

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, BURLINGTON & QUINCY RAILROAD**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Section Laborer F. L. Lacy, Hamburg, Iowa, St. Joseph Division, shall be paid the difference between what he received at pro rata rate and that which he should have received at time and one-half rate for all time that he was instructed to work nights, or outside of the regularly assigned work period from May 1st to the 8th, 1944, inclusive.

EMPLOYEES' STATEMENT OF FACTS: F. L. Lacy was regularly assigned as a section laborer at Hamburg, Iowa, working regularly assigned daytime hours from 7:00 A. M. to 4:00 P. M. with one hour off for lunch. On May 1, 1944 Lacy was instructed to temporarily work nights, pumping water out of the depot basement at Homburg, Iowa. He was continued on that temporary night work from May 1 until May 8, 1944, inclusive.

Agreement effective June 1, 1938 between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rules 42(a) and 43(a) revised December 16, 1944 and Rule 45 of Agreement effective June 1, 1938 between the Carrier and the Brotherhood of Maintenance of Way Employees read:

"Rule 42. (a) Time worked preceding or following and continuous with a regularly assigned eight-hour work period shall be computed on actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen continuous hours of work in any twenty-four hour period computed from starting time of the employee's regular shift. In the application of this paragraph (a) to new employees temporarily brought into the service in emergencies, the starting time of such employees will be considered as of the time that they commence work or are required to report."

"Rule 43. (a) Employees other than those paid a monthly rate for all services performed, including incidental overtime, notified or called to perform work not continuous with the regular work period, will be allowed a minimum of two (2) hours and forty (40) minutes at time and one-half and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on actual minute basis."

"Rule 45. The starting time of the work period will be designated by the supervisory officer and in event of change, twenty-four (24) hours' advance notice will be given the employees."

May 1st, and was also notified that the starting time of his work period was changed to 7:00 P. M. thereafter. By such advance notice of not less than twenty-four hours, the starting time was properly changed to 7:00 P. M., effective May 2, 1944. Premium time as per rule 43 (a) was applicable and was allowed for the period of service commencing at 7:00 P. M., May 1st, 1944. Straight time as per Rule 37 was applicable and was allowed for the basic eight-hour regular work period commencing at 7:00 P. M. each day, May 2, 3, 4, 5, 6 and 8. The work on Sunday, May 7, 1944, was paid for at premium time in accordance with the Sunday-holiday rule.

The class of employees within the coverage of the Maintenance of Way Agreement are assigned to a variety of duties, ranging over a wide scope. Some are assigned in large gangs, some in small work units and many work independently of other employees. Some work in single shifts, some in two shifts and others in three shifts around the clock. The conditions affecting the working periods of the employees change from time to time, being affected by the seasons and by changing service requirements. The starting time provisions of Rule 45 were made in the light of these circumstances with an eye to the broad scope of employees involved and the variety of changes to be met. No distinction was made in the provisions for changing starting time between gangs on the one hand and individual employees working alone on the other hand. Nor does the starting time rule prescribe the time which changed requirements must run in order to constitute a proper basis for change of starting time. Therefore, the circumstances in each instance must be considered in the light of a reasonable and practicable application.

In this instance the claimant employee prior to the time of the claim had been assigned to work regularly from 7:00 A. M. to 6:00 P. M., exclusive of meal period. If his starting time had not been changed, it would have been necessary that he work from 7:00 A. M. to 6:00 P. M. and from 7:00 P. M. to 6:00 A. M. (exclusive of meal periods) for eight consecutive days, which would have allowed him no time for rest. Such a requirement over a period of eight consecutive days would not have been reasonable, nor would it have been practicable under the circumstances. Hence, change of starting time was proper and in conformity with the express provisions of the agreement. Any contention that the change of assignment was violative of Rule 49, or any other rule of agreement cited by petitioner, must be viewed in the light of the construction of the rules which best effectuates the intention of the parties. Since it cannot be assumed that the parties intended to produce a result so highly impracticable and unreasonable as to require an employee to work continuously (exclusive of meal periods) for eight consecutive days, it is reasonable to draw the conclusion that the parties intended in the circumstances herein that change be effected in the manner described in Carrier's Statement of Facts.

Reiterating the position of Carrier, it holds that the work of claimant, starting at 7:00 P. M. on the particular dates in question, was not work outside of the regularly assigned work period, but rather it was properly within his assigned work period under the rules of agreement.

OPINION OF BOARD: Claimant was regularly assigned as a section laborer 7:00 A. M. to 4:00 P. M., with one hour off for lunch. On May 1, 1944, he was directed to work nights, outside of his regularly assigned hours, pumping water out of the depot basement at Hamburg, Iowa. He continued to perform this work from May 1, 1944 to May 8, 1944, inclusively. The claim is for the time and one-half rate for all time worked outside his regular assignment for which Claimant was paid at the pro rata rate.

The record shows that high water flooded the basement of the depot at Hamburg, Iowa, and Claimant was directed to start work at 7:00 P. M., effective May 1, 1944, to perform the work incident to pumping the water from the depot basement. He commenced work at 7:00 P. M. from May 1 to 8, inclusive, and upon completion of the work resumed his former starting time of 7:00 A. M. He was allowed time and one-half on May 1 under the starting time rule and time and one-half on May 7 under the Sunday and holiday rule. He also received time and one-half for time worked in excess

of eight hours on each day. For the balance of the time worked, he received the pro rata rate. He claims time and one-half for such time also. It is not claimed that this employee suffered a reduction in his rate of pay or a loss of compensation while performing the work involved in this claim.

Awards are cited in behalf of both parties to the dispute purporting to sustain their positions. An examination of these awards reveal that each has been decided upon some particular language in the applicable rule with the result that a proper application of the rules to situations such as we have before us has not been well defined.

The applicable rule in the present case is Rule 45 of the current Agreement. It is as follows:

"The starting time of the work period will be designated by the supervisory officer and in event of change, twenty-four (24) hours' advance notice will be given the employees.

(a) For single shifts regularly assigned exclusively to day service, the starting time shall not be earlier than 6 A. M., and not later than 8:30 A. M.

(b) When employees' regular assignment requires them to work part day and part night service, their starting time will be between 3 P. M. and 7 P. M.

(c) Single shifts regularly assigned exclusively to night service will start work period between 7 P. M. and 9 P. M.

(d) For operations regularly necessitating work period varying from those fixed as per Sections (a), (b), and (c) of this rule, the hours of work on individual position may be assigned in accordance with service requirements.

(e) When two or more shifts are employed, no shift will have a starting time between Midnight and 5 A. M.

(f) No assigned hours will be designated for employees performing intermittent service or working variable hours requiring them to work, wait or travel as regulated by train service and the character of their work, and when hours cannot be definitely regulated."

It seems to us that if a work period has been designated by the supervisory officer for either of the shifts provided for in Sections (a), (b) or (c) of the rule, they may be changed upon the giving of 24 hours notice to any other starting time within the limits fixed by those sections without it constituting a violation of the rule. In the absence of another provision of the Agreement to the contrary, any work performed outside of the designated hours of service must be compensated at the time and one-half rate. Any other rule would nullify for all practical purposes the benefits to be derived from the rule. Proper assignments to new positions, of course, will not be affected by this rule. This seems to be the basis upon which Awards 3055, 2973 and 2775 were decided. We conclude therefore that unless there is a provision authorizing the use of Claimant outside of his designated hours at the pro rata rate, the time and one-half rate will apply.

Section (d) has application to the situation. The meaning of this rule is that operations necessitating regular work periods varying from those fixed by Sections (a), (b) and (c) may be assigned in accordance with service requirements. We think that Claimant is within this rule if there was a sufficient showing of necessity for the change. This statement is supported by our holding in Award 3039 where the work done on a coal trestle could not have been done during regular hours because of density of traffic, in which Award we said:

"We think this showing was sufficient, *prima facie*, to justify the Carrier's conduct and to cast upon the Petitioner the burden of

rebutting the showing that the change of starting time was not reasonably necessary."

In the present case no showing of necessity was made. For aught the record shows, the pumping of the depot basement could have been done as well during the regularly designated hours as during the night time. No showing of necessity having been made as contemplated by Section (d), the Carrier has not brought itself within the provisions of that section. No other rule has been pointed out which would relieve the Carrier of its obligation to compensate Claimant at the time and one-half rate for the hours worked outside of his regularly designated hours. The position of the Organization is correct.

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 Agreement was violated as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of March, 1946.