

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Steamship Clerks, Freight Handlers, Express and Station Employees, that the Carrier violated the Clerks' Agreement:

(1) When it failed and refused to allow 20 minutes overtime at punitive rate to employe holding continuous service position, when the nature of the work did not permit the twenty minutes within which to eat, between the ending of the third hour and the beginning of the seventh hour, as Rule 37 "C" provides and carrier refuses to designate the twenty minutes that shall be taken within which to eat.

(2) That Yard Clerk, Walter W. Henley, be paid twenty minutes at overtime rate because of not having been afforded twenty minutes within which to eat between the hours designated, from November 15, 1946, the date of his claim, until the situation is corrected by the Carrier.

EMPLOYEES' STATEMENT OF FACTS: Yard Clerk, Walter W. Henley, employed alone on the second shift from 3:00 P. M. to 11:00 P. M. on a continuous service position, at Bridge Junction, East St. Louis, Illinois, filed claim for twenty minutes overtime on November 15, 1946 because the nature of the work did not permit him to eat between the end of the third hour and the beginning of the seventh hour. Copy of claim presented by employe Henley is attached as Employee's Exhibit "A". Reply of Agent R. B. Wilson of November 16, 1946 is attached as Employee's Exhibit "B"; Mr. Henley's claim for November 16th is attached as Employee's Exhibit "C" together with Statement of Performance on November 16th, 1946, which is attached as Employee's Exhibit "D". Mr. Wilson's reply of November 17, 1946 is attached as Employee's Exhibit "E". Mr. Henley's reply to Mr. Wilson is attached as Employee's Exhibit "F". Mr. Henley filed similar time claims for each day worked from November 17, 1946 to November 22, 1946 and reply to these claims was made by Mr. Wilson on November 23, 1946 and copy of this reply is attached as Employee's Exhibit "G". Mr. Henley's request for a denial or approval of these claims to Mr. Wilson, dated November 23, 1946 is attached as Employee's Exhibit "H". Mr. Wilson's reply of November 25, 1946 is attached as Employee's Exhibit "I". Under date of December 10, 1946 this Organization appealed the decision of Mr. Wilson to Superintendent Henry Miller, Jr. and we attach our letter as Employee's Exhibit "J". Mr. Miller's reply of December 13, 1946 is attached as Employee's Exhibit "K". Under date of April 2, 1947, after due deliberation and study of this question,

1920, between the U. S. Railroad Administration and all railroads. It was carried forward in Agreement of February 1, 1922, between this Company and the Clerks' organization, and also in the Agreement of April 1, 1945, between the same parties. The rule in the three Agreements referred to reads the same, with exception of the addition of the phrase, "between the ending of the third hour and the beginning of the seventh hour after starting work," in the Agreement of April 1, 1945, which phrase in no wise affected the intent of the rule.

As previously stated, the instant case is the first in all those years that any contention has been made that the time allowed in which to eat under Rule 37(c) must be specified. In fact, the very wording of the rule, when compared with Rule 37(c) covering the meal period on the employee's own time, precludes any basis for such a contention. Rule 37(a) provides that the meal period "will be regularly assigned," and it is fit and proper that it does so because it is taken on the employees' own time and they are entitled to know what they will be paid for. However, employees on continuous service positions are assigned and paid for eight consecutive hours, including the twenty minutes allowed for eating lunch. Rule 37(c) covering such positions reads, "twenty (20) minutes shall be allowed in which to eat, between the ending of the third hour and the beginning of the seventh hour after starting work, without deduction in pay, when the nature of the work permits." Note use of the word "assigned" in Rule 37(a) which means that the lunch period must be definitely assigned, and the word "allowed" in Rule 37(c) which means employees will be permitted to take twenty minutes for lunch although being under pay at the time. The time to be taken for eating lunch under the latter is further qualified by the concluding phrase of the portion quoted, "when the nature of the work permits." This phrase recognizes the fact that the requirements of the service must be considered when taking time to eat and that the opportune time will vary from day to day. The practice of having employees located at strategic points away from the main offices on the property to provide a more efficient operation has been in vogue many years and it has always been the practice for such employees to eat lunch at the most advantageous time, they being in closer touch with conditions prevailing at that location than anyone else. Just for that reason, such positions were among those that Rule 37(c) was originally written to cover.

As we have pointed out, the Agreement differentiates between positions having meal period on the employees' own time and those assigned in continuous service without meal period, by providing a separate rule to cover each, Rule 37(a) covering the first mentioned, and Rule 37(c) the latter. If the meal period was to be assigned in the same manner in both instances, there would have been no reason for two rules with different wording to cover the two types of positions. The two rules are clear and unambiguous, not susceptible to misinterpretations, which is definitely proved by the fact that the present practice has been in effect since January 1, 1920, without protest of any kind from the Clerks' organization until November 15, 1946, over twenty-six years. What the organization is really asking for is that the Board expand or read into the rule something which is not there. The Board has ruled many times it is their function to interpret rules as written and that it is not within their power to read into the rules something which the negotiators did not place therein. The rules of the Agreement do not support the claim and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim of the Brotherhood on behalf of Yard Clerk Walter W. Henley for 20 minutes daily at the overtime rate from November 15, 1946 on account of the failure of the Carrier to allow Henley a period of 20 minutes between the end of the third and the beginning of the seventh hour of his assigned hours of work. The Brotherhood contends that this failure is a violation of paragraph (c), of Rule 37 of the controlling agreement. Rule 37 is the Meal Period Rule. Paragraph (c) is the following:

"(c) For regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a day's work, in which case not to exceed twenty (20) minutes shall be allowed in which to eat, between the ending of the third hour and the beginning of the seventh hour after starting work, without deduction in pay, when the nature of the work permits."

There is no substantial dispute about the facts. Henley held a position such as is contemplated by this provision of the Rule. He appears not to have had designated for him on any day involved a period of twenty (20) minutes within which to eat.

The substantial position of the Brotherhood is that the Rule provision requires that the Carrier shall designate the time and in case of failure so to do he is not entitled to take it and the Carrier is obligated to pay him for the time not allowed as overtime.

The Carrier's substantial position on the other hand is that under the wording of the Rule provision it is not incumbent upon it to designate the time but that the employe is permitted to make his own selection of time within the prescribed limits when he finds that the nature of the work will permit.

With the contention of the Carrier we cannot agree. The provision does not say that the employe shall take twenty (20) minutes when he finds that the nature of the work permits but it says that he "shall be allowed" by the Carrier this time within which to eat. It places the control of the period with the Carrier.

Also this appears to be the reasonable interpretation to be placed upon the provision since it is properly a prerogative of management to ascertain and determine when and in what circumstances the nature of the work of the Carrier will permit the temporary release of an employe engaged in continuous service. See Award 2855.

It is our conclusion that Henley was entitled to have allowed to him by the Carrier a time within which to eat and for its failure to make such allowance the agreement was violated.

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 claim has been sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of June, 1948.

DISSENT TO AWARD 3943—DOCKET CL-3842

This award fails to give proper interpretation of that part of the meal period rule here involved in application to the facts of record though it properly places with Carrier control of the 20 minute allowance coming within the specified period, and thus accords with prior holding that (1) "the meal period does not have to be assigned at any particular time and the carrier is given the right to assign it at any time" within the prescribed limits (Award 2855) and (2) the rule "permits the carrier to indicate a meal period * * * but does not require him specifically to designate the period" (Award 131).

Here, however, the award, contrary to the facts, concludes that Carrier failed to make allowance to claimant of a time within which to eat. The facts for November 15 and 16th, the only dates for which facts are portrayed, specifically show a period of about 50 minutes and a period of about one hour, 45 minutes for the 15th; and a period of about one hour, five minutes and a period of about one hour, 35 minutes for the 16th within which Carrier's Agent allowed and expected claimant to take his 20 minutes in which to eat. The failure to properly relate these facts to the rule has resulted in an unwarranted award.

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