Award No. 2345
Docket No. CL-2316

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Henri A. Burque, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated the Clerks' Agreement:

1. By ordering employes of the Auditor of Traffic's Office, Philadelphia, Pa., to work additional time beyond their regularly assigned hours of service, for period covering October 27, 1942, to November 9, 1942, inclusive, without payment therefor.

2. That employes affected shall be properly compensated for time worked beyond their regularly assigned hours.

EMPLOYES' STATEMENT OF FACTS: On Octboer 23, 1942, a bulletin was issued by the Auditor of Traffic, Lehigh Valley Railroad, changing hours of service in the Philadelphia office, from seven and one quarter (7¼) to eight (8) hours per day, Monday to Friday inclusive, and from three (3) to three and one-half (3½) on Saturday, (Employes' Exhibit No. 1). This condition existed for a period of two weeks, commencing Tuesday, October 27th, and was rescinded by bulletin issued Monday, November 9, 1942, with the close of work that date. (Employes' Exhibit No. 2.)

On October 23, 1942, the local representative of the Brotherhood was furnished a copy of the bulletin changing the hours of service, at which time he requested a conference with the Auditor of Traffic. Conference was held on October 24th, at which time the Management was notified that changing the hours of assignment would be a violation of the Clerks' Agreement, unless agreed to under provisions of Rule 81, with Brotherhood representative.

The practice in the past had been, that where the Management found it necessary to request that certain employes work eight (8) instead of seven and one quarter (7¼) hours per day, the employes so worked were given an equal amount of time off from their regular assignment, as soon thereafter as possible. The Auditor of Traffic was asked by the representative of the Brotherhood to agree to such condition as consistent with past understandings and practice; this he refused to do, nor would he agree to additional compensation for the extra time worked.

No satisfaction being obtained at the above conference, the Carrier was again notified by letter under date of October 26, 1942, that the placing in effect of changed hours on October 27th, would constitute a violation of agreement, and under Rule 82, the Railway Labor Act. Notwithstanding conference and letter as recited above, the change in hours was placed in effect and continued for period stated.

August 1937, we allowed the Clerks the hourly increase on the basis of 204 hours per month. If the Clerks' contention in this case is considered proper, then, we had the right to base their increase on 7¼ hours a day, or 185 hours per month, which would have materially reduced the amount of their increase under the awards mentioned.

It is respectfully submitted that there are no grounds for this claim, and it should be denied.

OPINION OF BOARD: The facts in this case are simple and not in dispute. Prior to October 27, 1942, the employes involved were working 7¼ hours per day, Monday to Friday, inclusive, and three hours on Saturday. For the period October 27, 1942, through November 9, 1942, the Carrier by notice of October 23, 1942, changed the hours of assignment of these employes from 7¼ to 8 hours daily, and from 3 to 3½ hours on Saturday forenoon. On and after November 10, 1942, the former assignments of 7¼ hours and 3 hours were resumed by Carrier's notice of November 9, 1942.

The issue is: Are the employes entitled to compensation for the three-quarter (¾) hour worked from Monday to Friday and half (½) hour on Saturday over their regularly assigned hours during the period in question?

The following rules, part of the Agreement in force as of March 1, 1939, are to be considered:

Rule 6:

"Basic rates of pay now in effect shall become a part of this Agreement and shall remain in effect until changed by mutual agreement or as provided herein."

Rule 14:

"Except as otherwise provided in this agreement, eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work."

Rule 16:

"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, except as otherwise provided in this agreement."

Rule 81:

"Except as otherwise provided, exceptions to any rule or rules in this Agreement may be made by agreement between the company and the General Committee or their representatives."

In addition to the above rules, we have the following Memorandum of Agreement, entered into between the parties:

"MEMORANDUM OF AGREEMENT

between

LEHIGH VALLEY RAILROAD COMPANY

and the

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

"In connection with the agreement between the Lehigh Valley Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes which will become effective as of March 1, 1939.

"IT IS AGREED THAT the following will be continued in effect:

1.— In the Accounting Department and Freight Claim Department.
(a) Present hours of assignment.
(b) Additional Holidays observed: Columbus Day, Lincoln's Birthday, Good Friday and Election Day."

Up to October 27, 1942, and, it is stated and not disputed, for forty years prior to that date, the Clerks herein involved had assigned office work of 7¼ hours daily from Monday to Friday, viz.: 8:45 A. M. to 12:30 P. M., and 1:15 P. M. to 4:45 P. M., and Saturday 8:30 A. M. to 11:30 A. M.

On October 23, 1942, the Carrier posted a notice to the effect that due to present emergency it was necessary that the office work full eight hours for a temporary period beginning October 27th, and fixed the hours as follows: 8:30 A. M. to 12:30 P. M. and 1:15 P. M. to 5:15 P. M. (meaning Monday to Friday, hereinafter referred to as week days), and Saturdays 8:30 A. M. to 12:00 M. The employes, through their representative, immediately protested on the very same day.

The petitioner states, and it is not challenged by the Carrier, that in the past when the Carrier has found it necessary to request certain of its employes to work eight hours instead of the regularly assigned 7¼ hours per day, the employes so worked were given an equal amount of time off to equalize for the increased hours of their assignment as soon thereafter as possible.

The Carrier contends that the regular basic work day under the Agreement, as specified in Rule 14, is eight consecutive hours, exclusive of the meal hour, and with that no one can quarrel. The Carrier further contends that the statement in the rule: "Except as otherwise provided in this Agreement," means just what it says and that there being no exception to the rule to be found in the agreement, the rule prevails.

The Petitioner, answering this contention, calls attention to Rule 81, which says that, "Except as otherwise provided, exceptions to any rule or rules in this Agreement may be made by agreement between the Company and the General Committee or their Representatives," and says an exception to Rule 14 was agreed upon in the Memorandum of Agreement which became part and parcel of the rules and agreement of March 1, 1939; that there is nothing in the rules and agreement to have prevented the adoption of this Memorandum of Agreement; that, therefore, "except as otherwise provided" in Rule 81, does not apply here and does not prevent the parties from entering into agreements creating exceptions, as they did in this case; and that the Memorandum of Agreement entered into between the Carrier and the Employes became effective simultaneously with the March 1, 1939 agreement and made a component part thereof.

The petitioner's position is well taken. There is absolutely nothing in the rules and agreement of March 1, 1939, prohibiting the Carrier and the Employes from reaching and effecting an agreement such as was entered into and evidenced by the Memorandum of Agreement. The Agreement is explicit, clear and unambiguous: "IT IS AGREED [therein] THAT the following be continued in effect: (a) Present Hours of Assignment." What does "present hours of assignment" mean? It can mean but one thing: the hours then assigned and then in effect for the performance of work constituting a day's work, in this case 7¼ hours week days and 3 hours Saturdays. No other construction can possibly be adopted.

There is a well recognized and implied doctrine and rule of law that in construing contracts and agreements, the language used shall be given its natural, ordinary and common usage meaning. The test is: What does the language used mean and convey to the average person? What would the average

mind understand it to mean? When the Carrier assigned the office work on a 7¼ hour basis and construed it to mean an 8-hour day and paid the employes therefor on a basis of eight hours, the latter had the right to assume and understand that 7¼ hours were the equivalent of eight hours and constituted a day's work, and that all work required of them over and above the assigned 7¼ hours was to be compensated for. Likewise as to the three-hour Saturday assignment.

Had the Carrier lived up to the accepted practice of giving an equal amount of time off to equalize for the increased hours worked over and above the assignments, to which the employes had assented, there could be no claim for compensation. But the Carrier, not having seen fit to carry out this established practice, must now compensate the employes for the extra work performed over and above the assigned hours.

The instant case is no different than the Saturday afternoon rule and practice cases, considered in Awards 2040, 2073 and 2268. In each of these it is held that the Saturday forenoon work constituted a day's work, and that all work performed over and above the required hours on Saturday mornings constituted overtime. Awards 2040 and 2073 were based on interpretations of rules incorporated in the agreement, but Award 2268 is based on interpretation of a Memorandum of Agreement, probably more explicit, if you will, than the one we are considering in this case, in that it said: "That where it has been the practice to allow clerks to be off on Saturday afternoons, this practice will not be rescinded or departed from"; whereas, in the instant case, the Memorandum of Agreement says that it is agreed that present hours of assignment will be continued in effect, but the result is the same. The cases are comparable and analogous. The hours of assignment are just as definite in the present case as the assigned Saturday work in the above Awards. In each of the above cases a week's work, without Saturday afternoons, was construed to amount to a full 48-hour week's work of 8 hours each day, and Saturday afternoon work considered overtime. The result is the same, whether we deal with 7¼ hours each day, plus 3 hours Saturdays, as in this case, the assignment constitutes a full week's work of 6 days, 8 hours each, and to be paid on that basis in each case.

It then follows that the employes involved here are entitled to compensation for the three-quarter (¾) hour period each day and one-half (½) hour period each Saturday they worked during the period covered in this case. On what basis? This question is also answered in the three awards above referred to, viz., on the basis of time and one-half.

But the Carrier contends that as eight hours constitute a day's work, time and one-half is to be allowed only for work in excess of eight hours and refers to Rule 16. We agree that is what the rule says, but we cannot leave out of the rule the last words, "except as otherwise provided in this agreement."

Again we revert back to what we have said in regard to exceptions. We have seen that Rule 81 provides for exceptions, and that an exception was mutually agreed upon and made by the Memorandum of Agreement. That being so, it follows that the parties have agreed to an exception to the eight-hour rule, which means also to the Overtime Rule. Having agreed that a 7¼-hour assignment for week days and a 3-hour assignment for Saturdays constitute a day's work, the Carrier cannot now be heard to claim that an 8-hour day of actual work is here the basis for overtime pay.

We concede this is a penalty, but as is said in Awards 685, 1646 and 2282, and by the Emergency Board created by the President, in its report of February 8, 1937, quoted in Awards 685 and 2282:

> "Penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the

money to be paid in a concrete case, yet experience has shown that if rules are to be effective there must be adequate penalties for violation."

See further comment on penalties in Opinion of Award 2282.

We cannot agree with the Carrier that the instant case is to be considered in the light of a schedule agreement covering clerks, effective as of April 1, 1935. The rules and agreement governing this case are those in effect March 1, 1939, and even though nothing is said in them directly to the effect that they supersede all prior existing rules and agreements, it is a well recognized principle of law that where newly adopted rules and regulations (which would also include agreements) are in direct conflict with previously adopted rules and regulations, the former prevail. Even if that were not so, we are not confronted with any conflict here. Rule 6 of the 1935 agreement is now Rule 14 of the 1939 agreement, and has been copied verbatim. No other conflict of rules is called to our attention; nor have we discovered any.

We are mindful of dissenting opinions in Awards 2040, 2073 and 2268, and we have given full consideration to the positions taken therein, but we cannot agree with them and feel constrained to follow the majority opinion of the Board in each of the above cases.

Interpreted in the light of the Rules and Memorandum of Agreement referred to in the opinion, and also in the opinions in the awards cited, it follows here that the employes in question are entitled to overtime pay for extra work over 7¼ hours week days and 3 hours Saturdays during the period in question, to wit: from October 27, 1942 to November 9, 1942, computed on the minute basis, as per Rule 16.

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 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 Carrier violated the agreement and that the employes are entitled to compensation as per Opinion.

AWARD

Claims 1 and 2 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of October 1943.