

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the provisions of Rule 45 (a) of agreement effective June 1, 1938, when it changed the regular starting time of Crossing Watchman Pfaff from 7:00 A. M. to 11:00 A. M., between the period June 10, 1946, and November 30, 1946, both dates inclusive;

(2) That Crossing Watchman Pfaff be allowed the difference between what he received at the straight time rate between the hours of 4:30 P. M. and 7:00 P. M., and what he should have received at the overtime rate between the hours of 4:30 P. M. and 7:00 P. M., during the period June 10, 1946, and November 30, 1946, both dates inclusive;

(3) That the Carrier violated the provisions of Rule 33 (a) of agreement effective December 1, 1946, when it assigned Crossing Watchman Pfaff to start his work period at 11:00 A. M.;

(4) That the Carrier violated the provisions of Rule 40 (a) of Agreement effective December 1, 1946, when it assigned an employe having no seniority as a crossing watchman to perform work as such, thereby depriving Crossing Watchman Pfaff of four (4) hours work each day subsequent to December 1, 1946;

(5) That Crossing Watchman Pfaff be paid eight (8) hours straight time rate and four (4) hours at the overtime rate for each day that he performed service as a crossing watchman subsequent to December 1, 1946.

EMPLOYEES' STATEMENT OF FACTS: Subsequent to June 1, 1938, the regular assigned hours of the crossing watchman at Fairview Avenue, Downers Grove, Illinois, had been from 7:00 A. M. to 7:00 P. M. On June 10, 1946, the starting time was changed from 7:00 A. M. to 11:00 A. M., and an employe having no seniority as a crossing watchman was assigned to work as such from 7:00 A. M. to 11:00 A. M.

Agreement dated June 1, 1938, and agreement dated December 1, 1946, are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Crossing Watchman H. J. Pfaff had a regular assignment as crossing watchman at Fairview Street from 7:00 A. M. to 7:00 P. M. He was allowed pay at the straight time rate from 7:00 A. M. to 3:00 P. M. and at the time and one-half rate from 3:00 P. M.

(d) Nothing in this rule shall apply to positions which are not assigned to regular daily hours and the rate of which comprehend all service performed, including incidental overtime."

Here again the Committee places reliance upon Paragraph (a) of the rule, which has application only when "one shift day service is employed," and completely disregards the other provisions of the Rule. As previously shown, the assignment forming the basis of this dispute involves more than a single shift, and it is the position of the Carrier that the starting time of such shifts is governed by the provisions of Paragraph (c) of Rule 33. The starting time of claimant Pfaff at 11:00 A. M. is in conformity with those provisions.

STATEMENT OF CLAIM—ITEM (4)

Rule 40 (a) of Agreement effective December 1, 1946, reads as follows:

"Rule 40. (a) Senior available qualified employes in the respective gangs will be given preference to work when overtime service is required."

It is readily apparent that this rule simply covers the distribution of overtime "when overtime service is required." It is applicable only to employes in **gangs**, in the event overtime service is required of a part of the gang in excess of the regular assignment of 8 hours, in which event it provides the senior employes in the gang will be given preference. Crossing Flagmen are not members of gangs, and therefore their services do not fit the circumstances to which Rule 40 (a) is applicable. It is the position of the Carrier that claimant Pfaff is entitled to overtime compensation (under Overtime Rule 39) only if and when he is authorized to work preceding or following and continuous with the regularly assigned 8-hour work period from 11:00 A. M. to 7:00 P. M.

Contention of the Committee that an employe having no seniority as Crossing Flagman was assigned to perform work as such at Fairview Avenue is without foundation. As previously shown, an employe named P. Gammuto is the incumbent of the shift starting at 7:00 A. M. As evidence that this employe holds seniority as Crossing Flagman, the Carrier attaches hereto as its Exhibit No. 2, copy of Chicago Division Crossing Flagmen seniority roster, whereon appears the name of this employe with seniority date of January 7, 1944.

STATEMENT OF CLAIM—ITEM (5)

As previously stated, the Carrier contends that claimant Pfaff has been properly assigned and compensated in accordance with applicable Agreement Rules, and the claim of the Committee for penalty payment at punitive rate is devoid of merit. Certainly there is no obligation to regularly work employes more than 8 hours per day, as requested in Item (5) of Statement of Claim, and there is nothing in the agreement between the parties requiring the Carrier to make assignments or administer the rules so as to enhance the earnings of employes in the circumstances over the rates specified at Page 43 of agreement of December 1, 1946. In this respect, see findings in First Division Award 11605.

In the light of the foregoing, it is the position of the Carrier that the claim presently before the Board is without merit or justification and therefore should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was the regular assigned crossing watchman at Fairview Avenue, Downers Grove, Illinois, with hours 7:00 A. M. to 7:00 P. M. On June 10, 1946 another employe was assigned to work four hours of such position from 7:00 A. M. to 11:00 A. M., so Claimant's starting time was postponed from 7:00 A. M. to 11:00 A. M.

At that time the 1938 agreement was in effect. On December 1, 1946 the current agreement became effective. Since the violation claimed is a continuing one both agreements are applicable and the whole claim falls into two parts. The first part includes items 1 and 2 of the claim for violation of the 1938 agreement, and the second part includes items 3, 4 and 5 of the claim for violation of the 1946 agreement.

Addressing ourselves to the first part, we find Rule 45 (a) of the 1938 agreement states:

"For single shifts regularly assigned exclusively to day service, the starting time shall not be earlier than 6:00 A. M., and not later than 8:30 A. M."

We find items 1 and 2 of the claim come squarely under the provisions of this rule and no other rule relieves Carrier from observing its mandatory requirements.

Therefore, Claimant's starting time under the rule should not have been later than 8:30 A. M. instead of 11:00 A. M. Had he started at 8:30 A. M. his regular day's work would have been completed at 4:30 P. M. Since Claimant may not be required to suspend work in order to absorb overtime, and since time worked following and continuous with his regular eight-hour work period shall be at time and one-half rate, Claimant is therefore entitled to such time and one-half rate from 4:30 P. M. to 7:00 P. M.

It follows that Claims 1 and 2 under the 1938 agreement must be sustained.

We turn now to items 3, 4 and 5, or the second part of the claim, which grow out of the 1946 agreement.

Item 3 charges Carrier with a violation of Rule 33 (a) which states:

"When one shift day service is employed, the starting time will not be earlier than 6:00 A. M., and not later than 8:30 A. M., except as hereinafter provided, and will not be changed without first giving employees affected thirty-six (36) hours notice."

This rule is applicable because the position in question comes under the term "one shift day service." In the "Tabulation of Rates of Pay" it shows only one position of crossing watchman at Fairview Avenue, Downers Grove. There is no exception to Rule 33 (a) which is pertinent here so that Rule 33 (a) is the governing rule and Carrier has violated it in this case.

Item 4 of the claim has been withdrawn, so it is not before us for consideration. Thus the second part of the claim, that part governed by the 1946 agreement, has been reduced to items 3 and 5. We cannot say that the compensation sought in item 5 for the claimed violations of the 1946 agreement is dependent only upon sustaining item 4 because if we did, we would be forced to ignore item 3, which we may not do. Item 5 must be regarded as a claim for compensation for both alleged violations stated under items 3 and 4 and not only for the alleged violation set out in item 4.

Therefore, we have left for consideration the violation charged in item 3 and the monetary claim of item 5. It is needless to point out these two items have always been present in this case and subject to consideration since the filing of this claim.

However, we find that the amount of the monetary claim under item 5 is excessive for the violation of item 3, and must be reduced to conform with the award under item 2. Accordingly, under item 5 Claimant is entitled to the overtime rate from 4:30 P. M. to 7:00 P. M., or for two and one-half hours, for each day that he performed service as a crossing watchman subsequent to December 1, 1946. So Claimant must be allowed the difference between the straight time rate he received and the overtime rate he should have received for those hours.

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 Carrier violated the agreement as set out in the Opinion of the Board.

AWARD

Claims 1, 2 and 3 sustained.

Claim 4 dismissed.

Claim 5 sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of March, 1948.