Award No. 4151

Docket No. MW-4168

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) That Section Laborers C. R. Faber and G. Stumphey be paid the difference between compensation received at pro rata rate and what they should have received at punitive rate for all services performed outside their regular assigned hours on February 18 to 22, 1947, inclusive:

(2) That Section Laborers C. R. Faber and G. Stumphey be reimbursed at pro rata rates for all regular assigned hours they were not allowed to work because of the instructions of the Carrier during the period February 18 to 22, inclusive.

EMPLOYES' STATEMENT OF FACTS: C. R. Faber and G. Stumphey were, on February 18, 1947, regularly assigned Section Laborers and members of the Thomson, Illinois Section Crew working under the supervision of Foreman George Creighton. The regular assigned hours of the Thomson Section Crew were 7:30 A. M. to 4:30 P. M.

On February 18, 1947, both these employes worked their regular assignment from 7:30 A. M. to 4:30 P. M. and were then released. However, in accordance with previous instructions given him by the Carrier, Section Laborer G. Stumphey returned to work at 11:30 P. M. on February 18, 1947 and commenced an emergency assignment as a Crossing Flagman at the Chicago, Milwaukee, St. Paul and Pacific and Chicago, Burlington and Quincy crossing at Ebner, Illinois and continued on such emergency assignment until 12:30 P. M. on February 19, 1947, with no meal period deducted. Likewise, Section Laborer C. R. Faber, in accordance with similar instructions given him by the Carrier, reported for work at 11:30 A. M. on February 19, 1947, at the same Crossing to perform emergency work as a Crossing Flagman. Faber continued on such emergency assignment until 12:30 A. M. on February 20, 1947. Both these employes actually flagged the crossing for twelve (12) hours from 12:00 noon to twelve (12) midnight and from midnight till noon. The half hour overlap before and after noon and midnight was to allow these employes time to travel to and from the location of their assignment. This same daily assignment continued in the above described manner to February 22, 1947. During this time Section Foreman Creighton of the Thomson Section continued to work on his section and did not supervise the work being performed by the claimants.

Following that date both these employes were returned to their regular assignment as Section Laborers in the Thomson Section Crew and continued

for the first 36 hours on the new assignment. Thereafter it paid him in accordance with the requirements of Rule 7.

We think the record demonstrates that the Carrier meticulously complied with all applicable provisions of the controlling agreement."

The circumstances underlying Award 2172 were quite similar to those prevailing in the instant controversy, in that the change in starting time in both instances was the result of an emergency condition which required a temporary change in the assigned hours.

Award 2714, Third Division (BMWE vs. SL-SF, Referee Tipton), also dealt with an emergency condition which required 24-hour service, and denied the claim of the employes for penalty payment. The following is taken from the Opinion of the Board in that award:

"When we consider that this was emergency work and it was necessary to work the 24 hours each day to make the repairs caused by the washout, we believe that the carrier did not violate the agreement. 'For operations necessitating working' 24 hours each day, the carrier had a right to change the assigned hours of this crew after it gave 36 hours' notice under Rule 19."

As a matter of information, claimant C. R. Faber is no longer in the service of the respondent carrier. He was laid off in reduction of force on December 31, 1947, and did not exercise his right to return to service when forces were subsequently increased.

The foregoing record of facts amply supports the position of the Carrier on the following points:

1. The exceptions to Paragraph (a) of Rule 33, as conatined in Paragraphs (b), (c), and (d), were agreed to in order to permit of changes and flexibility in designating work periods to meet the requirements of the service.

2. The change in the claimant's assigned hours was necessary in order to meet the requirements of the service during the time the interlocking plant at Ebner was inoperative.

3. The claimants were given proper notice of the change in starting time, as required by Rule 33(a). The starting time of the two shifts worked by the claimants was in conformity with the provisions of Rule 33(c).

4. The claimants were correctly compensated under the provisions of Rules 31 and 39(a); therefore they were properly assigned and correctly compensated under the applicable rules of the agreement.

5. Previous awards of the Third Division, as referred to in this submission, sustain the position of the Carrier on all these points.

In the light of these indisputable facts, it is clearly evident that the claim of the System Committee is not supported by rule or precedent, and should be denied.

OPINION OF BOARD: Claimants, section laborers, members of a section crew with regularly assigned starting time from 7:30 A. M. to 4:30 P. M. were removed from their crew on February 18, 1947 to commence emergency assignments as crossing watchmen on two shifts from 11:30 P. M. to 12:30 P. M., and from 11:30 A. M. to 12:30 A. M. from February 18, 1947 to February 22, 1947, inclusive.

Claim is made: (1) For punitive rate outside of regularly assigned hours from February 18th to 22nd; (2) For pro rata rate for all regularly assigned hours they were not permitted to work during the period February 18th to 22nd, inclusive.

As to the first part of the claim, Employes rely on Rule 39(a), which reads as follows:

> "Time worked preceding or following and continuous with a regularly assigned eight-hour work period shall be computed on actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen (16) continuous hours of work in any twenty-four hour period computed from starting time of the employe's regular shift. In the application of this paragraph (a) to new employes temporarily brought into the service in emergencies, the starting time of such employes will be considered as of the time that they commence work or are required to report."

As to second half of the claim, Employes rely on Rule 40 (c), which reads as follows:

> "Employes will not be required to suspend work during any assigned work period for the purpose of absorbing overtime."

Carrier relies on Rule 33, which reads as follows:

> "STARTING TIME.
>
> (a) When one shift day service is employed, the starting time will not be earlier than 6:00 A. M., and not later than 8:30 A. M., except as hereinafter provided, and will not be changed without first giving employes affected thirty-six (36) hours notice.
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> (b) When movement of trains or boats is such that necessary work (other than that performed by gangs engaged in B&B or Track maintenance, and fuel service and pumpers), can be done within the spread of a single shift but cannot be done between 6:00 A. M. and 5:00 P. M., the hours of such service may be assigned to meet the conditions, but no such shift shall have a starting time between midnight and 4:00 A. M.
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> (c) When two or more shifts are employed, the starting time may be regulated in accordance with requirements of the work, except that no shift shall start between 12 o'clock midnight and 4:00 A. M.
>
> (d) Nothing in this rule shall apply to positions which are not assigned to regular daily hours and the rates of which comprehend all service performed, including incidental overtime."

While there have been numerous awards dealing with the starting time rule, none has been called to our attention where the provisions of the rules involved are identical with those in the agreement involved herein. There is no doubt that the purpose of Rule 33 is to protect the employes from constantly changing starting time. That being so, if under the thirty-six hour notice provision, the Carrier were to be permitted as frequently as it saw fit to designate individual employes in a given classification and work them out of such classification for a very short period of time at a different starting time, and then return them to work in their original classification at the previous starting time, the first part of subsection (a) of the rule would be completely nullified by the second. We cannot assume that reasonable people would intend any such result in the wording of an agreement and we ascribe to the 36-hour provision the more reasonable construction that it was intended for the purpose of permitting changes in regularly assigned starting time of crews or positions. That being so, Carrier could not have changed the starting time of the Claimants without observing the requirements of Rule 39 (a), which would require the payment of punitive rate for all service performed outside their regularly assigned hours on February 18 to 22, 1947, inclusive. (See Award 3636.)

Accordingly, we sustain the first part of the claim.

With respect to the second part of the claim, we do not believe that the provisions of Rule 40 (c) were intended to have any application to a situation such as that herein presented. Here, the Carrier paid overtime for hours in excess of eight and will be required by our sustaining the first part of this claim to pay additional overtime. To require the Carrier to pay the pro rata rate for time held off regular assignment in addition would be to impose a double penalty under the rule and we do not believe that any such double penalty was contemplated by the framers of the Agreement.

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 Agreement.

AWARD

Claim sustained as to Part 1 thereof; denied as to Part 2.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of October, 1948.