

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

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

(1) The Carrier violated the agreement when it required or permitted a junior clam shell operator to perform overtime service on Saturday, July 28, 1951, in lieu of senior operator Hubert McKeel;

(2) Clam Shell Operator Hubert McKeel be allowed eight hours' pay at his time and one-half rate of pay because of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Clam Shell Operator Hubert McKeel is regularly assigned to work Mondays through Fridays as are all Clam Shell Operators on this property.

On Saturday, July 28, 1951, the Carrier assigned a junior Clam Shell Operator to work eight hours, for which he was compensated at the time and one-half rate of pay. Clam Shell Operator Hubert McKeel was not called or notified to perform the overtime service, although he was available and willing to perform the overtime work.

Clam Shell Operators are not assigned to operate a specific machine by bulletin, but may operate any and all Ditcher and Clam Shells owned by the Carrier as may be required by the nature of the work to be performed.

Two Clam Shells were required on the date herein involved, one of which had been operated on the previous day by Clam Shell Operator Ralph Hall, who is the junior Clam Shell Operator referred to above.

The other Clam Shell used was operated the previous day by a Clam Shell Operator junior as such to Clam Shell Operator Roy Horner. However, he was not permitted to operate that Clam Shell on the instant date at the overtime rate of pay, but the work was assigned to Clam Shell Operator Roy Horner, who is a brother to General Roadmaster W. H. Horner. Clam Shell Operators work under the jurisdiction of the General Roadmaster.

The agreement between the two parties to this dispute dated November 15, 1940 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

Although clam shell operator positions are bulletined without any reference whatsoever to the particular machine on which the operator may work, each operator is assigned to a particular machine and generally remains with that machine unless it is laid up or he is otherwise instructed. At the time this claim arose two clam shells were being used at Wiggins No. 5 Yard, East St. Louis, another at Compton Avenue, St. Louis (with the claimant as operator) and still another at Eager Road Bridge in St. Louis County, the latter two being manned by operators senior to those working in Wiggins No. 5 Yard. It was decided to work the two clam shells at East St. Louis, Saturday, July 28, 1951, in order to avoid delay in the unloading of refuse that had accumulated as the result of the Mississippi River overflowing its banks.

POSITION OF CARRIER: As Saturday is not a part of any assignment and there were no extra or unassigned employees available on Saturday, July 28, the operators of the machines to be used that day to dispose of the rubbish accumulated from the flood were notified to work. However, in accordance with our prior practice, the senior clam shell operator was permitted to displace a junior operator for that day when he made request to do so. The claimant did not make any request to work that Saturday. Had he done so his request would have been granted.

Inasmuch as the clam shell operators were assigned under the only rule in the agreement dealing with overtime work and in accordance with past practices, there is no basis whatever for the claim, the details of which are set forth in our letter of October 31, 1951, to the General Chairman, copy of which is attached as Carrier's Exhibit A, and it should be denied.

(Exhibits not reproduced)

OPINION OF BOARD: Clam Shell Operator Hubert McKeel is regularly assigned to work Mondays through Friday. On Saturday, July 28, 1951, the Carrier assigned a junior clam shell operator to work 8 hours for which he was compensated at the time and one-half rate of pay. McKeel was not called or notified to perform the overtime service, although he was available and willing to perform the overtime work. Clam shell operators are not assigned to operate a specific machine by bulletin, but may operate any and all ditch and clam shells owned by the Carrier as may be required by the nature of the work performed.

The Employees rely upon Rule 4 — Consideration:

"Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Railroad as hereinafter provided."

It is the position of the Carrier as Saturday is not a part of any assignment and there were no extra or unassigned employees available on Saturday, July 28, the operators of the machines to be used that day to dispose of the rubbish accumulated from the flood were notified to work. However, in accordance with our prior practice, the senior clam shell operator was permitted to displace a junior operator for that day when he made request to do so. The Claimant did not make any request to work that Saturday. Had he done so, his request would have been granted.

It is also the position of the Carrier that it has been its practice to have the Saturday work performed by the regular employee assigned to the job unless a senior man of that class desires to displace the regular employee for the work to be done on Saturday and that as Claimant is senior to Horner and would have had the work if he had asked for it and that because of the failure of Claimant to ask for the extra work, the Carrier was within its rights in giving the work to Horner.

The record shows that Claimant's address and telephone number were listed with the Carrier. We are not in accord with the position of the Carrier that it could give the work to Horner because he asked for it. We hold that it was the duty of the Carrier to call the Claimant and ascertain from him if he wanted the work. Our conclusion in this regard is sustained by the following Awards: 4841 and 4200.

The Carrier urges that in the event Claimant is entitled to an Award that compensation should be limited to the pro rata rate and cites many cases to that effect. The Employees likewise cite cases to the effect that time and one-half is the proper rate of pay except where a day other than Sunday or a Holiday is assigned as the rest day. It is our opinion that an employee denied work is entitled to the rate of pay he would have received had he performed the services denied him.

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 9th day of February, 1954.

DISSENT TO AWARD 6474, DOCKET MW-6245

This Award does not deal with a breach of contract involving the performance of work by the claimant. It only has to do with the right to certain work which the claimant contended he should have performed.

Looking aside from the merits in this case, the Award is in error in allowing the overtime rate of pay for work not performed because it has been soundly enunciated in the jurisprudence of this Division that "the overtime rule has no application where only the right to perform work is involved." Award 3955. We have also said many times that the overtime rules all contemplated "work performed". There are more than one hundred and forty Awards of this Division alone clearly establishing the principles hereinabove briefly mentioned.

The Carrier was, therefore, correct in urging, as the Opinion here says, that the claimant's compensation "should be limited to the pro rata rate". The Employees urged only, again as the Opinion here says, that the overtime

rate is applicable to a Sunday or holiday. Therefore, the Opinion in this Award falls short of being a "majority opinion" where it steps aside from the representations made by the Employees and orders payment at the overtime rate on Saturdays or any unassigned day other than Sunday or a holiday.

All of the "many cases" cited by the Carrier and which far outnumber those cited by the Employees leave no real question on the point that the overtime rules are not applicable to claims for work not performed when the claimant did not work on a holiday, a Sunday, a Saturday, an unassigned week-day, or any rest day.

Because of the departure from a long line of controlling cases, we dissent to the holding that the overtime rate of pay is applicable in this single case to work not performed by the claimant.

/s/ E. T. Horsley

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp
