Award No. 4744

Docket No. MW-4725

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood: (1) That the carrier violated the Agreement by assigning Section Laborers Ennis Hynson and Willie Smith to temporary positions of Crossing Flagman at Texarkana during the period September 28 to October 2, 1948, inclusive, without compensating them at the time and one-half rates while they were working in overtime hours:

(2) That Section Laborer Willie Smith be allowed the difference between what he received at his pro rata rate and what he should have received at the time and one-half rate for the service he performed from 5:00 P.M. to 12 Midnight on each of the referred to dates:

(3) That Section Laborer Ennis Hoynson be allowed the difference between what he received at his pro rata rate and what he should have received at the time and one-half rate for the service he performed from 12 Midnight to 8:00 A.M. on each of the above referred to dates.

EMPLOYES' STATEMENT OF FACTS: Willie Smith and Ennis Hynson as of September 28, 1949 were regularly assigned trackmen on Section No. 53 at Texarkana. As of September 28, 1948, these employes were notified by their section foreman that they were temporarily being assigned to crossing protection at Spring Lake Park Crossing during night time hours. The need for this crossing protection was because of the Two States Fair.

These two employes worked as crossing flagmen from September 28 to October 3, 1948, inclusive. Willie Smith worked his assignment from 4:00 P.M. until 12:00 Midnight. Ennis Hynson worked his assignment from 12:00 Midnight until 8:00 A.M. The regular assignment for both employes as members of Section Crew No. 53 was 8:00 A.M. to 5:00 P.M. with one hour lunch period.

The Committee has contended that the claimants should have been compensated at the time and one-half rate for all services rendered as crossing flagmen outside of their regular bulletined hours of 8:00 A.M. to 5:00 P.M. The Carrier has declined the claim.

The agreement in effect between the two parties to this dispute dated January 1, 1947, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

"It is our position that Rule 18 only permits a change in REGULAR starting time" . . . "It clearly does not anticipate that any crew or part of the crew can be required to do emergency work or night work (which is not a part of their regularly assigned duties) for the convenience of the carrier for five or six days under the claim that the regular starting time has been changed, . . . "which in this case was to change only these two men's starting time and not the entire crew for a period of six days."

The two men were notified by the Foreman the previous day of the change in their assignment. There is no requirement that any such changes be, either in writing to the individual or by bulletin notice. The notice was given to the employes affected. We do not agree that Rule 18 applies only when the hours of assignment of the entire gang are **permanently** changed.

There are times when it is necessary to provide service for a period, temporary period, where it is not practical, reasonable, or safe, to employ an outsider, as in this particular instance, where it is necessary to temporarily change the assignment of some one or more individuals, and the rule specifically states that "notice" (of change) "to the employes affected" be given. This was done.

Employes' representative refers to certain awards of this Board, but such awards were made under rules and conditions entirely different from the rules and conditions here at issue.

We, in turn, referred the Chairman to Award #2172, which we consider as more nearly applicable to this case, but he proceeded to appeal the claim to your Board.

Summarizing—It was necessary to furnish crossing protection for a period of one week; this was a daily assignment for the entire week; it was not a case where change was made to save "overtime", but was made at request of civic authorities as a measure of protection to the public traveling over our tracks on the road to and from the Fair at the City Park; the employes affected were given advance notice as required by the Agreement; the change was made for a specific period and was a change in their regular assignment. These two men worked no overtime or overtime hours. There is no rule in the agreement prohibiting such change and no rule providing penalty in such case.

Claim should be denied and the Board is respectfully requested to so find.

(Exhibits not reproduced).

OPINION OF BOARD: Claimants were regularly assigned trackmen at Texarkana, working 8:00 A.M. to 5:00 P.M., with a one-hour lunch period. It became necessary during the holding of a fair to protect a much used railroad crossing during night time hours. Claimants were assigned to this work, one working from 4:00 P.M. to 12:00 midnight and the other, from 12:00 midnight until 8:00 A.M. For this they were paid at straight time. They claim the rate of pay should have been time and one-half under the provision of the Starting Time Rule which provides:

"Regular assignments will have a fixed starting time and regular starting time will not be changed without at least twelve (12) hours' notice to the employes affected, except as otherwise agreed between the employes and local supervisory officers based on actual service requirements."

Rule 18, current Agreement.

There has been some conflict in the awards dealing with this provision of the Agreement. The Carrier relies upon Award 2172. It will be noted that this award was decided on the question whether the Carrier changed the assignment "to avoid the application of overtime rules." No such provision

is contained in the present Agreement. Claimants rely upon Awards 3449, 3784, 4151. While the reasoning supporting the conclusions reached in these awards does not tend to establish a uniform and precise rule, the results themselves are consistent.

The claimants in the case before us occupied regularly assigned positions with fixed starting times. Consequently, the Starting Time Rule is applicable. The positions as watchmen to which claimants were assigned were in a different class of service. Strictly speaking, the changes in the assignments here made were not starting time changes of a continuing position but an assignment to temporary work of another classification. The assignment was for a period of five days and, in the absence of special circumstances, would not constitute a regular assignment as distinguished from a temporary one. A change of starting time on assignments continuing to perform the same class of work on a regular basis may be properly changed under the Starting Time Rule by giving the required notice. Award 4194. But where the change in the assignments is to require the occupants of regular positions to engage in temporary work of another class, it violates the intent and purpose of the Starting Time Rule. Whether an assignment is regular or temporary is ordinarily a question to be determined from all the facts and circumstances. But an assignment to a different class of work for five days, as here, is clearly a temporary assignment. It is not here claimed that it was improper to assign claimants as watchmen. The claim is that because of the restrictive provisions of the Starting Time Rule, it could not be done without the payment of the penalty rate. In other words, the starting time of a regular assignment may be changed after giving the required notice if the assignment continues to be a regular assignment in the same class of service. But if the assignment is temporary, as distinguished from regular, and in another class of service, the change in starting time is not authorized and, in effect, prohibited by the Starting Time Rule. An affirmative award is required.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1950.