Award No. 5873
Docket No. CL-5800

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

WESTERN WEIGHING & INSPECTION BUREAU

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

(a) The Bureau violated rules of Agreement effective September 1. 1949, when it declined to compensate E. E. Fenimore, Clerk, Position No. 3, Grain Door Dept., Kansas City, of all services performed on his designated helief days, i.e., Saturday, November 12, 1949, and Saturday, July 15, 1950, at one and one-half times the basic straight time rate;

(b) That the Bureau shall now be required to reimburse Claimant E. E. Fenimore for loss of compensation representing the difference between the straight time rate and over-time rate—time and one-half for eight (8) hours on Saturday, November 12, 1949, and eight (8) of the thirteen (13) hours, work on Saturday, July 15, 1950. Claimant was paid on the basis of time and one-half rate for five (5) of the thirteen (13) hours worked on July 15, 1950.

EMPLOYES' STATEMENT OF FACTS: The Claimant, Mr. Fenimore, is regularly assigned to Position No. 3, rate of pay $10.28 per day, hours of service from 8:00 A. M. to 5:00 P. M., Grain Door Dept., Kansas City, His assignment is from Monday to Friday. Saturdays and Sundays are the designated rest days.

As of November 12, 1949, Mr. E. R. Bowers was regularly assigned to Clerical Position No. 2, rate $13.96 per day, in the Grain Door Dept., Kansas City, with work assignment Tuesday to Saturday and designated rest days on Sundays and Monday.

On Saturday, November 12, 1949, Mr. Bowers was absent from his position account personal reasons.

Mr. Fenimore, who was off on his designated rest day, was called in to fill the vacancy caused by Mr. Bowers' absence. He worked from 8:00 A. M. to 5:00 P. M. total eight (8) hours and was compensated therefor eight (8) hours at $13.96 rate perday straight time.

On Saturday, July 15, 1950, Mr. Fenimore was again called to fill vacancy on the same Position No. 2, then regularly held by Mr. H. J. Smith who was off duty account personal reasons. Mr. Fenimore worked from 8:00

Board that there has been no violation of our Working Agreement and that this claim is without merit and should be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is by the Organization in behalf of E. E. Fenimore, a clerk at Kansas City. Fenimore held a regularly assigned position with rest days Saturday and Sunday. At the times in question here he had occupied his own position the full five days or 40 hours. On Saturday, November 12, 1949, his rest day, he was called to occupy another position. Saturday was not a rest day of the position to which he was called. He worked the position for 8 hours. The Carrier paid the straight time rate for the day. On July 15, 1950, he was called under like circumstances. He worked 13 hours. He was paid the straight time rate for 8 hours and time and one-half for 5 hours. The claim is for time and one-half for the 8 hours.

Whether or not the claim shall be allowed depends upon the interpretation and application of certain provisions contained in the rules of the Agreement. Those having particular bearing are Rule 34 (e) and (h) and Rule 35(a), as follows:

> Rule 34. "(e) Work in excess of 40 straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate except where such work is performed by an employe due to moving from one assignment to another or to or from a furloughed list, or where days off are being accumulated under paragraph (g) of Rule 28.
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> (h) Service rendered by employes on assigned rest days (other than Sunday) shall be paid for under Rule 35, paragraph (a) unless relieving an employe assigned to such day in which case they will be paid for eight (8) hours at the rate of the position occupied or their regular rate, whichever is higher. . . ."
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> Rule 35. "(a) Employes notified or called to perform work, either before or after, but not continuous with their regular work period, shall be allowed a minimum of three hours at pro rata rate for two hours, work or less and, if held on duty in excess of two hours, time and one-half shall be allowed on the minute basis."

It is to be obersved that Rule 34 is the **overtime** rule and Rule 35 is the **notified or called** rule. The two rules contemplate the practices to be followed by the parties in relation to the 40-hour week.

Rule 34(e) declares the rate of pay for time worked in excess of 40 straight time hours. This rate is one and one-half times the straight time rate. Thus, under the rule the agreement rate for work in excess of 40 hours is time and one-half of the straight time rate. There are exceptions written into this rule but they have no relation to the matters involved in this claim. The exceptions relate only to employes moving from one assignment to another; to or from a furloughed list; and where days are being accumulated under Rule 28(g).

This provision of Rule 34(e) represents the basic purpose and intention of the parties as to work in excess of 40 straight time hours of work. Therefore, to sustain the contention of the Carrier something must be found elsewhere in the Agreement which amounts to a further exception and removes the claim from the operation of this basic purpose and intention of the parties. The Carrier contends that Rule 34(h) contains an exception which permits it to require an assigned employe on his rest day (other than Sunday) to work in relief on an assigned day of another position for 8 hours at the straight time rate.

It will be observed from this provision and Rule 35(a) that for any work outside assigned hours the employe shall be paid as for a call and at time and one-half. Thus, under Rules 34(e) and 35(a) the contract or basic rate for overtime other than that involved here is one and one-half times the straight time rate. This is not a penalty rate. It is simply an agreed to measure of compensation to be applied under named conditions.

It is to be noted that as to situations such as this Rule 34(h) reads:

> ". . . they will be paid for eight (8) hours at the rate of the position occupied or their regular rate, whichever is higher."

It does not read eight (8) hours at the **straight time** rate of the position occupied or their regular rate whichever is higher. To read it in this manner would seem to be violative of the intention of the parties in dealing with work in excess of 40 straight time hours in any one work week. It would seem also to be violative of the letter of Rule 34(e).

The conclusion reached, therefore, is that Rule 34(h) as applied to situations such as this means that when an assigned employe who has worked 40 straight time hours and on his rest day is called to relieve an employe assigned to such day he shall be paid for 8 hours at the rate of the position occupied or his regular rate, whichever is higher; and that compensation therefor shall be the agreement rate applicable to work in excess of 40 straight time hours, or in other words at time and one-half of the straight time rate.

Superficially it might appear that this interpretation leaves as surplusage and meaningless the verbiage of the provision relating to 8 hours in Rule 34(h), but from an analysis of it and the other related provisions this is thought not to be true.

It is clear that the parties intended to remove situations such as this from the ordinary operation of the notified or called rule. There however is nothing to indicate that they intended to remove it from the operation of the overtime rule. The evident intent of this verbiage was to say that an employe called under circumstances such as these should not be compensated on the hour and minute basis provided for by Rule 35(a) but that regardless of the amount of time worked in the position occupied he should be paid for a full eight-hour day.

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 claim has been sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of July, 1952.