight time rate

Mail Truckman W. B. Sexton, seniority date October 19th, 1939, was worked and paid on dates shown as follows:

December 15th, 1940—11:40 A. M. to 1:40 P. M. and 5:00 P. M. to 10:00 P. M.—7 hrs.

December 16th, 1940—10:50 A. M. to 1:50 P. M. and 5:15 P. M. to 10:15 P. M.—8 hrs.

all time at straight time rate

Claim for difference in pay from allowance shown above and straight time with proper overtime from initial starting time until final release was presented to Management on January 20th, 1941 and declined by President F. B. Whitman on June 21st, 1941.

fluctuating or temporary character, such as that which is made a basis of dispute in this instance, and the construction placed upon the rule by the carrier has been upheld either definitely or by unmistakable implication in every award of the Third Division bearing on this particular subject.

The record of practice is conclusively evidenced by timerolls (Carrier's Exhibit A), which show that the regular force at the St. Joseph Union Depot has been augmented by part-time employes for several days immediately before Christmas every year since 1923, and that such employes have been compensated for actual hours of service.

In the light of the abundance of evidence which supports the Carrier's position in this case, including record of precedent established by this tribunal, the position of the petitioning organization is not tenable and should not be sustained.

OPINION OF BOARD: This case and the one following it numbered Docket CL-1965 involve the same principles and one opinion will dispose of both cases. This case involves the claim of Mail Truckman R. F. Farris and Mail Truckman W. B. Sexton. The one which follows involves the claims of other employes.

The claims of the Brotherhood in this case (and in the next following case) are based on the contention that the employes involved are entitled to be paid for a full eight hour day on the dates in question. The Employes rely upon Rules 37 and 39, which are as follows:

"Rule 37. Except as otherwise provided in Rules 38 to 44, both inclusive, eight (8) consecutive hours' work, exclusive of the meal period, shall constitute a day's work."

"Rule 39. Employes required to report for work at regular starting time, and prevented from performing service by conditions beyond control of the carrier, will be paid for actual time held with a minimum of two (2) hours.

"If worked any portion of the day, under such conditions, up to a total of four (4) hours, a minimum of four (4) hours shall be allowed. If worked in excess of four (4) hours, a minimum of eight (8) hours shall apply.

"All time under this rule shall be at pro rata.

"This rule does not apply to employes who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces; nor shall it apply to regular employes who lay off of their own accord before completion of the day's work."

On the other hand the Carrier contends "the issue definitely turns upon whether the service involved is or is not of a fluctuating or temporary character within the meaning of Rule 39" above quoted. Reference is also made to what is called the Intermittent Service rule (No. 38 of the agreement) which provides as follows:

"Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours, and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

"Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the management and duly accredited representatives of the employees. For such excepted positions the foregoing paragraph shall not apply.

"This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

"Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employees cannot otherwise be utilized.

"Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours."

The Carrier has submitted in evidence as Exhibit "A," pages 1 to 27, inclusive, its December payrolls from 1923 to 1939, inclusive, apparently for the purpose of showing the extra work involved in connection with holiday traffic, and to show that during that period of time many truckmen were employed for a few hours a day and for only a part of the month, generally between the 15th and 24th of December. The exhibit is effective for the purpose of demonstrating the application of rule 39, but neither effective nor binding upon the three employees here in question. The name of Ping first appears on December 14, 1934, the name of Farris on December 20, 1935, and the name of Sexton on December 18, 1936, and they all appear thereafter with substantial regularity on all of the remaining December payrolls. There is nothing in the exhibit that is helpful to us in this decision and a great deal that is confusing. It might be conceded that there is a heavy rush of business in the holiday season, and so far as any payrolls in 1934 are concerned they could not be involved in this case. Neither can we find anything about regularity of employment from looking at the payrolls of one month only without seeing the other payrolls for the rest of the year.

The decisive factor in this case is the seniority roster of clerical, office, station and storehouse employees prepared by the Carrier and posted as of January 1, 1942. The last three names on this seniority list are Leroy Ping, Truckman, seniority date February 24, 1934, F. R. Farris, Truckman, seniority date August 21, 1936, and W. B. Sexton, Truckman, seniority date of October 19, 1939. The rules of the agreement provide that seniority begins at the time the employee's pay starts on the seniority district and in the seniority class to which assigned, and will apply only in filling new positions or vacancies and in the reduction of forces. Rule 18 requires the annual posting of seniority rosters showing name and proper dating; that they will be revised and posted in January of each year and open to protest for a period of 30 days. The last paragraph of Rule 18 provides that certain employees therein named will not be included on seniority roster and seniority rights will not apply until they have been in continuous service of the Railroad in excess of six months. This last paragraph of the rule is not carefully punctuated and its designations are obscure, so it is impossible for the Referee to determine whether or not it applies to Mail Truckmen. For the purposes of this Opinion it is unnecessary to decide that point.

The seniority roster in this case is conclusive proof that Leroy Ping is a regular truckman holding seniority rights as of February 24, 1934; that F. R. Farris is a regular truckman holding seniority rights as of August 21, 1936 and W. B. Sexton is a regular truckman holding seniority rights as of October 19, 1939. This from the Carrier's own statement of the matter made long prior to this controversy and eliminates rule 39. Neither the 24th of February nor the 21st of August nor the 19th of October are emergency dates comparable with the holiday period, or Easter, or any other holiday, and yet these men were in service and given seniority rights as of those dates. Since rule 39 does not apply it follows that the other rules are controlling, and the claim must be allowed.

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 employees involved in this dispute are respectively carrier and employees 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 claim will be allowed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of October, 1942.

DISSENT TO AWARD NO. 2023, DOCKET CL-1964

In the last paragraph of the Opinion of this Award the claimant employees are declared to be "regular" truckmen,—a declaration in contradiction of their status as shown by evidence of record in the case. The record contained copies of certain monthly payrolls over a period of years on which were given the names of these claimants and the names of other employees. These payrolls clearly showed these other employees to be men having regular assignments working the full 8-hour period constituting a day's work for regularly assigned employees and as well continuing in full working periods for the whole number of working days of the respective months, in contrast with these claimants whose names, when they did appear, showed them to be upon irregular and extra assignments both of less than the regular working days of the month and of less than the full 8-hour period constituting a day's work for regularly assigned employees.

The designation of these claimants as "regular truckmen" upon such a record presents a false premise of their situation and one wholly contradictory of their status as it is contemplated by the Agreement and as it is well understood in all practical relations between Carriers and their employees.

It is apparent, of course, that the Opinion in this Award properly would apply to truckmen holding regular assignments,—employees who could be termed "regular truckmen" for purpose of relating the Opinion to the proper application of the Agreement, but to mistakenly treat employees of such irregular and limited employment as these claimants as not having the status of extra truckmen by referring to them as regular truckmen, and then give application of the Agreement to them as truckmen holding regular assignments cannot do other than give mis-application to the Agreement as it has done in this case.

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