Award No. 4194
Docket No. MW-4187

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, 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 39 of the current agreement by failing to pay the punitive rate of pay to the following employes for services rendered between the hours of 5:00 P. M. and 11:00 P. M. on the designated dates, in favor of: A. H. Vath, March 18, 19, 20, 21, 22, and 24, 1947; and Blos Gonzales, March 18, 19, 20, 21, and 22, 1947;

(2) That the Carrier violated the provisions of Rules 40(c) and 44(a) of the current agreement by not allowing pro rata rate to A. H. Vath and Blos Gonzales between the hours of 8:00 A. M. and 2:30 P. M., half-hour meal period, between the periods specified in Part (1) of this claim;

(3) That A. H. Vath and Blos Gonzales be reimbursed for compensation lost as a result of the Carrier's violation of the current agreement during the periods referred to above.

EMPLOYES' STATEMENT OF FACTS: On March 18, 1947, A. H. Vath and Blos Gonzales were Section Laborers and members of Section Gang SA-1, Lincoln, Nebraska. The regularly assigned hours for Section Gang SA-1 were from 8:00 A. M. to 5:00 P. M., with a one-hour lunch period.

Beginning at 2:30 P. M., March 18, 1947, Section Laborers Vath and Gonzales, in accordance with instructions from the Carrier, worked from 2:30 P. M. until 11:00 P. M., less half-hour lunch period. This assignment continued until March 22, 1947 for Gonzales, and until March 24, 1947 for Vath. Their duties during this period were to work with a Clamshell, assisting with the work of unloading coal.

During the period of March 18 to March 24, 1947, the regularly assigned hours of Section Gang SA-1 remained as from 8:00 A. M. to 5:00 P. M. Meanwhile, Section Laborers Vath and Gonzales were not allowed to work with their gang and during their regularly assigned hours, but were instructed to work with the Clamshell unloading coal in hours differing from those of their regular gang.

Section Laborers Vath and Gonzales are, in accordance with Rule 2 of the effective agreement, in Group 1, Grade C under the Track Sub-department. The work of operation of a Clamshell is classified in accordance with Rule 2, as Roadway Equipment Machine Sub-department.

During the dates above referred to, Vath and Gonzales did not work under the supervision of their Foreman, and were paid at pro rata rates for all services rendered.

In conclusion, Carrier avers that:

(1) The exceptions to paragraph (a) of Rule 33 as embodied in paragraphs (b), (c), and (d) thereof, were established through and under the processes of collective bargaining to permit flexibility in the designation of starting times to meet the requirements of the service.

(2) The starting times for two or more shifts were established in full and complete conformity with the provisions of Rule 33 (c).

(3) Claimants were properly assigned and correctly compensated under the provisions of Rules 31, 33, 39 (a), 40 (c), and 44(a).

(4) The awards of this and other Divisions of the National Railroad Adjustment Board cited by the Carrier clearly and decisively support Carrier's position.

(5) With these irrefutable facts and circumstances present Petitioner's claim is totally lacking in contractual substance and must, therefore, in all things be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 18, 1947, claimants were Section Laborers and members of Section Gang SA-1 at Lincoln Nebraska. The regularly assigsed hours of the Section Gang were from 8:00 A. M. to 5:00 P. M., with a one-hour lunch period.

During the period here involved, a clamshell was engaged in unloading storage coal. It became necessary on March 18, 1947, in meeting the requirements of the service, to operate the clamshell in two shifts. On March 17, at 5:00 P. M., claimants were notified that their assigned hours would be changed effective March 18, to 2:30 P. M. to 11:00 P. M., with a thirty-minute meal period, in order that they might perform work connected with the second shift clamshell operation. Claimants were paid time and one-half for the work performed between 5:00 P. M. and 11:00 P. M. on March 18 because of Carrier's failure to give the 36 hour advance notice of the change in their assigned hours as provided by Rule 33 (a), current Agreement. On all subsequent dates, claimants were paid at the pro rata rate. The Organization contends that claimants were entitled to the pro rata rate from 8:00 A. M. to 5:00 P. M. on each of the days worked and the punitive rate from 5:00 P. M. to 11:00 P. M. on each day worked, on the theory that the latter services were rendered following and continuous with a regularly assigned eight hour work period.

The controlling provisions of the Agreement are those parts of Rules 33, 39 and 40 reading as follows:

> "Rule 33. (a) 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 employes affected thirty-six (36) hours notice.
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> Rule 33. (b) When movement of trains or boats is such that necessary work (other than that performed by gangs engaged in B&B or Track maintenance, and fuel service and pumpers), can be done within the spread of a single shift but cannot be done between 6:00 A. M. and 5:00 P. M., the hours of such service may be assigned to meet the conditions, but no such shift shall have a starting time between midnight and 4:00 A. M.
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> Rule 33. (c) When two or more shifts are employed, the starting time may be regulated in accordance with requirements of the work, except that no shift shall start between 12 o'clock midnight and 4:00 A. M.
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> Rule 39. (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 (16) continuous hours of work in any twenty- four hour period computed from starting time of the employe's regular shift. * * *

Rule 40. (c) Employes will not be required to suspend work during any assigned work period for the purpose of absorbing overtime."

It is evident that if the assignment of claimants to work from 2:30 P. M. to 11:00 P. M. was properly made, Rule 39 (a) can have no application. Neither could there have been a suspension of work during an assigned work period to absorb overtime in the present case, if such assignment was properly made. The case therefore resolves itself into the question whether the assignment of claimants to work from 2:30 P. M. to 11:00 P. M. could be properly made under applicable portions of Rule 33.

It will be readily observed that Rule 33 (a) provides that where a one-shift day service is employed, the starting time must be fixed between 6:00 A. M. and 8:30 A. M., except as provided in other sections of the rule. Rule 33 (b) specifies the conditions by which the Carrier may properly change the starting time of a one-shift day service outside the limits prescribed in Rule 33 (a). Rule 33 (c) then provides that when two or more shifts are employed in accordance with work requirements, the starting time may be fixed in accordance with the necessities of the service, except that no shift shall start between 12:00 o'clock midnight and 4:00 A. M.

The record shows that the double-shifting of the work being done by the clamshell was necessary to replenish the stockpile of locomotive fuel which had been greatly depleted as a result of work stoppage in the coal mining industry and to expedite the release of coal cars which were badly needed in commercial service. The work of claimants was necessary and incidental to the clamshell work. This puts it within the meaning of the term "in accordance with requirements of the work" contained in the rule. Other restrictive provisions of the rule were met except for the giving of the 36 hour notice of the change in starting time and for this violation the penalty has been paid. It is true that claimants were regularly assigned 8:00 A. M. to 5:00 P. M. prior to March 18, but Rule 33 provides a method for changing such regular assignments. When the conditions exist that warrant such change and all restrictive provisions are met, the new assigned hours become the regular assignment. It is undoubtedly true that the new assignments were made to avoid working employes more than eight hours in one day. The purpose of the punitive rate as it applies to overtime is to penalize the Carrier for working an employe in excess of eight hours in any one day. Its purpose is not, as some seem to suppose, to create work for which time and one-half may be demanded. The overall effect of Rule 33 is to create a uniform starting time and make the work as convenient for the employes as is possible, but where the exigencies of the service require otherwise, a method is provided whereby service requirements can be met without penalizing the Carrier. The assignments of these claimants are in accordance with the provisions of Rule 33 which are here involved and, consequently, no violation of Rules 39 (a) and 40 (c) exist.

This holding is supported by Award 3156 of this Division.

Various awards have been cited which appear inconsistent with the view herein expressed. The differences are more apparent than real. A discussion of a few of these cited awards may tend to bring clarity out of apparent confusion. It must be conceded at the outset that the purpose of Rule 33 is to reasonably stabilize the hours of service of the employes covered by the rule. But the rule does not eliminate all flexibility in the making of assignments. As an example, the starting time in one-shift day service cannot be changed outside the limits prescribed in Rule 33 (a) unless necessitated by service requirements. In other words, the Carrier cannot capriciously designate a starting time different than that provided for in Rule 33 (a). A neces-

sity for the change must be shown. Awards 3156 and 4109 sustain this holding. If necessity for a change in the starting time is shown, then the Carrier by complying with other provisions of the rule may properly assign employes a different starting time without incurring penalty. In the case before us, the necessity for working the clamshell for two shifts was shown. The work to which claimants were assigned in connection with the operation of the clamshell could not be performed during the hours to which they were then assigned. It was not strictly speaking overtime work, but new or additional work which required the clamshell to work an additional shift. Under such circumstances, the Carrier by complying with conditions precedent contained in the rule, can properly change the starting time of employes engaged in the performance of the same class of work to meet such service requirements. The fact that the work may be of short or long duration is not a controlling factor and we so held in Award 4109. The duration of such work may depend upon factors that are not known when the change in starting time is made. We are cited to Award 4151 as holding to the contrary. In that Award, it is said: "That being so, if under the thirty-six hour notice provision, the Carrier were to be permitted as frequently as it saw fit to designate individual employes in a given classification and work them out of such classification for a very short period of time at a different starting time, and then return them to work in their original classification at the previous starting time, the first part of subsection (a) of the rule would be completely nullified by the second." We think this quoted statement fails to take cognizance of the fact that restrictions are imposed which prevent a capricious change in the starting time. We find nothing in the rule which treats the length of the assignment as a factor to be considered. The right to change the starting time of employes in a manner different from that stated in Rule 33 (a) exists where the necessities of the service require it and the conditions precedent stated in the subsequent paragraphs of the rule are met.

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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1948.