

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert G. Simmons, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAIL-
ROAD COMPANY (LINES EAST)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the assignment of certain crossing watchmen, with a starting time either in advance of 6:00 a.m. or subsequent to 8:00 a.m., is in violation of schedule Rule 22;

(2) That crossing watchmen who have been so assigned in advance of 6:00 a.m. shall be paid at the rate of time and one-half for any service rendered in advance of 6:00 a.m. in addition to the payment applicable for the regular eight hour assignment, or where assigned subsequent to 8:00 a.m. shall be paid at the rate of time and one-half for any services rendered following the regular eight hour assignment, computed from not later than 8:00 a.m. in addition to payment applicable to the eight hour assignment, retro-active to November 9, 1944.

EMPLOYES' STATEMENT OF FACTS: Rule 22 of Agreement in effect between the Carrier and the Brotherhood reads:

"**STARTING TIME:** The starting time of the work period for regularly assigned service will not be earlier than 6 a.m. nor later than 8 a.m., except the starting time may be otherwise arranged by agreement between representatives of the organization and the Management based on actual service requirements. The starting time will not be changed for the purpose of taking care of temporary conditions of twelve (12) days or less."

Crossing Watchman Ernest W. Dobrick, Watertown, Wisconsin, is assigned to work from 5:00 A.M. to 1:00 P.M.

Crossing Watchman August F. Schultz, Watertown, Wisconsin, is assigned to work from 5:00 A.M. to 1:00 P.M.

Crossing Watchman William H. Yuds, Columbus, Wisconsin, is assigned to work from 9:30 A.M. to 5:00 P.M.

Crossing Watchman Arthur A. Peck, Fall River, Wisconsin, is assigned to work from 9:15 A.M. to 5:15 P.M.

Crossing Watchman Albert Teneyck, Brodhead, Wisconsin, is assigned to work from 9:00 A.M. to 6:00 P.M.

Agreement effective November 1, 1940 between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

one-half for service performed in excess of eight (8) hours on any one day, whereas prior thereto service in excess of eight (8) hours was paid for at the pro rata rate by reason of the monthly rate being adjusted in accordance with the increase or decrease in the hours of the monthly assignment as provided in Rule 24(e) quoted above.

In further support of the Carrier's contention that Rule 22—Starting Time was not considered as applying to crossing watchmen it will be noted that no complaint was received from the employees regarding the starting time of crossing watchmen assignments prior to the change in the overtime rules, effective December 16, 1944, which provided for the change between the pro rata rate and the time and one-half for service performed in excess of eight (8) hours. Nothing in the revised overtime rules changed the application of the starting time rule.

Briefly it is the Carrier's position that:

(1) Rule 22 of the Maintenance of Way Agreement is not applicable to crossing watchmen.

(2) The starting time now complained of has been in effect for more than eight years, more than two years of which was prior to the effective date of the current agreement. In other words the starting times as now in effect were in effect at the time the agreement was negotiated and there was no complaint on the part of the Organization at that time nor for approximately five years after that time.

(3) Even though the starting time rule would be applicable to highway crossing watchmen and certainly in view of the provisions of that rule and in view of the actual service requirements, the Organization should agree to a starting time consistent with the requirements of the service.

(4) In view of the information set forth herein the Carrier feels the claim should be denied.

OPINION OF BOARD: The employees involved in this claim are highway crossing watchmen who have assigned starting times beginning at 5:00, 9:00, 9:15 and 9:30 a.m. These starting times are based on actual service requirements and have been established on the Carrier since a date sometime prior to 1938.

The employees contend that these starting times are in violation of Rule 22 of the Schedule in effect November 1, 1940 between the Carrier and the Brotherhood of Maintenance of Way Employees. That rule, so far as material here, is:

"The starting time of the work period for regularly assigned service will not be earlier than 6:00 a.m. nor later than 8:00 a.m., except the starting time may be otherwise arranged by agreement between the representatives of the organization and the Management based on actual service requirements...."

At the outset we are met with the contention of the Carrier that Rule 22 is not applicable to highway crossing watchmen. We are of the opinion that it is applicable. The rule contains no exceptions as to its applicability. It covers "regularly assigned service". It obviously applies to all employees coming within the scope of the Agreement. That highway crossing watchmen are within the scope of the Agreement is patent from a reading of Rule 2 (e) and 24 (e).

Prior to the adoption of Rule 22, effective November 1, 1940, the starting time rule was: "The starting time of the work period shall be arranged by mutual understanding between the local officers and the employees' committee based on actual service requirements". Rule 4(h), Schedule effective

October 1, 1926. A comparison of the two rules shows that the provision fixing a starting time for regularly assigned service as between 6:00 a.m. and 8:00 a.m., in the absence of an agreement as to each position, is the new provision in the rule. Rule 4(h) contemplated a mutual understanding between the parties based on actual service requirements in all cases. Rule 22 fixes a starting time within limits where such an agreement is not had.

The record does not disclose the exact time when the positions here involved were established with starting times as stated in the claim. It is undisputed that those positions were being maintained during the period that Rule 4(h) was applicable. It is not claimed that there was any violation of the Agreement in establishing and maintaining those positions at those starting hours during the period that Rule 4(h) was in force. The only conclusion is that they were established in accord with Rule 4(h) and by a mutual understanding based on actual service requirements. As has been pointed out, the starting time could not have been properly established under Rule 4(h) at other than by a "mutual understanding". The adoption of Rule 22 did not materially change the provision that positions could be started at other than the hours of 6:00 a.m. to 8:00 a.m. In Rule 4(h) it is by "mutual understanding", in Rule 22 it is "by agreement". We attach no particular significance to the difference of this language.

For over four years after Rule 22 became effective the Carrier, without protest from the Organization, continued to maintain the positions without change at the established starting time. The purpose of the new provision in Rule 22 was to fix a starting time that the Carrier could follow in the absence of agreement. It obviously was not the purpose of the adoption of Rule 22 to vitiate and terminate all such understandings and agreements then in existence. It did not have that effect. The Organization by its conduct has recognized those purposes.

It follows that the positions, having been established under Rule 4(h) which required a "mutual understanding", the mutual understanding continued under the provisions of Rule 22; the Carrier has not violated Rule 22 in these instances and the claim for pay based on the alleged violations should be denied.

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 Carrier has not violated Rule 22 in the manner claimed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1946.