Award Number 185
Docket Number CL-126

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Paul Samuell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE.—"Claim of S. V. Wycoff, John Pollak, Paul Morek, Herman Rupp, Peter Tabaka, John Hennes, Geo. Wishing, Paul Westrum, W. C. Nelson, Anton Englund, W. H. Schultz, and John Hein, warehouse employees at Minneapolis, for eight hours pay for services rendered at Minneapolis freight house November 1, 1932, and on subsequent dates on which they were paid less than a full eight hour day as provided for in Rules 52 and 54."

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

The parties to said dispute were given due notice of hearing thereon.

This Division having assumed jurisdiction of this dispute for the purpose of making an Award, and said dispute having become deadlocked in this Division, and Paul Samuell having been called in as a Referee, rendered the following Award, which is concurred in by a majority of the members of this Division.

The parties have jointly certified the following statement of facts and the Third Division so finds:

> "At Minneapolis freight station freight handling gangs consisting of checkers, callers, stevedores, and truckers are employed. The number of gangs employed vary from day to day. These gangs work eight hours or more. In addition to the men in these gangs other men are used commencing at 1:15 p. m., who work less than eight hours, and are paid pro rata rates for actual services rendered.
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> "The men who are presenting this claim are those who worked less than eight hours and who are paid pro rata rates for actual services rendered."

An agreement between the parties, effective date August 15, 1922, contains the following Rules:

> "RULE 52. *Day's work.*—Except as otherwise provided in this article, eight (8) consecutive hours' work, exclusive of the meal period, shall constitute a day's work."
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> "RULE 54. *Reporting and not used.*—Hourly-rated employes whose seniority entitles them to regular employment, required to report at regular starting time and place for a day's work and when conditions prevent work being performed, will be allowed a minimum of three (3) hours' pay at pro rata rates. If held on duty over three (3) hours, actual time so held will be paid for. If required to work any part of the time so held and through no fault of their own are released before a full day's work is performed, will be paid not less than eight (8) hours' pay unless they lay off of their own accord. This guarantee will not be construed to apply to those who are employed to take care of the fluctuating work that cannot be handled by regular forces."
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> "RULE 53. *Intermittent service.*—Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employes filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release

within twelve (12) consecutive hours, and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

"Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the management and duly accredited representatives of the employes. For such excepted positions the foregoing paragraph shall not apply.

"This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

"Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employes cannot otherwise be utilized.

"Employes covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours."

"RULE 22. *Scope of roster.*—Seniority rosters will show the name, proper dating, title, and location of employes, except that names of laborers will not be included, and their seniority rights will not apply until they have been in continuous service of the railroad in excess of six (6) months."

The record, briefs, and arguments in this dispute, which consist of more than 225 pages, exhaustively treat every phase of the subject, but no good purpose can possibly be served in setting forth in detail the position of the respective disputants in view of the conclusion reached by the Referee. Suffice it is to say that Petitioner's claim is based mainly on the theory that Rule 52 is a "guarantee rule", viz: eight hours are guarantees to an employee when he is called upon for service by the carrier and through no fault of the employee he is denied eight hours' work; that there is sufficient tonnage on hand at Minneapolis Freight Station to provide eight hour assignments in lieu of using men for a five hour period.

The employer's position is that Rule 54 is an exception to Rule 52; that Rule 54, by its specific provision, applies to hourly rated employees and clearly stipulates under what conditions the allowance will be made; that the form of employment in this dispute is justified under Rule 54; that the nature of the particular work at the Minneapolis Freight house is fluctuating, ebbing, and flowing back from hour to hour during the day.

There is a sharp conflict in the record as to whether the work performed in this dispute is regular and constant but manipulated by the employer in such manner as to create peak freight loads at noon and in the afternoon in each day, thus avoiding forenoon employment as well as the regular eight hour schedule and substituting average five hour employment. Because of the conclusion reached in this dispute, it appears unnecessary to discuss this question of fact.

The Referee is of the opinion that no single rule or group of rules in the schedule sustains the employees' contention that there is a guarantee of eight hours for all employees, nor can it be said that the kind and nature of the work performed in this dispute is such as to permit it to fall within Rule 54 as contended by the carrier. To sustain or deny the claim would impose upon this Division a requirement of adding language to the rules, a responsibility which this Division has no right to assume, and therefore this Division is of the opinion, and so holds, that the rules or schedule must be clarified through negotiations between the representatives of the employees and the carrier, or otherwise adjusted in conference.

AWARD

Claim remanded to the parties with instructions to clarify the rules through negotiation or adjust by conference.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 28th day of January 1936.