Award No. 2040
Docket No. CL-1926

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Michael L. Fansler, Referee

PARTIES TO DISPUTE:

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

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

1st.—That Mrs. Serene Swanson, stenographer, Chief Dispatcher's Office, Whitefish, Montana, shall be compensated for additional time worked on Saturday afternoon, April 5, 1941, and for each Saturday afternoon subsequent to April 5, 1941, at the time and one-half rate of the position for four hours.

2nd.—That all other employes that worked this position subsequent to April 5, 1941, shall be paid on the same basis.

EMPLOYES' STATEMENT OF FACTS: Prior to December, 1931, the position of stenographer in the Chief Dispatcher's Office at Whitefish, Montana, was assigned to work from 8:00 A. M. to 5:00 P. M. daily from Monday to Friday, inclusive, and from 8:00 A. M. to noon on Saturdays. In the month of December, 1931, this position was abolished and this same position was reestablished October 15, 1935, with the same hours of assignment on Monday to Friday, inclusive, and a full eight hour assignment on Saturday. Protest was made at that time but before it could be carried to a conclusion, the position was again discontinued on November 26, 1935.

The position was again reestablished June 14, 1936, and was worked continually from that date to April 5, 1941, with the assigned hours from 8:00 A. M. to 5:00 P. M. on Mondays to Fridays, inclusive, and from 8:00 A. M. to 12:00 noon on Saturdays, with a few exceptions when the position was worked the full eight hours on Saturday. Additional compensation was allowed in each instance where the additional time was worked.

On April 5, 1941, Mrs. Serene Swanson was informed she would be required to work the full eight hours thereafter on Saturdays.

POSITION OF EMPLOYES: There is in effect an agreement bearing effective date of October 1, 1925, in which the following rules appear:

> Rule 42—Where in a given office it has been the practice to let employes off a part of the eight-hour day on certain days of the week, such practice shall not be rescinded and shall not be departed from except in cases of emergency.

42 is a matter of both fact and judgment, and that the local officers have been instructed to provide such amount of release as is possible, consistent with the necessities of the service as they, from time to time, exist, which is in accordance with the practice referred to in Rule 42, and when so applied, is in full compliance with Rule 42.

In view of the present legislative and regulatory arguments, as to limitation of hours of service and penalties for exceeding such limits, the Board's attention is called to the fact that the Clerks' schedule provides for a basic eight hour day and a six day, 48 hour week, while this claim seeks to set up a basic four hour day for Saturday, and a 44 hour week, to be paid for in the sum of 48 hours at pro rata rate, plus four hours at time and one half if the 44 hours be exceeded. In other words, after establishing a standard 48 hour week, paid for as such, the employes seek, through Rule 42 alone, to eliminate such standards and set up in their place either a 44 hour week, paid for at the equivalent of 48 hours at pro rata rate, or a 48 hour week paid for at the equivalent of 54 hours at pro rata rate. There is no provision, nor even any inference, in Rule 42 which can possibly lead to support of such attempt.

OPINION OF BOARD: The rule that where it has been the practice to let employes off a part of a certain day the practice shall not be departed from except in an emergency has been in effect since October 1925.

The position in question was rated at eight hours per day six days per week. From its re-establishment June 14, 1936, the employe was required to work on no Saturday afternoon until July 1940, and thereafter until April 1, 1941, the employe was required to work approximately three-fourths of the Saturday afternoons, but was paid overtime at time and one-half rates in addition to pay at the regular rate for eight hours on that day. Since April 1, 1941, the position has been required to work eight hours each Saturday without extra pay.

The carrier contends that the purpose of the rule is to permit employes to be off duty on Saturday afternoon "When the requirements of the service will permit," but if that was the intent, it is not expressed in the language of the rule.

It is clear that for several years it was the practice to let the employes off every Saturday afternoon and that when Saturday afternoon work began to be required local officials considered it not emergency work but work outside of regular duty.

The payment of overtime may not have been authorized by responsible authority, but it is evidence of the local view as to the character of the situation which made the work necessary. It seems clear from all the evidence that the work was required by increasing business which soon required regular service every Saturday afternoon. Webster defines emergency as "a sudden occasion; pressing necessity; strait; crisis." It implies the unusual rather than the usual; the extraordinary rather than the ordinary. Regular work regularly required every Saturday afternoon or three-fourths of all Saturday afternoons cannot be considered emergency work in any ordinary or proper sense of the word.

We conclude that the rule was violated by working the employe on Saturday afternoon without pay. The carrier contends that there is no provision for a penalty, and that therefore the employe is not entitled to compensation, but it is clear that the employe's full six days' pay was earned without working on Saturday afternoon. It must be assumed that services without compensation were not contemplated. The only open question is the amount of compensation.

Construing Rules 41 and 42 together, it is clear that where it had been the practice to let employes off on Saturday afternoon, four (4) hours' work on Saturday constitutes a day's work.

Rule 51 provides that time in excess of eight (8) hours shall be considered overtime, to be paid for on the actual minute basis at the rate of time and one-half, but it does not provide that work not in excess of eight (8) hours, where it is more than a scheduled full day's work, shall not be paid for as overtime.

Rule 52 provides a method of computing overtime pay for work before or after, but not continuous with, the regular work period, and on Sundays and holidays. The provision is that employes shall be paid a minimum of three hours for two hours' work or less.

Rule 53 is as follows: "Employes who have completed their regular tour of duty and have been released, required to return for further service, may, if the conditions justify, be compensated as if on continuous duty." This rule is part of Article VII, which has to do with Overtime and Calls. It may be reasonably construed as referring to the two methods of computing overtime pay, and to contemplate that where the extra duty is not continuous with the regular tour, they will be paid under Rule 52, but that if conditions justify they may be paid on the minute basis, even though the duty is not continuous.

When all of these rules are read together, they indicate an intention that where employes not on a fixed-time schedule work in excess of eight (8) hours, it shall be considered overtime; that for employes on a fixed schedule or tour of duty, work in excess of the regular schedule shall be overtime; that all overtime shall be paid for at the rate of time and one-half, but that with certain exceptions overtime not continuous with the tour of duty shall be paid for a minimum of three hours. The facts before the board seem to indicate that the Saturday afternoon services involved required the employes to return after lunch. A lunch hour is not a break in the continuity of duty, and it seems therefore that, under the rules as interpreted, the employe was entitled to be paid time and one-half for the actual time worked on Saturday afternoon.

When the carrier discontinued paying the employe for services rendered on Saturday afternoon, it was upon the theory that the employe was entitled to no extra compensation whatever for such services. When the services were paid for, the carrier's accounting department interpreted the rules as requiring payment at time and one-half, and while this may not be a binding interpretation it lends support to our conclusion.

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 carrier has violated the Agreement as indicated.

AWARD

Claim (1st and 2nd) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of November, 1942.

DISSENT TO AWARD 2040, DOCKET CL-1926

The error of this award is found in the foundation built up, into which is woven the construction placed on the various rules cited. Such foundation is premised on the following conclusions contained in the Opinion:

> "We conclude that the rule was violated by working the employe on Saturday afternoon without pay."

Such a premise can find no support in the record. The employe did not work on Saturday afternoon without pay. Eight hours service was performed on regular assignment for which eight hours pay was allowed. When the employe did not work on Saturday afternoon eight hours pay was allowed.

The Opinion further states:

> "It must be assumed that services without compensation were not contemplated."

which is but confirmation of the initial error of building up the foundation on the assumption that this employe was worked without compensation.

The concluding assumption is stated as follows:

> "When all of these rules are read together, they indicate an intention that where employes not on a fixed-time schedule work in excess of eight (8) hours, it shall be considered overtime; that for employes on a fixed schedule or tour of duty, work in excess of the regular schedule shall be overtime;"

Here a new theory has been pronounced contrary to any previous awards by this or any other tribunals and heretofore unheard of in the railroad industry.

The three quotations constitute the foundation upon which the award is premised and into which the various rules cited are woven to sustain such premise. The entire foundation being erroneously constructed, it is not surprising that erroneous interpretations would be placed on the various rules cited. This employe was not required to work Saturday afternoon without pay. The regular assignment contemplated eight hours work for which eight hours pay was allowed. Such being a fact, the foundation upon which the award was predicated collapses. By its express terms the agreement contemplates eight hours pay for eight hours work on a regular assignment, as the one here involved, and nothing can be read into the agreement requiring additional compensation, except by the erection of an erroneous foundation upon which to premise such conclusion as has been done by this award.

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