

Award No. 3001

Docket No. TE-2874

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Atchison, Topeka & Santa Fe Railway, that agent-telegrapher C. A. Berg, regularly assigned at Smithshire, Ill., with hours 6:15 A. M., to 3:15 P. M., with an hour allowed for noon meal, was required to work overtime ranging from two hours and forty-five minutes to four hours and twenty minutes on thirteen days during the period August 23 to September 22, 1943, without being allowed the thirty minute meal provided by Article III-(c) of the Telegraphers' Agreement, shall be paid thirty minutes additional pay at the overtime rate for each of the thirteen days on which he was required to work this additional meal period.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date December 1, 1938, as to rules of working conditions, and December 27, 1943, as to rates of pay is in effect between the parties to this dispute.

During the period involved in this dispute, C. A. Berg was regularly assigned as agent-telegrapher at Smithshire, Ill., a position covered by the telegraphers' agreement, with assigned hours 6:15 A. M. to 3:15 P. M. with an hour allowed for noonmeal.

Article III-(c) of the telegraphers' agreement provides:

"For continuous service after regular working hours, employees will be paid time and one-half on the actual minute basis. Employees shall not be required to work more than two (2) hours after completing regularly established working hours without being permitted to take a second meal period, and time so taken will not terminate the continuous service period and will be paid for up to thirty (30) minutes."

On the following named days, agent-telegrapher Berg was required to perform continuous service after his regular working hours in excess of two hours without being permitted to take a second meal period of thirty minutes, as noted:

	Released	Continuous overtime worked
Aug. 23,	6:15 P. M.	3 hours
Aug. 24,	7:00 P. M.	3 hours, 45 minutes
Aug. 27,	6:15 P. M.	3 hours
Sep. 1,	7:35 P. M.	4 hours, 20 minutes
Sep. 3,	6:30 P. M.	3 hours, 15 minutes
Sep. 6,	6:45 P. M.	3 hours, 30 minutes
Sep. 7,	6:30 P. M.	3 hours, 15 minutes
Sep. 10,	6:45 P. M.	3 hours, 30 minutes

(4) The restrictive handling now sought by the Organization has never been the subject of negotiations between the parties.

(5) The Third Division cannot extend or alter the provisions of the Agreement between the parties.

The Carrier has not been served with nor permitted to see a copy of the Employees' submission, consequently it is not informed with respect to the alleged facts, contentions or allegations which the Employees' ex parte submission may contain. The Carrier, therefore, has dealt only with those contentions and allegations presented to it by the Employees and such other matters as in its considered judgment are pertinent to the dispute. The Carrier, however, reserves the right to present evidence in rebuttal of any allegations, facts, or contentions that may be made by the Employees in their ex parte submission or to any other submission which the Employees may make to your honorable board in this case.

OPINION OF BOARD: The pertinent facts involved in the claim before us are not in dispute. The Claimant, as Agent-Telegrapher regularly assigned at Smithshire, Illinois, was required to work overtime from two hours and forty-five minutes to four hours and twenty minutes on each of thirteen days specified in the claim without being allowed the thirty minute meal period provided by Article III (c) of the Telegraphers' Agreement. The claim is for thirty minutes additional pay at the overtime rate for each of the thirteen days Claimant was required to work his second meal period.

The controlling rule provides:

"For continuous service after regular working hours, employees will be paid time and one-half on the actual minute basis. Employees shall not be required to work more than two (2) hours after completing regularly established working hours without being permitted to take a second meal period, and time so taken will not terminate the continuous service period and will be paid for up to thirty (30) minutes." Art. III-(c), current Agreement.

The Carrier contends that the quoted rule does not require the payment of the claim, that no penalty is provided for the violation of the rule and that the mutual interpretation given the rule by the parties over a long period of time requires the denial of the claim. It seems to us that under the language of the rule itself, the claim must be sustained. The rule provides that if the employee is held more than two hours after working his regular assignment, a thirty minute meal period will be permitted and paid for by the Carrier. Under the terms of the Agreement, although the thirty minutes are paid for by the Carrier, the thirty minute period belongs to the employee. If the employee is required to work the thirty minutes, he is simply selling his own time to the carrier and he is entitled to his pay for it. It seems to us that the claim is sustained under the reasoning announced by this Board in Award No. 2855.

It is then urged that even if there be a violation of the Agreement that no penalty is specified for non-compliance and that Claimant is left without a remedy. It is true that no penalty is provided by Rule 37. That, however, does not prevent a recovery of compensation earned under the very terms of the Agreement. No penalty is being inflicted on the Carrier in requiring it to do what it voluntarily contracted to do. A penalty is ordinarily assessed for the purpose of punishing the offender, it is a requirement in addition to the ordinary liability which usually grows out of a breach of an Agreement. We submit that the sustaining of the present claim in no manner involves the infliction of a penalty. It calls merely for a determination of the time worked by the Claimant which is to be paid for at the overtime rate specified in the Agreement.

The Carrier cites Awards Nos. 9504, 8251 and 6758, all of the First Division, as sustaining their views. They appear to have been cited in support of the principle that penalties may not be awarded upon implication but only under express contract provisions. Our holding that the present claim does not involve the enforcement of a penalty disposes of the controlling effect of these awards.

The Carrier contends that employes have long acquiesced in Carrier's interpretation of this rule and that they are now in no position to assert a different meaning. The record shows that similar claims have been made to and paid by the Carrier, although Carrier asserts that they were paid only through error. It also shows that other claims have been made and denied by the Carrier. The record is not such as to show a mutual acceptance of Carrier's interpretation that would bring into play the principle for which the Carrier contends. Although appeals to this Board have not been taken, the interpretation of the rule has not been questioned to such an extent that we are unable to say that its meaning has been fixed by a mutual understanding grounded on long acquiescence by the employes.

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 employes involved in this dispute are respectively carrier and employe 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 evidence supports a finding that the current Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary.

Dated at Chicago, Illinois, this 29th day of November, 1945.