Award No. 4851
Docket No. MW-4812

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) That the Carrier violated the agreement by suspending the duties of Crossing Watchman Joseph Tremblay between the hours of 1:30 P.M. and 2:00 P.M. each day commencing with January 27, 1947 and continuing;

(2) That Crossing Watchman Joseph Tremblay be compensated in the amount of one-half hour per day at time and one-half rate on each day that this violation of the agreement occurred.

JOINT STATEMENT OF FACTS: Prior to January 27, 1947, Crossing Watchman Joseph A. Tremblay, Broadway Crossing, Lawrence, Massachusetts, was assigned to the following hours of service:

8:45 A.M. to 2:00 P.M.
2:00 P.M. to 2:30 P.M. lunch period
2:30 P.M. to 6:15 P.M.

Tremblay worked a total of 9 hours of service, the 9th hour was paid for at the punitive rate.

These above noted hours of service have been in effect at Broadway Crossing for many years. Effective on January 27, 1947, Tremblay was instructed to take a meal period commencing at 1:30 P.M. and continue through to 2:30 P.M. He performed no work between the hours of 1:30 P.M. and 2:30 P.M. The relief Crossing Watchman protected this crossing during this period.

Under date of January 22nd the Carrier advertised for bids, position No. 11—Crossing Watchman at Lawrence—swing job as follows:

Weekdays—6:45 A.M. to 10:45 A.M.—Merrimac Street
2:00 P.M. to 2:30 P.M.—Broadway
2:45 P.M. to 6:15 P.M.—Water Street
Sunday —5:55 P.M. to 8:55 P.M.—Water Street

Effective January 27, 1947 Tremblay has been paid on the basis of 8½ hours per day, 30 minutes at punitive rate of pay. This arrangement has been in effect since January 27, 1947.

The agreement in effect between the parties to this dispute dated November 29, 1943 and its subsequent memorandums and interpretations are hereby made a part of this Statement of Facts.

meal period has been increased to one hour that he asserts that Claimant has been suspended from work and then only for the additional one-half hour.

Carrier believes Petitioner is making an untenable claim here and it should be denied.

3. THERE IS NO MERIT IN THE CLAIM ON THE BASIS OF EQUITY.

The claim advanced herein is for one-half (½) hour at time and one-half. Regardless of whether or not there was a violation of Petitioner's agreement, there is no merit to the claim for punitive rate. This is not a claim for payment for work performed but a claim for compensation for work which was not performed. Numerous Awards of the Third Division have established the principle that the penalty payment for "work lost" shall be at the pro rata rate of the position involved. (See Award No. 4244, Third Division, which is typical and includes reference to a comprehensive list.) The only basis for punitive rate of compensation under the controlling agreement is contained in the overtime and/or Sunday, holiday and call rules. All **of these rules (Rules 4, 5 and 6) provide such payment for work performed.** No work was performed in connection with the claim in this case.

The Third Division has also clearly stated in Award No. 4194 that "the purpose of the punitive rate as it applies to overtime is to penalize the Carrier for working an employe in excess of eight hours in any one day. Its purpose is not, as some seem to suppose, to create work for which time and one-half may be demanded". Here Carrier changed the "hours of duty" of Claimant to provide a more equitable distribution of crossing tender work at Lawrence, Mass., as well as to avoid "creating work for which time and one-half may be demanded". True, Claimant's daily overtime was cut down by one-half hour, but there is no merit in this claim on the basis of equity and it should be denied.

SUMMARY: Carrier has shown conclusively that there is no ground for sustaining the claim for the following reasons; there was no violation of Rule 4(b), as contended by Petitioner, Claimant was **not** suspended from work to avoid overtime; Claimant's "hours of duty" were changed by Carrier in accordance with its right to change hours of duty of crossing tenders, which right is recognized in Rule 17(a) and (b); Claimant was always relieved by a relief crossing tender during his meal period and the only difference, after the "change in hours of duty", was a longer meal period during which a relief crossing tender covered the crossing; if the original relief during meal period was not "suspension from work" neither can the present relief be so considered.

The claim should be denied.

OPINION OF BOARD: Prior to January 27, 1947, Claimant was an assigned crossing watchman at Broadway Crossing, Lawrence, Massachusetts. His assigned hours were 8:45 A.M. to 6:15 P.M. with lunch period from 2:00 P.M. to 2:30 P.M. Under this assignment Claimant was paid 8 hours at straight time and 1 hour at the overtime rate. On January 27, 1947, Claimant's assignment was changed, the only change being that the meal period was assigned 1:30 P.M. to 2:30 P.M. This change had the effect of reducing the overtime period from 1 hour to 30 minutes. The Organization contends this is a suspension of work to avoid overtime contrary to Rule 4(b).

Rule 3(a), Current Agreement states:

> "Except as otherwise provided in the rules of this Agreement, eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work.

The prohibition against a suspension of work to avoid overtime means that work of a regular assignment will not be suspended to avoid overtime. After the new assignment was made on January 27, 1947, the hours from 1:30 P.M. to 2:30 P.M. were not a part of Claimant's working hours. He was not required to suspend work from 1:30 P.M. to 2:00 P.M. to absorb overtime within the meaning of Rule 4(b).

We find nothing in the Agreement which prevents the changing of Claimant's assignment as here made. We cannot say that the extending of the meal period from 30 minutes to 1 hour is violative of the Agreement for the reason that the Agreement does not purport to fix the length of the meal period. A meal period of 1 hour is not unusual in the railroad industry and we cannot say that the Carrier acted unreasonably in so fixing it.

The Organization asserts that the change of meal period was made for the obvious purpose of depriving Claimant of 30 minutes of overtime. For the sake of argument, we concede this to be true. The Carrier has the right to change the hours of duty of employes to avoid overtime where no rule of the Agreement is violated in so doing. The very purpose of the punitive rate for overtime is to penalize the Carrier for working an employe in excess of eight hours in any one day. Its very purpose is to coerce the Carrier into a compliance with the eight-hour day rule and not to create work for which time and one-half may be demanded. See Award 4194. It is true that Claimant has lost 30 minutes overtime because of the change in his assigned meal period. No rule of the Agreement having been violated in so doing, he has no cause for complaint. His remedy, if he is dissatisfied with the assignment as now made, is to exercise his seniority and displacement rights.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of April, 1950.