

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, that the following employees: W. F. Sutton, P. E. Baker, J. M. Casteel, O. A. Killian, A. H. Hilton, Otis Wooten, A. W. Biggs, S. L. Gill, R. M. Huffines, and O. G. Grisham:

(a) Be allowed the difference in pay between what they did receive at the straight time rate and what they should have received at the overtime rate for all time worked between the hours of 5:00 P. M. and 12:00 midnight during the period September 5 to September 26, 1946, (both dates inclusive).

(b) Be reimbursed at pro rata rate for the portion of their regular assignment 8:00 A. M. to 4:00 P. M. less meal period, during the period September 5 to September 26, 1946, (both dates inclusive).

EMPLOYEES' STATEMENT OF FACTS: W. F. Sutton, P. E. Baker, J. M. Casteel, O. E. Killian, A. H. Hilton, Otis Wooten, A. W. Biggs, S. L. Gill, R. M. Huffines, and O. G. Grisham, were B&B Mechanics employed on the White River Division on September 5, 1946. Their regular assigned hours were 8:00 A. M. to 5:00 P. M., with one hour for lunch. Prior to September 5, 1946, they were instructed by their foreman to report for duty on September 5, 1946, at 4:00 P. M., and they were further instructed that their hours would be from 4:00 P. M. to 12:00 midnight, in order to perform work in the tunnel at Cricket, Arkansas. These B&B employees continued this same temporary assignment of 4:00 P. M. to 12:00 midnight for a period of nineteen days from September 5 to September 26, 1946, inclusive. They were paid pro rata rates of pay for the services so rendered. During this period, these employees were not allowed to perform any service during their regular assignment except between 4:00 P. M. and 5:00 P. M.

At the expiration of this nineteen day period above referred to, these B&B employees were instructed to report for work September 27, 1946, at their regular starting time, 8:00 A. M. to 5:00 P. M. This was done.

Agreement dated July 1, 1938, and Memorandum of Agreement effective December 16, 1944, Special Decision MW-113, between the parties are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: As stated in the Statement of Facts, the regular assigned hours of the employees involved in this dispute were 8:00 A. M. to 5:00 P. M., less one (1) hour lunch period. Rule 18 of the effective agreement is as follows:

Inasmuch as the Carrier has not been made aware of the basis for Employees' claim (b), request is hereby made that the Carrier be granted permission to make answer to any assertions made by the Employees in support of claim (b) in the Employees' original submission.

Exhibits not reproduced.

OPINION OF BOARD: There is no controversy as to the basic facts of this case. The involved employees were B & B Mechanics employed in the Carrier's White River Division for sometime before and during all of the month of September 1946. Their regularly assigned hours were 8:00 A. M. to 5:00 P. M. with one hour for lunch. At least thirty-six hours prior to September 5, 1946, and effective as of that date, they were notified their hours would be 4:00 P. M. to 12:00 midnight in order to perform regular maintenance work in Carrier's Cricket Tunnel located near Cricket, Arkansas. They worked this assignment as instructed from September 5 to September 26, 1946, a period of only nineteen days and were paid the pro rata rate of pay for their services. During such time they were not allowed to perform any other work. Work on the tunnel was completed on the date last mentioned. More than thirty-six hours prior to such date these employees were notified their hours would again be from 8:00 A. M. to 5:00 P. M. with one hour for lunch. Since September 27, 1946, they have worked their regularly assigned positions with hours as last indicated.

Under subsection (a) of the Claim the employees ask for the difference between what they actually received at the straight time rate and what they would have received at the overtime rate for all time worked between 5:00 P. M. and 12:00 midnight for the period of time in question. In subsection (b) they seek straight time for the period of time they were not permitted to work their regular assignment from 8:00 A. M. to 4:00 P. M.

Upon examination of the record and review of the arguments advanced by the respective parties it becomes apparent the sole question involved in this case is whether the negotiated contract in force and effect between them permits the Carrier to change at will the regular hours of service of employees holding regularly assigned positions by the simple process of giving them thirty-six hours notice of its intention to do so. The Carrier vigorously insists that it does while the Brotherhood just as vehemently takes a contrary view.

Rule 18 of the Agreement, on which both parties rely, as sustaining their position reads:

"Regular assignments will have a fixed starting time and regular starting time will not be changed without at least thirty-six (36) hours' notice to the employees affected, except as otherwise agreed between the employees and local supervisory officers based on actual service requirements."

We think the all decisive question here presented has been recently and definitely answered by this Division. In Award 3784, under conditions and circumstances very similar to those here involved, with a starting time rule, the substance and import of which is exactly the same as that of Rule 18, supra, and in the face of arguments such as are here advanced, it is said and held:

"The Carrier insists that since the members of the crew were given 36 hours notice there was no violation of Rule 32. With this contention we cannot agree.

This rule only permits a change in **regular** starting time on the giving of 36 hours notice. It clearly does not anticipate that the crew can be required to do emergency work or night work for the convenience of the Carrier for two or three days under the claim that the regular starting time has been changed by giving 36 hours notice.

Here it is very evident that there was no intention to change the starting time permanently or to make the regular starting

time of these men 5:00 P. M. The starting time was changed only for this one job for three days for the convenience of the Carrier. We see no reason why the Carrier should be permitted to so work these men at night for its convenience and to prevent interference with its day-time office workers and not pay the members of this crew overtime.

The claim of the Carrier here that the regular starting time of these men was changed for three days in order to do this night work is only a subterfuge to avoid the payment of the overtime rate."

It will be noted, that except for overlapping hours affecting its compensation phase, the only possible differentiating factual feature in the instant case and the one from which we have just quoted is that here the starting time and hours of service were changed for a nineteen day period whereas the change there involved three days only. We regard the difference in length of time immaterial. Here, as there, the record clearly reveals, there was no intention on the part of the Carrier to permanently change the starting time of the involved employees, the change made was temporary, not permanent, and solely for purposes of completing a single job under conditions deemed by the Carrier to be most desirable and convenient, and the result, considering the conditions under which the instant work was performed and whatever may have been the motive of the Carrier, is avoidance of payment of overtime. Therefore, based on Award 3784 and what has been heretofore stated, we hold the Carrier's action did not effect a change in the regular starting time of the positions of the employees herein involved and therefore resulted in violating the heretofore quoted rule of the Agreement.

In the light of the record facts we are not inclined to adopt the Brotherhood's theory the action of the Carrier, herein described, was for the purpose of absorbing overtime and in wilful violation of Rule 14 (h) of the Contract. We are more inclined to the view, since Award 3784 was rendered long after its occurrence, such action was the result of a bona fide but erroneous construction of Rule 18, supra. Even so the result is the same. Be that as it may, both Rules were violated and the Carrier must be penalized.

That, we believe, under all the circumstances will be accomplished by requiring it to compensate each of the Claimants at the pro rata rate for the hours they were deprived of work on their regularly assigned positions as a result of the Carrier's action from September 5 to 26th, 1946, inclusive. Since they worked one hour of their regular assignment on each of these days such compensation is to be paid from 8:00 A. M. to 4:00 P. M. only.

This Division is committed to the rule that overtime will not be allowed where a regular assignment is not worked but compensation is allowed the regular occupant of such position because deprived of its work in violation of Rules of the Agreement. For that reason Claim (a) should be and is denied.

In conclusion it should perhaps be stated the short and simple answer to any possible inquiry as to why the difference in compensation in this Award and in Award 3784 is that in the latter case the only compensation claimed was for the difference between the pro rata and the overtime rate.

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 employes involved are entitled to the compensation claimed by them in Claim (b).

AWARD

Claim (a) Denied. Claim (b) Sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

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