# Award No. 5423
# Docket No. MW-5461

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

Jay S. Parker, Referee

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## ILLINOIS CENTRAL RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the agreement when it failed to properly compensate Section Laborer John Orme for services performed during overtime hours, March 10 to March 20, 1948, both dates inclusive;

(2) The Carrier violated the agreement when it denied Section Laborer John Orme the privilege of working his regular assignment during the period March 10 to March 20, 1948, both dates inclusive.

(3) Section Laborer John Orme be compensated for the difference between what he received at his straight time rate of pay and what he should have received at his time and one-half rate of pay for work performed outside his regular assigned hours on March 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20, 1948;

(4) Section Laborer John Orme be compensated at his straight time rate of pay, eight (8) hours per day, for days he was denied the privilege of working his regular assignment. (March 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20, 1948).

**EMPLOYES' STATEMENT OF FACTS:** Section Laborer John Orme was employed on Section DA-8 and was regularly assigned eight (8) hours per day, 7:00 A. M. to 4:00 P. M., with one hour for lunch, Monday through Friday.

On Wednesday, March 10, 1948, the Carrier assigned Section Laborer Orme to work the hours of 11:00 P. M. to 7:00 A. M. Section Laborer Orme was assigned to these new hours so that he could assist the Leverman in handling switches and flagging trains through the Interlocking Plant, Avenue Tower, Springfield, Illinois.

During the period, March 10 to March 20, 1948, Section Laborer Orme was denied the privilege of working his regular daily assignments (7:00 A. M. to 4:00 P. M. with one hour for lunch). Section Laborer Orme was paid at his straight time rate of pay for all work performed during the period March 10 to March 20, both dates inclusive. He was not paid for any of the hours of his regular assignment—7:00 A. M. to 4:00 P. M.

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."
Claim should be denied.

**OPINION OF BOARD:** This is a joint submission where the facts essential to the disposition of the cause, although not agreed upon, are not in conflict.

Prior to March 10, 1948, Claimant John Orme was employed on Section DA-8 and was regularly assigned eight hours per day, 7 A. M. to 4 P. M., Monday through Saturday, with one hour for lunch. On Wednesday, March 10, 1948, due to the making of changes in its Interlocking Plant, Avenue Tower, Springfield, Illinois, the Carrier assigned the involved section laborer to work the hours of 11 P. M. to 7 A. M. to assist the leverman on duty in the interlocking plant in handling switches and flagging trains through such interlocking plant.

The Carrier concedes in its reply to the Employes' submission that the hours of claimant's regular assignment were changed from 7 A. M. to 4 P. M. to 11 P. M. to 7 A. M. and that the work to which he was assigned was performed daily during the period of the instant claim, i. e., March 10 to 20th, and paid for at the straight time rate of pay for each 8-hour tour of duty except for March 10. It asserts that on that date claimant was compensated at the penalty rate because of the failure to give him 36 hours notice of the change it was making in his assigned hours. This last statement is not challenged by the Organization and we assume it to be a fact. We also proceed, since it is fairly inferred from the record, on the theory Orme was returned to the hours of his regular assignment on March 21 after there was no longer any occasion for his services by reason of completion of the repairs on the interlocking plant.

The Carrier also contends its action in changing Orme's hours and assigning him to service while the plant was being repaired constituted a regular assignment. This claim is not borne out by the record which defi-

nitely established that the work assigned was temporary in character, that it was not intended to and did not result in the establishment of a new position. What the claimant was actually required to do was to leave his own regular assignment and perform service, at a different starting time, in the nature of emergency work for the same number of hours he would have been required to work if he had not been removed from his regularly assigned position.

To sustain their claim the Employes rely on Rule 33 (a) of the current Agreement while the Carrier relies on subdivision (b) of the same rule as warranting its action. The mentioned portions of such rule read:

"STARTING TIME

Rule 33 (a) Starting time of work period for regular assigned day service will not begin earlier than six A. M. and not later than eight A. M. except by mutual agreement between employes and supervising officer, and will be fixed by the supervising officer and will not be changed without giving employes affected thirty-six hours' advance notice.

(b) The starting time for employes other than covered by section (a) of this article and for employes where more than one shift is employed, will be designated by the supervising officer and will not be changed without giving employes affected thirty-six hours' advance notice."

The parties do not agree on the question whether the work in question belongs to the same classification. Assuming as the Carrier insists part of it might be classified as track work, ordinarily performed by employes of the Track Department, other portions thereof consisted of flagging trains. Indeed in the joint submission the Carrier in outlining its position states "it was necessary to assign someone to flag trains", asserts "there were no qualified employes available on the watchmen's roster" and adds that it was either necessary to use Orme and two other section laborers who were experienced in the particular work involved, hire new employes to do it, or use other employes within the scope of the Agreement. In that situation, particularly in view of the fact Rule 2 of the Agreement provides "Seniority rights of all employes are confined to the sub-departments in which employed" and defines sub-departments as (1) Track Department, (2) Bridge and Building Department, (3) Paint Department, (4) Pumpers, and (5) Watchmen, and Gatemen or Signalmen, we are constrained to hold that while Orme was engaged in the performance of the work his proper classification, within the meaning of that term as used in Rule 2, was that of a Signalman.

Having reached the conclusion just announced we think our decision is controlled by Award No's. 4744, 4151, 4109, 3784, 3156, 3055, 2973 and 2775. While, as is to be expected, the factual situations in the foregoing cases are not identical, the principles therein enunciated and set forth are. Indeed careful examination of the Opinions will reveal that in some instances the starting time rules involved were far less favorable to a sustaining Award than the one in the confronting case. Therefore, based on such Awards we hold the Carrier's action was in violation of subdivision (a) of Rule 33, heretofore quoted.

The reasons for the holding just indicated, not only in this case but in the other Awards to which we have referred, are well stated in Award No. 4159, where it is said:

"There is no doubt that the purpose of Rule 33 is to protect the employes from constantly changing starting time. 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 classi-

fication 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 cannot assume that reasonable people would intend any such result in the wording of an agreement and we ascribe to the 36-hour provision the more reasonable construction that it was intended for the purpose of permitting changes in regularly assigned starting time of crews or positions. That being so, Carrier could not have changed the starting time of the Claimants without observing the requirements of Rule 39 (a), which would require the payment of punitive rate for all service performed outside their regularly assigned hours on February 18 to 22, 1947, inclusive. (See Award 3636)."

See also Award No. 4744, and in particular that portion of the Opinion which reads:

"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."

A full and complete answer to the Carrier contention that when Orme took over the duties of the involved temporary assignment he automatically passed out from under the control of Rule 38 (a) and became subject to Rule 33 (b) is to be found in the foregoing quotations.

In the light of the confronting facts we are not inclined to adopt the Brotherhood's theory the action of the Carrier was for the purpose of absorbing overtime. However, we do agree that removing him from his regularly assigned position resulted in a violation of the Agreement. Thus it appears we have two violations. The penalty for one, the position worked, is time and one-half. On the other, the regularly assigned position, it is straight time for all time lost. Even so, we cannot agree, as the Organization insists, the two violations require a double penalty. The rule, so well established that it does not require citation of Awards to sustain it, is that penalties cannot be pyramided. It is true that in Award No. 4139, and for that matter in several of those heretofore cited, we held time and one-half was the applicable penalty. It is also to be noted that in Award No. 4151, where there were at least two rule violations and the Organization was claiming both the pro rata and the time and one-half rate, we denied the pro rata claim for the regular position not worked and limited reparation to time and one-half for the temporary position assigned. Be that as it may, we think the sound rule, in the absence of exceptional circumstances requiring a contrary conclusion, is that where two or more violations carrying different penalties are established the higher of the several penalties involved is the one to be imposed. Therefore we adhere to Award No. 4109 and hold that under the facts and circumstances of the instant case the Carrier should be required to compensate the claimant at the pro rata rate for the time lost on his regularly assigned position. The Carrier's payment of time and one-half for the first day the temporary position was worked must be considered as voluntary and affords no basis for diminution of the reparation allowed.

**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 subdivisions 1, 2, and 4 of the claim should be sustained and subdivision 3 thereof denied.

AWARD

Claims 1, 2 and 4 sustained. Claim 3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of August, 1951.