

Award No. 13657
Docket No. CL-14202

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

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

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5368) that:

1. Carrier violated the rules of the current agreement when on March 21st, 1962 it required certain employes at Trinidad, Colorado to suspend work to absorb meal period and starting time in violation of Rule 30 (b).

2. Carrier now be required to compensate the following employes, their successor or successors, for one (1) hour overtime daily effective March 21st, 1962, and each and every day thereafter until violation is discontinued.

S. W. Wooster
N. G. DeBono
F. W. Shew
T. Trancoso

EMPLOYEES' STATEMENT OF FACTS: Prior to March 21st, 1962 the Yard Office clerical force at Trinidad consisted of 1st and 2nd trick Yard Clerk Callers and one Relief Clerk.

1st Trick assigned 8 A.M. to 5 P.M., Monday through Friday, 1 hour for lunch.

2nd Trick assigned 5 P.M. to 2 A.M., Thursday through Monday, 1 hour for lunch.

Relief or Swing Clerk relieving 1st Trick on Saturday and Sunday, 2nd Trick Tuesday and Wednesday. Monday working as "Janitor".

On March 21st, 1962 a 3rd Trick Yard Clerk-Caller-Janitor position was established. Notice No. 102 of March 15th, 1962 assigned 12:01 A.M. to 9:00 A.M., 1 hour for lunch, Saturday through Wednesday. Position awarded to F. W. Shew March 21st, 1962.

"We cannot agree with the Brotherhood.

. . . since crew calling is not necessary during the meal period of the first and second tricks we cannot say it is that type of an operation requiring continuous hours within the meaning contemplated by the Schedule."

In the instant case at Trinidad, the crew calling and the Yard Clerk work, as well as all of the Janitor work, is most certainly not necessary during the meal periods of positions Nos. 1 and 2, and, by the same line of reasoning, the inconsiderable amount of crew calling, if any, and the little amount of Yard Clerk, as well as all of the Janitor work performed by Yard Clerk-Caller-Janitor Position No. 3, is not necessary on Thursdays nor during the one-hour meal periods of the position, consequently, it does not constitute that type of regular operation requiring continuous hours within the meaning contemplated in Agreement Rule 30 (b).

The lack of a logical basis for this claim is borne out by the fact that S. W. Wooster is included as claimant. This man was the incumbent of the first trick position, with assigned hours from 9:00 A. M. to 5:00 P. M. with no meal period. How he could possibly have been required to "suspend work to absorb meal period" (the language of the Brotherhood's statement of claim) has never been explained. The same thing is true of T. Trancoso, who held the relief position during the 121-day claim period, on Saturdays and Sundays when he relieved the first trick position and was not assigned a meal period.

In conclusion, it is no more than appropriate to refer your Division to rather recent Award 10963 wherein the majority, with Referee John H. Dorsey participating, very cogently held that:

" . . . the National Railroad Adjustment Board may not impose a penalty unless expressly provided for in a collective bargaining contract."

In the instant case, the petitioning Organization is endeavoring to persuade your Board to impose a penalty that is expressly prohibited in the instant circumstances in the permissive provisions of Rules 30 and 31.

There being no sound basis for the claim, contractually or otherwise, it should categorically be denied and the Carrier, with deference, so urges.

OPINION OF BOARD: There were three employees; covered by the Clerks' Agreement, employed at the Trinidad, Colorado, Yard Office, with assignments as follows:

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|------------------------------|---|
| 1. Yard Clerk-Caller | 9:00 A. M. to 5:00 P. M.
No lunch period assigned. |
| 2. Yard Clerk-Caller | 5:00 P. M. to 2:00 A. M.
Meal Period 9 to 10 P. M. |
| 3. Yard Clerk-Caller-Janitor | 12:01 A. M. to 9:00 A. M.
Meal Period 4 to 5 A. M. |

The positions were assigned so as to cover the work twenty-four (24) hours per day, six (6) days per week, Friday thru Wednesday. On Thursday, the first and second positions only worked, covering the period from 9:00 A. M. to 2:00 A. M. All three positions were assigned identical duties, except for janitor work assigned to the third position. These three positions were established from March 21, 1962 until July 19, 1962, a total of 121 days, which is the claim period set forth by the Claimants.

The Organization contends Carrier violated Rules of the current Agreement when it required certain employees to suspend work to absorb meal period and starting time in violation of Rule 30 (b); that each of the three positions should have been assigned eight (8) consecutive hours work as required by Rules 30 (b) and 31, and given twenty minutes in which to eat without deduction in pay; the assignments are improper and Claimants should receive one hour at rate of time and one-half for each day they worked said improper assignments; that the claim for the occupant of the first trick arises account under the Rules, 8:00 A. M., instead of 9:00 A. M., was the latest hour it could start; that Claimants are all involved in same work identical duties, except for Janitor work of third trick, receive same rates of pay, and occupy position requiring continuous hours twenty-four (24) hours of the day. Rules alleged violated are 30 (b), 31, 34, 36 of the Agreement.

Carrier contends there is no requirement for "continuous hours" of the three assigned positions; there were not three consecutive shifts of like classifications and duties; that the three positions did not follow one another in uninterrupted succession; that Claimants were not required to suspend work during regular hours to absorb overtime as they observed the assigned one hour meal period under Rule 30 (a) and paid under Rule 30 (e).

This Division has interpreted like rules and like issues by determining two questions. One: Are the assigned schedules of three shifts continuous and uninterrupted in regular operation, covering a twenty-four hour period? Two: Does the work of the class, performed by the employees working in three consecutive shifts, remain as like duties on all three shifts?

Rules allegedly violated by Carrier are:

Paragraph (b) of Rule 30 reads:

"(b) For regular operations requiring continuous hours, eight (8) consecutive hours without meal period shall be assigned as constituting a day's work, in which case the employee will be allowed twenty (20) minutes in which to eat, without deduction in pay."

Rule 31 reads:

"THREE-SHIFT POSITIONS

Where three consecutive shifts are worked covering the twenty-four (24) hour period no shift will have a starting time after 12:00 o'clock midnight and before 6:00 A. M."

Paragraph (a) of Rule 34 reads:

"(a) Except as otherwise provided in Rule 35, time in excess of eight (8) hours, exclusive of the meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

Rule 36 reads:

"ABSORBING OVERTIME

Employees will not be required to suspend work during regular hours to absorb overtime."

The Board finds no intent on the part of the Carrier to violate Rule 31. Evidence supplied in the record, by both parties, shows the Third position had been bulletined, assigned, and abolished several times on the property, with the starting time of 12:01 A. M. instead of 12:00 Midnight. The oft changed position had been done to meet the fluctuations of business, specifically at Trinidad. Carrier should not be penalized for a one-minute deviation of an accepted practice, that has not heretofore been complained of. The occupant, in any event, was compensated for the full eight hours.

Carrier alleges that when the Third position was assigned, the first two tricks were for seven days a week and the Third trick was for six days a week; that "regular operations" did not require "continuous hours" as the Third trick did not perform on Thursday. We disagree with the Carrier's interpretation of "regular operations" in the Agreement.

"For regular operations requiring continuous hours, eight (8) consecutive hours without meal period shall be assigned as constituting a day's work . . ." and "Where three consecutive shifts are worked covering the twenty-four (24) hour period . . ." (Emphasis ours.) The construction of both rules are clear in defining "regular operations" of the Carrier for "a day's work" and "covering the twenty-four (24) hour period" of these three shifts, within the twenty-four hours, and does not imply a weekly operation as alleged by the Carrier. The three shifts in this dispute are within the twenty-four hour period, as set forth in the schedule.

Carrier claims the three shifts are not consecutive as the shifts did not follow one another in uninterrupted succession. The Second trick began at 5:00 P. M. - 2:00 A. M. causing the three positions at that point during the period, not to follow in succession. We find no break between the first or second tricks, and none between the second or third tricks. Certainly there is continuity of operation "covering the twenty-four (24) hour period" as shown by the schedule.

Carrier, in a denial letter dated September 28, 1962, commented on the Third trick position which reads in part ". . . it is rather apparent that this newly-established composite position was created for the primary purpose of performing janitor work and assisting with mail and baggage work with incidental Yard Clerk and Caller work attached thereto and does not function in sequence with any position of like classification, identical designation or assigned duties. . . ." As pointed out by the Carrier, this statement was not denied by the Organization on the property, however, the Carrier states in its Ex Parte submission and Answer that "even though the incumbent thereof occasionally does some Yard Clerk work, calls crews, if necessary, and assists in the handling of mail, baggage, and other head-end commodities to and from passenger trains Nos. 2 and 7" such statement would appear that the composite position was not created for the primary purpose of performing janitor work but is continuous with the like duties of the First and Second tricks.

What are the duties of the bulletined First and Second Tricks? They are Book trains in and out, call trains and engine crews, weigh cars, yard reports, BREX work, work mail and baggage. The Third Trick? Same duties except janitor work included. No evidence is submitted to determine the time required for the performance of janitor work or the other duties. The Board finds conflict in the Carrier's position that the Third trick was created for the primary purpose of performing janitor work when it states the Third trick position is performing the same duties as the other two shifts.

The Board finds that evidence is contrary to the statement on the property by the Carrier that the position "does not function in sequence with any position of like classification, identical designation or assigned duties." The work of the class, performed by the employees working in three consecutive shifts, does remain and function as like duties on all three shifts.

Based on the record and our findings, the Claimants named in Claim 2 are entitled to payment of one hour overtime under Rule 34, as Claimant should have been scheduled for eight consecutive hours inclusive of a twenty-minute lunch period. However, the record shows, four Claimants were actually paid one hour overtime at time and one-half rate on fifty-five separate occasions. Claimants may not recover time and one-half for those days worked and paid the punitive rate as recorded in the record.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained, as to recovery set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of June 1965.