Award No. 5414

Docket No. CL-5432

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE LAKE TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violates the Rules of the Clerks' Agreement at Lorain, Ohio when on November 17, 1949, and subsequent dates it required Employe Earl Price to work more than eight (8) hours per day for which service he was compensated at pro rata rate, and,

That Carrier shall now compensate Employe Price for all service performed in excess of eight (8) hours on any day retroactive to November 17, 1949, and until date violation complained of is corrected.

EMPLOYES' STATEMENT OF FACTS: Sometime prior to November 17, 1949 the carrier established relief position relieving weighmasters at Lorain, Ohio as follows:

Wednesday	Third	Turn	No. 5	Scales	hours	11 PM	to	7 AM
Thursday	Second	Turn	No. 5	Scales	hours	3 PM	to	11 PM
Friday	Second	Turn	No. 5	Scales	hours	3 PM	to	11 PM
Saturday	First	Turn	No. 6	Scales	hours	7 AM	to	3 PM
Sunday	First	Turn	No. 6	Scales	hours	7 AM	to	3 PM

Mr. Price was assigned to the position. As a result Employe Price is required on Wednesday and Thursday to work 16 hours within 24 hours from beginning of previous assignment and on Friday and Saturday 16 hours within 24 hours from beginning of previous assignment.

POSITION OF EMPLOYES: This grievance primarily involves the application of Rule 3 (Day's Work—Work Week—Overtime) of our current agreement with the carrier revised January 3, 1949, amended July 20, 1949, printed copies of which are on file with your Honorable Board and said rule as well as those not specifically cited herein, contained in the Agreement are to be considered as if filed as a part of this submission.

Mr. Earl Price is a regularly assigned relief Clerk at Lorain, Ohio and is used each week to relieve the regularly assigned weighmasters. On Thursday he is required to report for duty at 3 P. M. after completing his previous day's assignment at 7 A. M. Thursday thereby starting his second tour of duty within the 24 hour period. On Saturday he is required to report for service at 7 A. M. after having completed his previous tour of

Such a result was never contemplated by the 40-Hour Week Agreement nor agreed to by the parties to this dispute. To sustain the Organization's position would require reading into the controlling contract a requirement not clearly expressed therein, i.e., sixteen (16) hours of rest between each tour of duty, which requirement would, in most instances, be repugnant to the clearly expressed requirement of rules 3-2(a) and 3-2(e), and would render the second paragraph of Rule 3-2(e) impractical and unworkable.

OPINION OF BOARD: The facts of this case are not in dispute and can be briefly stated.

On or about November 17, 1949, Earl Price was regularly assigned to a relief position, namely, that of Weighmaster, and thereafter was required to relieve the Carrier's regularly assigned Weighmasters at Lorain, Ohio, with assigned hours as follows:

Wednesday	Third Turn—No. 5 Scales hours	11 PM to 7 AM
Thursday	Second Turn—No. 5 Scales hours	3 PM to 11 PM
Friday	Second Turn—No. 5 Scales hours	3 PM to 11 PM
Saturday	First Turn—No. 6 Scales hours	7 AM to 3 PM
Sunday	First Turn—No. 6 Scales hours	7 AM to 3 PM

From the above it becomes obvious that under his assignment Price, although the starting time of each day of the position to which he is assigned commences on a separate calendar day, is required to work 16 hours Wednesdays and Thursdays, also on Fridays and Saturdays, within a 24-hour period from the commencement of his first or previous daily assignment. It is conceded that for the second eight hours worked in each such 24-hour period compensation has been paid at the pro rata rate.

The Organization contends that Price should be paid the overtime or time and one-half rate for all time worked on his assignment from 3:00 to 11:00 P. M. on Thursday, and a like rate from 7 A. M. to 3:00 P. M. on Saturday, that payment for his services on those days constitutes a violation of the current Agreement and that he should be compensated the difference between the pro rata rate as paid and the punitive rate from the time violations of that Agreement commenced until they are corrected. Provisions of the Agreement relied upon by the Organization as sustaining its position are as follows:

Rule 3-1 which reads:

> "Eight (8) consecutive hours, exclusive of meal period, shall constitute a day's work, for which eight (8) hours' pay shall be allowed."

and Rule 3-3(a) which provides:

> "Time in excess of eight (8) hours shall be considered overtime and paid for at the rate of time and one-half."

At the outset it can be stated that with an agreement containing the following or similar provisions, regardless whether they are embodied in one or are to be found in several different rules, to-wit: "Except as otherwise provided herein, eight consecutive hours, exclusive of the meal period shall constitute a day's work for which 8 hours' pay will be allowed. Time in excess of that **on any day** will be considered as overtime and paid at the rate of time and one-half" (emphasis supplied). There can be no question, ignoring for the moment any possibility of any exceptions to the contrary, that under the facts and circumstances here involved our decisions sustain the Organization's position. This we may add would be true irrespective whether the second eight-hour shifts on the days involved on the positions in question were worked on what is commonly known as a regular (see Awards 687, 2030, 2053, 2340, 2346 and 5051) or on a relief (see Awards 2887 and 3258) position.

To illustrate, in Award 687 the following statement, subsequently expressly approved in Awards 2030 and 2053, appears:

> "While it is admitted that the word day in its more technical sense does mean a calendar day beginning and ending at midnight, it is obvious that it has other less technical meanings; and its meaning in a given situation must be determined in view of the circumstances of that situation. The Division is of the opinion that in computing a tour of duty within the meaning of Rule 49, the word should be taken to mean a period of twenty-four hours computed from the beginning of a previous assignment. If this were not so, the carrier would be able to assign extremely inconvenient hours of work."

For the same purpose see also Award 2346, where it is said:

> "The rule that 8 hours in 24 constitute a day's work, and that all work in excess of eight hours is to be paid on an overtime basis of time and one-half regular pay for the work performed, is too well known to require citation and further consideration. The construction adopted for what constitutes a 24-hour day, and as to how and from when it is to be computed, is also so well established now (Awards 687, 2030 and 2053) that it is no longer open to discussion or difference of opinion."

In defending its position payment at the pro rata rate on the days involved is proper under the Agreement, the Carrier, when all its arguments are analyzed, actually relies upon two basic contentions which will be given consideration in the order of importance given them in its submissions.

Heretofore it will be noted that in quoting the language of the rule and/or rules involved in the Awards to which we have referred we emphasized the phrase "on any day" appearing therein. Carrier's first contention is based on the premise this phrase does not appear in Rules 3-1 and 3-3(a), involved in the instant case. Briefly stated its position is that because that phrase was left out of Rule 3-3(a), dealing with overtime, such Awards have no application and hence are not decisive of the present dispute. In our opinion Carrier's argument on this point is more theoretical than sound and for that reason we are not disposed to labor it. In substance Rule 3-1 states in clear and unequivocal language that 8 hours shall constitute a "day's" work. In like manner and just as concisely and understandingly Rule 3-3(a) states that time in excess of 8 hours shall be considered as overtime and paid accordingly. That, construed in connection with the language of 3-1 in our opinion, with or without the phrase "on any day" means one and the same thing, namely, that in the performance of a day's work, consisting of eight hours and commencing at the starting hour of the daily assignment, time worked in excess of eight hours on the work day in question shall be paid for at the overtime rate. By the application of ordinary rules of construction this conclusion appears so inescapable that it almost seems a play on words to argue to the contrary. The result is that the Awards heretofore cited are decisive under the confronting facts and compel a sustaining award unless elsewhere in the Agreement the parties have contracted otherwise.

The second of the important contentions advanced by the Carrier is that the current Agreement does contain rules which permit its action. The first of these rules is 3-2(a) which relates to the establishment of a 40-hour work week and in substance states the work weeks may be staggered in accordance with the Carrier's operational requirements clearly cannot be given the force and effect which the Carrier would have us give it. The second Rule 3-2(e) comes closer to being applicable and should be quoted. It reads:

> "All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned.

Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class in the seniority district, provided they take the starting time, duties and work locations of the employe or employes whom they are relieving."

To merely read the first paragraph of the rule just quoted demonstrates that it deals with a different phase of relief assignments than is here involved. Indeed the Carrier impliedly so concedes. The burden of its argument on this point is that standing alone the second paragraph of such rule clearly gives it the right to establish the assignments here in dispute, i.e., one with different starting times on different calendar days. We agree with respect to different starting times on work days but are unable to concur in the view it gives the Carrier the right to assign different starting times on different calendar days where the result—as here—requires the employe holding the position to work 16 hours within any 24-hour period commencing with the starting time of the previous work day. Exceptions to rules, and here it has been demonstrated that Rules 3-1 and 3-3(a) when considered together require pay at the overtime rate for more than 8 hours' work in any 24-hour period, must be expressed in clear and unequivocal language. We do not believe the language in the second paragraph is susceptible of that construction. Of a certainty it cannot be said an exception is expressed in language of that character. It necessarily follows the rules relied on by the Carrier cannot be regarded as authorizing its action with respect to the position here in question. This, of course, does not mean such paragraph could not have been so worded as to carve out an exception. All we hold is that in its present form it does not do so.

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 Employe involved in this dispute are respectively Carrier and Employe 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 30th day of July, 1951.