

Award No. 16739
Docket No. MW-17165

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

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

(1) The Carrier violated the Agreement when it required members of Extra Gang No. 7, Albany, Oregon, to suspend work during their assigned work period on January 6, 1966. (Carrier's file 61-48.)

(2) Messrs. M. Garcia, F. Garcia, P. L. Wells, O. Zehr, J. Bitterman, F. A. Mireles and L. Ebbs each be allowed one (1) hour's pay at his respective double time rate and seven (7) hours' pay at his respective straight time rate because of the violation referred to in Part (1) of this claim.

(3) The Carrier further violated the Agreement when it required Truck Driver Jose Z. Merjil to suspend work during his assigned work period on March 17, 1966. (Carrier's file 61-49.)

(4) Mr. Jose Z. Merjil be allowed seven (7) hours' pay at his straight time rate because of the violation referred to in Part (3) of this claim.

(5) The Carrier further violated the Agreement when it required Truck Driver Mike M. Ornelas to suspend work during his assigned work period on March 17, 1966. (Carrier's file 61-50.)

(6) Mr. Mike M. Ornelas be allowed eight (8) hours' pay at his straight time rate because of the violation referred to in Part (5) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Messrs. M. Garcia, F. Garcia, P. L. Wells, O. Zehr, J. Bitterman, F. A. Mireles and L. Ebbs, regularly assigned members of Extra Gang No. 7, have hours of assignment from 7:30 A. M. to 4:00 P. M. including a thirty minute meal period, Monday through Friday of each week.

parties on the property concerning this claim are attached as Carrier's Exhibit B.

CLAIM NO. 3

On March 17, 1966, Mike M. Ornelas (hereinafter referred to as the Claimant) was assigned to position of Truck Driver on Carrier's San Joaquin Division with regular assigned work period 7:30 A. M. to 4:00 P. M. (one-half hour lunch), Monday through Friday. This Claimant was performing hauling work in connection with the derailment referred to in "Claim No. 2" above. Claimant was on continuous duty from 7:30 A. M., March 16th until 7:30 A. M., March 17, 1966, at which time service requirements permitted his release for the purpose of obtaining rest. Claimant was compensated as follows:

7:30 A. M.-4 P. M., March 16, 8 hours at straight time, plus one-half hour at time and one-half account worked during meal period;

4 P. M.-11:30 P. M., March 16, 7 hours, 30 minutes at time and one-half;

11:30 P. M., March 16-7:30 A. M., March 17, 8 hours at double time.

Claim for an additional 8 hours' pay at straight time rate on Claimant's behalf was denied and appealed on the property; following discussion between the parties in conference, the claim was denied by Carrier's Assistant Manager of Personnel on August 17, 1966. Copies of correspondence exchanged between the parties on the property concerning this claim appear as Carrier's Exhibit C.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants listed in Section 2 of the Claim have regularly assigned hours from 7:30 A. M. to 4:00 P. M., Mondays through Fridays, including a thirty minute meal period. They worked continuously from 7:30 A. M. on Wednesday, January 5, 1966, to 4:30 A. M. on Thursday, January 6th, at which time they were released and told by their foreman to report back at their regular starting time three hours later if they wanted to get paid for that day; they did report. But then they were told to go home at 8:30 A. M. and that they would get straight time for the day. However, the record indicates that Carrier issued instructions that they be paid double time for the hour from 7:30 A. M. to 8:30 A. M., but is inconclusive as to whether they were ever actually so paid; and the record is clear that they were not paid at all for the time from 8:30 A. M. to 4:00 P. M. on January 6th.

Claimant Merjil had regularly assigned hours from 7:30 A. M. to 4:00 P. M., Mondays through Fridays, including a thirty minute meal period. He worked continuously from 7:30 A. M., Wednesday, March 16, 1966, to 8:30 A. M., March 17th, at which time he was released and instructed to report back to his regular starting time the next day. He was not paid for the seven hours from 8:30 A. M. to 4:00 P. M. on March 17th.

Claimant Ornelas had the same regularly assigned hours and days. He worked from 7:30 A. M. on March 16, 1966, to 7:30 A. M. on March 17th, at

which time he was released and instructed to report at his regular starting time on March 18th. He was not paid for the time from 7:30 A.M. to 4:00 P.M. on March 17th.

It is the Brotherhood's contention that Carrier violated the Agreement by having Claimants suspend work during their assigned work period for the purpose of absorbing overtime; on the property Brotherhood charged violation of "the provisions of the current Agreement, particularly the third paragraph of Section (b), and Section (g) of Rule 28 . . ."; in the Submission, Brotherhood also specifies that Rule 19 (b) was violated.

Carrier argues, first, that the allegation of a violation specifically of Rule 19 (b) for the first time in Brotherhood's Submission is improper and that we should limit our consideration of the Claims to "the application and interpretation of the rules and issues considered and discussed while the claims were on the property."

We will limit our consideration of the Claims to the issue joined on the property; that issue clearly was whether Carrier in violation of the Agreement had required the Claimants to suspend work during their assigned work period for the purpose of absorbing overtime. On the property Carrier contended that the suspension of work in these cases and circumstances was permitted by the last paragraph of Rule 28 (b), and relied on our Award 7661 as precedent for the propriety of its actions.

The Rules referred to read:

"RULE 19.

(b) Regularly established daily work hours shall not be reduced below eight (8) hours per day, five days per week, except that this number of days may be reduced in a week in which holidays occur by the number of such holidays."

"RULE 28.

(b) Time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on actual minute basis and paid for at time and one-half rate, the regularly assigned eight (8) hour work period to be paid at straight time rate.

Time worked after sixteen (16) hours of continuous service shall be computed on the actual minute basis and paid for at the double time rate until employe is released for eight (8) consecutive hours time off duty. For purpose of computing sixteen (16) hours of continuous service, as referred to herein, actual time worked shall be counted from time on duty until relieved for eight (8) consecutive hours time off duty.

It is understood that nothing in this rule requires that the Carrier retain an employe on duty at punitive rate of pay."

"RULE 28.

(g) Employees shall not be required to suspend work during any assigned work period for the purpose of absorbing overtime or to avoid holiday pay, and the Management shall not apply the assignment or displacement rules in such a manner as to deprive the employee of holiday pay."

Among other things, Rule 19(b) has the effect of clarifying some of the scope of Rule 28(g) by making clear that regularly established daily work hours, which are an assigned work period, may not be set at less than eight hours per day.

Carrier argues that in the conflict between applying Rule 28(b) and Rule 28(g) and/or Rule 19(b), Rule 28(b), being a specific rule, takes precedence over the others, which are general. However, there is no conflict between these rules if each is construed strictly as it is written; they are in potential conflict only if one construes the last sentence of 28(b) as requiring that the Carrier not so retain any employee, and if "this rule" in the sentence is construed to refer to other rules than 28(b). Either of these constructions requires reading into the language of 28(b) something that is not clear and explicit in it. If the sentence is read giving no more than the normal meanings to its words, there is no conflict with either Rule 28(g) or Rule 19(b). The first paragraph of Rule 28(b) read literally provides the formula and the rate of pay for time worked preceding or following and continuous with a regularly assigned eight hour work period, and that "the regularly assigned work period is to be paid at the straight time rate." In this case, there is no conflict with either 28(g) or 19(b) if this is applied literally; we are dealing here with pay for time not worked. The second paragraph of 28(b) provides the formula and rate of pay for time worked after sixteen hours of continuous service until the employee is released for eight consecutive hours off duty; this paragraph does not deal with the question of pay during a suspension of work required by Carrier during an assigned work period for the purpose of absorbing overtime. Thus, if it is read literally, it has application only to pay for some of the time worked in this case about which there is no dispute — the hour from 7:30 A. M. to 8:30 A. M. for some of the Claimants, and it is not in conflict with 28(g) or 19(b).

We will read the involved rules giving no more than the usually accepted meaning to the language; thus we will avoid creating a conflict between them. We conclude that Carrier was in error in relying on a strained construction of Rule 28(b) to override the injunction of Rule 28(g).

Award 7661 differs from this case in some of the circumstances considered: there, the Board considered Carrier's averment there "that less than 8 hours (within the normal daily schedule) were worked (1) for the convenience of the employees and (2) because of weather conditions,"; neither of these circumstances was argued in this case.

On the dates here involved, Claimants' regularly assigned hours were from 7:30 A. M. to 4:00 P. M.; had Carrier not suspended Claimants, they would have worked on overtime during those hours. In these cases we find that Carrier required Claimants to suspend work during their regularly assigned work period for the purpose of absorbing overtime.

As noted above, the record is not clear as to whether Claimants listed in Section 2 of the Claim were in fact paid double time for the hour worked on January 6th between 7:30 A. M. and 8:30 A. M. In sustaining the Claim we do not intend that these Claimants be paid twice at double time for that hour; if the records show that they have already been paid double time for the hour, no additional payment for the hour is required.

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 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 Agreement was violated.

AWARD

Claim sustained with the condition set forth above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of November 1968.