

Award No. 1228

Docket No. MW-1228

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
MOBILE AND OHIO RAILROAD**

STATEMENT OF CLAIM: "Claim of Employees' Committee, first: That the Carrier violated Rule 3 of Agreement effective December 1, 1929, and the same rule identified as Rule 5 in revised Agreement effective December 1, 1939, by effective October 24, 1939, assigning certain crossing watchmen to seven hours and twenty minutes per day.

"Second: That these crossing watchmen shall be restored to full time eight hours' per day assignment."

EMPLOYES' STATEMENT OF FACTS: "An Agreement exists between the Mobile and Ohio Railroad and its employees represented by the Brotherhood of Maintenance of Way Employees. The effective date of the agreement in effect on October 24, 1939, was December 1, 1929. The effective date of the current agreement being December 1, 1939.

"Rule 3, which sets up Basic Day in Agreement effective December 1, 1929, reads as follows:

'Eight consecutive hours exclusive of meal period shall constitute a day's work.'

"Rule 5, which sets up Basic Day in Agreement effective December 1, 1939, superseding agreement of December 1, 1929, reads as follows:

'(a) Eight (8) consecutive hours exclusive of meal period shall constitute a day's work, except for cooks whose monthly rate covers all service.

(b) When meal period is allowed, it will be between the beginning of the fifth hour and ending of the seventh hour; if not allowed within this period twenty (20) minutes will be allowed at the first opportunity without loss of pay.'

"This basic eight hour day rule has been in effect by agreement since December 16, 1921, and those certain employees whose hours were reduced on October 24, 1939, had always prior to that time been required to work eight hours per day.

"Effective October 24, 1939, instructions were issued to certain crossing watchmen that their assignment was reduced to seven hours and twenty minutes per day."

POSITION OF EMPLOYES: "Rule 3 of Agreement effective December 1, 1929, and Rule 5 of Agreement effective December 1, 1939, quoted in Employees' Statement of Facts, specifically provides that eight hours shall constitute a basic day.

Brotherhood of Maintenance of Way Employees, and pays to such employee the agreed upon rate of the position, is the carrier compelled by Rule 3 to require eight hours of actual work to be performed by such employee on each calendar day?

"This Carrier believes, and so contends, that it has the right, without violating any provision of its agreement with its Maintenance of Way Employees, to excuse a Crossing-Watchman from the performance of duty at any time during his assignment, provided that such Crossing-Watchman be compensated upon the basis of the agreed-upon rates of pay that are specified in the current agreement. Such a right has been exercised regularly for many years, without protest, particularly in the case of general office clerical employees.

"The Carrier contends that the question involved in this dispute should be answered in the negative, and, as a consequence, this claim of the employees' is without merit and should be denied."

OPINION OF BOARD: Briefly stated, the facts in this claim are as follows: That on October 24, 1939, instructions were issued to certain crossing watchmen that their assignment was reduced to seven hours and twenty minutes per day. These crossing watchmen were paid a monthly salary and they continued to receive the same rate of pay that they received before their assignment was reduced. In other words, these employees received the same rate of pay for working seven hours and twenty minutes per day that they previously received when they worked eight hours. Therefore, this claim does not involve a question of pay reduction.

The interpretation of the "Basic Day and Meal Period" Rule of the Agreement effective December 1, 1939, is involved in this dispute. It reads:

"(a) Eight (8) consecutive hours exclusive of meal period shall constitute a day's work, except for cooks whose monthly rate covers all service.

"(b) When meal period is allowed, it will be between the beginning of the fifth hour and ending of the seventh hour; if not allowed within this period twenty (20) minutes will be allowed at the first opportunity without loss of pay."

It is the contention of the Petitioner that as the rule said: "Eight (8) consecutive hours * * * shall constitute a day's work, * * *"; this rule was violated, even though these employees' pay was not reduced.

The position of the Carrier may be thus stated: That as these crossing watchmen are paid on a monthly basis, the Carrier has the right to exact of these employees eight consecutive hours' work, exclusive of meal period, if such length of service is required, but it is not obligatory upon the Carrier to work such monthly paid employees the full eight hours, exclusive of meal period, if such service is not necessary, provided these employees are paid in full the monthly rate of pay named in the schedule, therefore, the Agreement was not violated.

It has been suggested that this reduction in hours per day was so that the Carrier might comply with the "Fair Labor Standards Act of 1938." This is not denied by the Carrier. It is probably true, but this Board has no concern regarding the compliance with or violation of that Act. The contract between the Petitioner and Respondent must be interpreted independently of this Act. To this conclusion, the Referee understands that both parties to this dispute agree.

It will be noticed that the rule says that: "Eight (8) consecutive hours * * * shall constitute a day's work, * * *." It does not say that the employees here involved must work eight consecutive hours.

The Board holds that the Agreement between the parties is that the employees are to be available to perform such work as might be demanded of them not to exceed eight hours per day, and the Carrier to pay them a stipulated sum per month, whether they are required to work the full eight hours or not. It follows that the Carrier did not violate the Agreement.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of November, 1940.