Award No. 4054
Docket No. TE-4078

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ANN ARBOR RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Ann Arbor Railroad Company, that E. Harrell, regularly assigned third trick telegrapher-leverman at Boulevard tower, Toledo, Ohio, hours 12:00 o'clock midnight to 8:00 A. M., who was required to work four hours overtime on September 8, 9, 22, 23, 24, 29 and 30, 1946, without being allowed the thirty (30) minutes meal period provided by Rule 6-(b) of the telegraphers' agreement; and C. B. Anderson, regularly assigned second trick telegrapher-leverman at Boulevard tower, Toledo, Ohio, hours 4:00 P. M. to 12:00 o'clock midnight, who was required to work four hours' overtime on September 19, 1946, without being allowed the thirty (30) minutes meal period provided by Rule 6-(b) of the telegraphers' agreement, shall each be paid thirty minutes additional pay at the overtime rate on each of the specified days on which they were required to work this special meal period.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date May 16, 1942, as to rates of pay and working conditions is in effect between the parties to this dispute. The positions of second trick and third trick telegrapher-leverman at Boulevard tower, Toledo, Ohio, here involved, are covered by said agreement.

Rule 6-(b) of the said telegraphers' agreement provides:

> "For continuous service after regular working hours, employes will be paid time and one-half on the actual minute basis. Employes shall not be required to work more than two (2) hours overtime without being permitted to go to meals. Time taken for meals will not terminate the continuous service period and will be paid for up to thirty (30) minutes."

On the following named days E. Harrell, the third trick telegrapher-leverman at the Boulevard tower, was required by the carrier to work four hours continuous service after his regular working hours on September 8, 9, 22, 23, 24, 29 and 30, 1946, without being allowed the thirty minute meal period provided by Rule 6-(b) of the telegraphers' agreement. Harrell filed prompt claim for pay for thirty minutes at the overtime rate for the thirty minute meal period he was not allowed on each of these days. The carrier declined each of these claims.

On the following named day C. D. Anderson, the second trick telegrapher-leverman at the Boulevard tower, was required by the Carrier to work four hours continuous service after his working hours on September 19, 1946,

employes of The Ann Arbor Railroad represented by The Order of Railroad Telegraphers.

As further evidence of the fact that it has heretofore been very definitely understood by both Management and Committee, in the application of a rule in the Wabash Agreement reading identical with Rule 6 (b) of The Ann Arbor Agreement, that employes who are required to work more than two (2) hours overtime without being permitted to go to meals are not entitled to additional compensation as a result thereof, attention is directed to Award No. 2777 of the National Railroad Adjustment Board, Third Division, wherein the Agent-Telegrapher at Bement, Illinois, was required to double and work four (4) hours overtime from 3:00 P. M. to 7:00 P. M. on the position of Second Trick Telegrapher at that point without being permitted to go to meals. In the handling of that case with the Carrier and in submitting it to the Board the Committee did not contend that the Agent-Telegrapher at Bement was entitled to any additional compensation account of being required to work more than two (2) hours overtime without being permitted to go to meals.

Attention of the Board is also directed to the fact that the General Chairman in his letter of December 26, 1946 (Carrier's Exhibit "A") submitted claim for thirty (30) minutes at punitive rate in favor of employes who were called to work more tran two (2) hours in advance of their regular starting time and were not permitted to go to meals, and the further fact that those claims were withdrawn by the General Chairman in his letter of September 24, 1947 (Carrier's Exhibit "A").

The action of the General Chairman in that connection is further evidence of the fact that the alleged claim set up in the Committee's ex parte Statement of Claim is without foundation under the rules of the Agreement effective May 16, 1942.

Attention of the Board is also directed to the fact that even though the Carrier was not required, under the rules of the existing Agreement, to assign the Telegrapher-Levermen employed at Boulevard to work eight (8) consecutive hours with no allowance for meals, it would not be possible, in keeping with the requirements of the service, to grant the Telegrapher-Levermen employed at that point a meal period or time off to go to meals, as it is necessary for a Telegrapher-Leverman to be on duty at that point at all times to handle the interlocking for the movement of trains and engines through Boulevard, as approximately eighty-six (86) trains and engines operate through or over that interlocking in each twenty-four (24) hour period, an average of one (1) every seventeen (17) minutes.

The foregoing definitely shows that the alleged claim set up in the Committee's ex parte Statement of Claim is without foundation under the rules of the Agreement effective May 16, 1942, and therefore, the contention of the Committee should be dismissed and the claim denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier maintains an around-the-day position of telegrapher-leverman at Boulevard Tower, Toledo, Ohio, operating on three tricks, the first from 8:00 A. M. to 4:00 P. M.; the second, from 4:00 P. M. to 12:00 midnight; and the third, from 12:00 midnight to 8:00 A. M.

Claimant, E. Harrell, was regularly assigned to the third trick, and on the seven days mentioned in the claim was required to double over and work on the first trick for four hours' overtime, that is, from 8:00 A. M. to 12:00 noon, without time allowed for meals during his overtime period of work.

Claimant, C. B. Anderson, who was regularly assigned to the second trick, was on September 19, 1946, required to double over and work on the third trick for four hours' overtime, that, from 12:00 midnight to 4:00 A. M. the following morning, without time allowance for meals during his overtime work.

Both Claimants were paid for their regular assignments at the pro rata rate of pay; and each was paid for his four hours of overtime work performed at the overtime rate. But they claim that, under Rule 6 (b) of the controlling Agreement they should have been allowed, after they had performed two hours of overtime work, a thirty minutes' period for meals; and, not having been allowed such period, should have been paid therefor at punitive rates.

This case is controlled by Sections (a), (b), (c), and (d) of Rule 6 of the Agreement between the parties, effective May 16, 1942, which Sections read:

> "(a) Time worked 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 time and one-half rate.
>
> (b) For continuous service after regular working hours, employes will be paid time and one-half on the actual minute basis. Employes shall not be required to work more than two (2) hours overtime without being permitted to go to meals. Time taken for meals will not terminate the continuous service period and will be paid for up to thirty (30) minutes.
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> (c) Employes notified or called to perform work not continuous with the regular work period, or continuous with but in advance of the regular work period, will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.
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> (d) Employes required to double will be paid for excess time as overtime, as per paragraph (a) of this rule."

It will be noted, as to each of the Claimants, that the overtime work they performed, followed immediately the completion of their regular assignments. Under the basic day rule, Rule 5 of the Agreement, no provision was made for a meal period during the eight hours of their regular assignment; so that each of the Claimants was required to work twelve hours without a meal period, a situation which, Petitioner contends, Section (b) of Rule 6 was designed to prevent.

The Carrier does not deny that Claimants performed the overtime work as alleged in the claim, except an unimportant variance in two dates; nor that they were not allowed a meal period; but it contends that Section (b) of Rule 6 does not cover such a situation, and relies on the four sections of Rule 6, quoted above as sustaining its contention.

The Carrier's position, as stated in its submission, is as follows:

> "As hereinbefore stated, it is the position of the Carrier that Rule 6 (b) of the Agreement effective May 16, 1942, does not apply to employes working on positions assigned to work eight (8) consecutive hours, with no allowance for meals, as provided by Rule 5 of the current Agreement, and does not apply to employes who are, after the completion of eight (8) consecutive hours on the position on which they are assigned, required to double and work four (4) hours on another position assigned to work eight (8) consecutive hours with no allowance for meals, and in that connection, attention is invited to Rule 6 (d) of the current Agreement."

We do not believe the construction of the Agreement contended for by the Carrier should be adopted by this Board. It is true that, under the Agreement, an employe who works a regular eight hour trick must do so without an allowance of time for meals; but this should not be held to apply to work performed by an employe outside of his regular assignment, though continuous therewith, as in this case, even though that work is performed on another trick of eight hours, when, if the same had been performed by the

employe assigned thereto, he would not have been entitled to a time allowance for meals. Such a construction would emasculate Rule 6 (b), and, for all practical purposes, make it useless in many cases. Rule 6 (b) covers overtime work to be performed after an employe has already performed his full eight hour assignment, and its evident purpose was to provide, in such circumstances, for a meal period. There is, of course, the practical difficulty of allowing employes to take time for meals from a position requiring continuous operation, but the rule as written makes no exception of such positions. The first sentence of Rule 6 (b) provides: "For continuous service after regular working hours, employes will be paid time and one-half on the actual minute basis." The Claimants qualify thereunder, and have been paid for four hours' overtime work at the rate of pay prescribed. The next sentence is: "Employes shall not be required to work more than two (2) hours overtime without being permitted to go to meals." No exception is made covering positions requiring constant attention, and if that were a matter of importance, the Agreement should have covered it. That it was contemplated that employes, doing overtime work in excess of two hours, would take time for meals, is evidenced by the third and last sentence of the Rule which provides: "Time taken for meals will not terminate the continuous service period and will be paid for up to thirty (30) minutes." Under this provision of the Rule, we are of the opinion that employes were entitled to take as much as thirty minutes for meals, and to be paid therefor. In effect, the time allowed employes for meals was their time, and if they have been required to use it for the Carrier's benefit, and on its requirement, they should be compensated therefor at the same rate as that provided to be paid for overtime work.

The Carrier stresses the fact that Rule 6 (b) was taken from an Agreement between Petitioner and the Wabash Railroad, effective October 16, 1927, which first appeared in the Wabash Agreement January 1, 1925, and was then designated as Rule 5 (b); and contends that it has "been understood * * * by both the Carrier and the Committee since the January 1, 1925 Agreement became effective that Rule 5 (b) did not apply to employes working overtime on positions requiring continuous service." It refers to one case where that question was involved, arising on the Wabash in 1931, where the General Chairman did not claim compensation on the same state of facts as those here involved. Award No. 2777 of this Division was based on a case where overtime pay was involved on account of doubling on one of the tricks, and also arose on the Wabash, but the question of time for meals was not there raised. Our attention is called to the fact that the Wabash and the Ann Arbor have, for the most part, the same operating officials, and are otherwise closely allied. All these matters are presented in support of the Carrier's contention that the "understanding" alleged to exist on the Wabash should be applied to this case.

We reject this contention. It is not at all clear that what happened on the Wabash in 1931, a mere failure to present a claim, forever prevented even the employes of the Wabash from thereafter presenting a claim on the same or similar state of facts; and certainly it could not be extended so as to bar claims against another Carrier, however closely connected the two may be in operation or otherwise. Employes may waive their rights under the Agreement in a particular instance, without being barred from thereafter asserting a claim on the same facts. Something more than failure to present a claim, under a particular rule of an Agreement, is necessary, before it can be said that an employe has lost his right to the benefits of such rule. Clearly Award No. 2777, a Wabash case, does not bar the present claim. It would not have operated as such bar, had the claim there asserted been against the Carrier here involved.

We are of the opinion that Rule 6 (b) of the Agreement has been violated, and that the claim in behalf of the named Claimants should be sustained.

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 has violated Rule 6 (b) of the Agreement.

AWARD

(1) Claim in behalf of Claimant E. Harrell sustained.

(2) Claim in behalf of Claimant C. B. Anderson sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of August, 1948.