

Award No. 13992

Docket No. MW-14248

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
GULF, MOBILE AND OHIO RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Section Foreman W. C. Stringfellow and Section Laborers M. D. Pugh, Hershel Dallas, P. Sanders, M. N. Beard, N. Smith, Isaac Thigpen, Booker Carter, Henry Hickman, Jordan Thigpen and Willie Knight at their respective time and one-half rates of pay for work performed outside their regularly assigned working hours on Sunday, March 18 and Monday, March 19, 1962.

[Carrier's File E-41-91.]

(2) The Carrier further violated the Agreement when it required the claimants named in Part (1) of this claim to suspend work during their regularly assigned working hours from 8:00 A. M. to 4:30 P. M. on Monday, March 19, 1962.

(3) The Carrier violated the Agreement when it failed and refused to compensate Section Foreman E. F. McCarty and Section Laborers Richard Osborne, Primer Beard, Jr., Louis Moffet and Dudley Hartfield at their respective time and one-half rates of pay for work performed outside their regularly assigned working hours on Sunday, March 18 and Monday, March 19, 1962.

[Carrier's File E-41-92.]

(4) The Carrier further violated the Agreement when it required the claimants named in Part (3) of this claim to suspend work during their regularly assigned working hours from 9:00 A. M. to 4:30 P. M. on Monday, March 19, 1962.

(5) The Carrier violated the Agreement when it failed to call Section Laborers Ed Fisher and Sam Pierce to perform overtime work on their assigned territory from 11:30 P. M. on Sunday, March 18 to 7:30 A. M. on Monday, March 19, 1962.

(6) Each claimant named in Parts (1) and (3) of this claim be allowed the difference between what he was paid at straight time rate and what he should have been paid at time and one-half rate account of the violations referred to in Parts (1) and (3) of this claim.

(7) Each claimant named in Part (1) of this claim be allowed seven and one-half (7½) hours' pay at his respective straight time rate of pay because of the violation referred to in Part (2) of this claim.

(8) Each claimant named in Part (3) of this claim be allowed six and one-half (6½) hours' pay at his respective straight time rate of pay because of the violation referred to in Part (4) of this claim.

(9) Each claimant named in Part (5) of this claim be allowed eight (8) hours' pay at the section laborers time and one-half rate of pay because of the violation referred to in Part (5) of this claim.

EMPLOYES' STATEMENT OF FACTS: During the period involved herein, the claimants listed in Parts (1) and (5) of the Statement of Claim were regularly assigned to their respective positions on Section No. 2 with headquarters at Mobile, Alabama, while those listed in Part (3) were regularly assigned to their respective positions on Section No. 5 with headquarters at Wilmer, Alabama.

Each gang was regularly assigned to work from 7:30 A. M. to 4:30 P. M., excluding a one hour meal period, Monday through Friday.

On Sunday, March 18, 1962, the Carrier called the Wilmer section gang at 11:00 P. M. and the Mobile section gang (with the exception of Claimants Ed Fisher and Sam Pierce) at 11:30 P. M. and used them to make repairs to the Government Street Loop crossing, which is located on Section No. 2 at Mobile, Alabama. The work consisted primarily of changing rail and guard rail and of replacing the bituminous concrete (blacktop) in said crossing.

The Mobile and Wilmer section gangs completed work on this crossing at 8:00 A. M. and 9:00 A. M., respectively, on March 19, 1962. Each gang was then required to suspend work for the balance of that day's regular assignment.

The employees of these two gangs were paid at their regular straight time rates for all work performed preceding their regularly assigned work period.

Although Claimants Ed Fisher and Sam Pierce were regularly assigned as section laborers on Section No. 2, neither was called to perform overtime service thereon from 11:30 P. M., March 18, 1962, to 7:30 A. M., March 19, 1962 in connection with the subject crossing work. Consequently, each was deprived of eight (8) hours' pay at his time and one-half rate.

The Agreement in effect between the two parties to this dispute dated April 28, 1950, together with supplements, amendments and interpretations thereto, is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Carrier's position in this dispute was clearly set forth in a letter of claim declination reading, in part, as follows:

"The above mentioned claim was declined as being without merit since the Section Foreman and 10 laborers were performing regular

no proof whatsoever that the agreement (effective April 28, 1950) has ever been construed in such a manner as complained of.

There is no rule of the agreement that by its language or implication prohibits the Carrier from making the change in the work period as referred to in this claim. The principle of Burden of Proof is well summarized in Award No. 6391, Referee Frank Elkouri. The Board stated:

"Thus, the Employees have a burden in coming before this Board of showing either some rule of the agreement clearly prohibiting the change made by the Carrier or of showing by specifically identifying injured individuals that the Carrier's method of putting a change not specifically prohibited by the agreement into effect trespassed upon the seniority or other contractual rights of the employees so identified." (Emphasis ours.)

CONCLUSION

The Change in the starting time of the work period was made at the request of the City Officials of Mobile, because of the heavy traffic over the crossing that was being repaired. Rule 5 was negotiated to take care of such practical situations. There is no requirement that the claimants be additionally compensated.

Carrier urges that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Wilmer section gang and the Mobile section gang were regularly assigned to work from 7:30 A. M. to 4:30 P. M., with one hour off for lunch, Monday through Friday. Saturday and Sunday were their rest days. Claimants, except Ed Fisher and Sam Pierce, received twenty-four (24) hour notice changing their starting time and ordered to report for work at 11:30 P. M. on Sunday, March 18, 1962. The Mobile gang worked until 8:00 A. M. and the Wilmer gang worked until 9:00 A. M. on March 19, 1962, at which time they were sent home and directed to report for work at 7:30 A. M. on Tuesday, March 20, 1962. They were paid at their straight time rate for the hours worked from 11:30 P. M. on Sunday until 7:30 A. M. on Monday and the time and one-half rate thereafter until 8:00 A. M. and 9:00 A. M. respectively.

Claimants Ed Fisher and Sam Pierce, who were members of the Mobile section gang, were not asked to work from 11:30 P. M. on Sunday until 8:00 A. M. on Monday. They reported at their usual and customary starting time of 7:30 A. M. on Monday and worked their scheduled hours until 4:30 P. M.

Petitioner contends that the Carrier changed the starting time and suspended work during the regular scheduled work hours on Monday for the sole purpose of avoiding overtime pay in violation of Rule 8(d). This Rule says:

"(d) Employees will not be required to suspend work during regular working hours to absorb overtime."

Carrier contends that since it gave Claimants the required twenty-four (24) hours' notice, and had complied with the requirements of Rule 5(a),

there is no violation of Rule 8(d). Rule 5 reads:

"(a) For regular assigned employees starting time of the work period will be designated by supervisory officer and will not be changed without first giving employees affected twenty-four (24) hours' notice.

(b) No assigned starting time will be designated for employees performing intermittent service."

Carrier argues that: "It was not contemplated by the agreement that once the proper notice was given, work performed would then be at overtime or penalty rates. On the contrary, once the work period is properly changed, the Carrier does not incur penalty pay until after the expiration of eight hours . . . Where the work performed is that ordinarily performed by section laborers, the starting time of the work period is of necessity changed to meet practical conditions." (Emphasis ours.)

If Carrier's position is correct, it could serve notice under Rule 5(a) and change the starting time daily to "meet practical conditions." It could thus avoid overtime pay, and Rule 8(d) would have no validity. This was not the intent of the parties. To reach a meaningful intent, it is necessary to consider all of the Rules of the Agreement.

These were five day positions with Saturday and Sunday as days off, as provided in Rule 7(b). Claimants worked Monday through Friday in the week prior to Sunday, March 18, 1962. They had worked forty (40) hours that week. Rule 8(c) provides that work in excess of forty (40) hours in any week shall be paid for at the rate of time and one-half the basic straight time rate. Likewise, Rule 8(a) provides that time and one-half shall be paid for all hours worked preceding or following the regularly scheduled eight (8) hours of work. Applying these Rules to Rule 8(d), it is clear that the parties never intended to permit Carrier to change the starting time at its whim in order to avoid overtime pay. Rule 8(d) is clear and meaningful. It cannot be avoided as contemplated by the Carrier.

Rule 5(a) permits Carrier to change the assigned starting time of employees where such change is for a reasonably regular period, but not for a single day or other short period where the obvious purpose of the change is to avoid overtime pay.

The Mobile section gang, is identified as Section No. 2, while the Wilmer section gang is identified as Section No. 5. Each laborer established and held seniority in his respective gang. Claimants Ed Fisher and Sam Pierce held seniority in Section No. 2. In its Ex Parte Submission, Petitioner stated that Carrier violated the Agreement when it called and used Section laborers from Section 5 to perform the work on Section 2 where Claimants Ed Fisher and Sam Pierce had seniority. Nowhere in the record does Carrier deny this statement. In the absence of evidence to the contrary, it has to be accepted as a fact.

Claimants, W. C. Stringfellow, M. D. Pugh, Hershel Dallas, P. Sanders, M. N. Beard, N. Smith, Isaac Thigpen, Booker Carter, Henry Hickman, Jordan Thigpen and Willie Knight are entitled to receive additional pay of one-half times their respective basic hourly rates for eight (8) hours work performed starting at 11:30 P. M. on Sunday, March 18, 1962. They have received time

and one-half pay for the consecutive hours worked beyond eight (8) hours on that assignment. The Claimants are also entitled to receive seven and one-half (7½) hours' pay at straight time from 8:00 A. M. to 4:30 P. M. on Monday, March 19, 1962.

Claimants E. F. McCarthy, Richard Osborne, Primer Beard, Jr., Louis Moffett and Dudley Hartfield are entitled to receive additional pay of one-half times their respective basic hourly rates for eight (8) hours' work performed starting at 11:30 P. M. on Sunday, March 18, 1962. They have received time and one-half pay for the consecutive hours worked beyond eight (8) hours on that assignment. The Claimants are also entitled to receive six and one-half (6½) hours' pay at straight time, from 9:00 A. M. to 4:30 P. M. on Monday, March 19, 1962.

Claimants Ed Fisher and Sam Pierce are entitled to receive eight (8) hours' pay at straight time their respective basic hourly rates, for the hours between 11:30 P. M., Sunday and 7:30 A. M. Monday. They requested time and one-half pay for those hours, but they may recover only straight time pay because they did not actually work those hours. See Award 10513 and other Awards therein cited.

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

Claims are sustained and Claimants shall be paid the additional compensation set out in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1965.