

Award No. 6833

Docket No. CL-6855

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

WESTERN WEIGHING AND INSPECTION BUREAU

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

(a) The Bureau violated Rules of currently effective Agreement with the Brotherhood dated September 1, 1949, in calculating the wage compensation due G. R. Decker, Fruit and Vegetable Inspector at Omaha, Nebraska, for services performed on Sunday, May 18, 1952.

(b) Mr. Decker be paid the additional compensation due him representing a "call" or five hour and twenty minute pay at rate of time and one-half equivalent to \$15.53 for the service performed.

EMPLOYEES' STATEMENT OF FACTS: The claimant, Mr. G. R. Decker, is regularly assigned to Position 101—Fruit and Vegetable Inspector—with headquarters in the Union Pacific Freight house at 9th and Jackson Street, Omaha, Nebraska.

Mr. Decker's assigned hours of service are from 8 A. M. to 5 P. M. Mondays to Fridays of each week. Saturdays and Sundays are designated as his rest days. Rate of pay is \$15.53 per day. Normal duties assigned to the position are inspection of cars of Fruits and Vegetables, See Employees' exhibit No. 1 and 2.

Mr. Decker resides at 211-15th Avenue, Council Bluffs, Iowa, which is approximately six miles by automobile from his point of employment. Mr. Decker uses his personal automobile in the course of Sunday and Holiday work and there is no additional expense allowed for that purpose. The approximate travel time from home to headquarters is twenty five minutes.

Mr. Decker is required by the Bureau to maintain a telephone in his residence at a cost of \$4.10 per month to permit of his being called for inspection service or other emergencies that may arise outside of his regular assigned hours of duty.

On Saturday afternoon, May 17, at or about 4 P. M. the Car Clerk for the Railway Express Agency called (phoned) Mr. Decker at his residence to report at the Safeway's Store Warehouse, 13th and Leavenworth St.,

POSITION OF BUREAU: This case is similar to the one which was referred to your Honorable Board by Grand President Geo. M. Harrison on January 8, 1952 involving Fruit and Vegetable Inspector R. W. Parker, employed by us at Kansas City, Missouri, who, on July 4, 1950, was called to perform service from 12:35 A. M. to 1:55 A. M. and again from 5:00 A. M. to 6:25 A. M.

In this case the record clearly shows the Claimant worked a total of three hours and fifteen minutes for which this Bureau compensated him for five hours and twenty minutes at the rate of time and one-half. Our position in this case is the same as it was when Docket CL-6019 was before your Honorable Board. We maintained then as we do now that Rule 35, paragraph (c) does not involve the number of calls but applies only to the time worked and in this instance Claimant Decker worked less than four hours, consequently he was compensated on basis of five hours and twenty minutes at the rate of time and one-half, which is as it should be.

It is interesting to note that when this claim was being handled on the property the General Chairman was willing to hold the file in abeyance until a decision was rendered in Docket CL-6019. This is clearly brought out in his letter of August 23, 1952, which is our Exhibit No. 3.

One would gather from the language set forth in his letter of August 23, 1952 that whatever the Referee's decision was in Docket CL-6019 would likewise apply insofar as this claim is concerned, but no, that was not the case because in his letter of November 18, 1952, Employer's Exhibit No. 5, he stated that he was not agreeable with the findings of Referee Jay S. Parker in Award 5932 and unless we settled the claim on the basis as filed he would submit this to your Honorable Board for adjudication.

It is not our intention to burden your Honorable Board with a lengthy submission because the issue here has previously been decided on by the Honorable Referee Jay S. Parker. The conditions in this case insofar as the application of our rules are concerned is the same as in the former case, consequently there can be only one finding and that is the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The record discloses that G. R. Decker is employed by the Western Weighing and Inspection Bureau, hereinafter referred to as the Bureau, Omaha, Nebraska, in the capacity of a fruit and vegetable inspector. Claimant Decker's regularly assigned hours of service are from 8 A. M. to 5 P. M., Monday through Friday each week. Saturday and Sunday are his rest days. On Sunday, May 18, 1952, Decker was notified or called for 7 A. M., and worked to 7:45 A. M. He was again notified or called at 6 P. M., and worked to 8:30 P. M. The claim is for two separate calls on the basis of five (5) hours twenty (20) minutes for each call at the rate of time and one-half.

The Petitioner contends that since claimant was given two separate calls on the day in question, both of which were outside of his regular weekday or regularly assigned hours, he was not properly compensated when he was compensated for only one call. Claimant was paid a minimum of five (5) hours and twenty (20) minutes at time and one-half.

The Bureau contends that the claimant was properly compensated, as provided for by the Rules of the Agreement between the parties bearing effective date of September 1, 1949.

The principal rule involved here is Rule 35—Notified or Called. This rule provides as follows:

“(a) Employees 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.

(b) Employees notified or called to perform work, either before or after, but continuous with their regular work period, shall be allowed time and one-half on the minute basis for such time worked.

(c) Employees notified or called to perform work on Sunday or a specified holiday, as referred to in Rule 38, will be allowed five hours and twenty minutes at the rate of time and one-half for four hours' work or less. Employees worked in excess of four hours will be allowed a minimum of eight hours at the rate of time and one-half."

Claimant Decker was compensated under (c) of Rule 35 above.

In Award 5932 of this Division, involving the same parties and agreement and issue as involved in the instant case, Rule 35 was before the Referee. He interpreted Rule 35 (c) thereunder as follows: "The rule specifically provides what an employee notified or called on a holiday (in the instant case on Sunday) shall receive for 4 hours' work or less on that day and is wholly silent on the subject whether more than one call affects the pay to which he may be entitled. Of a certainty it makes no express provision for the pyramiding of pay on the basis of calls made and received. Under the circumstances if that is what is desired we think it should be procured by negotiation not through a strained or unwarranted construction of the contract. It follows the claim must be denied."

The Employees are in agreement with the Bureau that the resolution of this dispute before the Board involves Rule 35 set out above.

The Employees do not agree with the reasoning contained in Award 5932 and the interpretation of Rule 35 (c) being correctly given in Award 5932. The Employees seize upon the language contained in Award 5932 as follows: "Neither party cites awards to sustain its position. In that situation we assume they have been unable to find any that do so." Therefore, the Employees imply that in the event the Referee had before him certain subject matter pertaining to rules "Notified or Called," he might have arrived at a different decision in the award 5932.

The Employees argue as follows: "Obviously, the first sentence of Rule 35 (c), by its language contemplates but one call." If that were not true, the Carrier could on a Sunday or holiday start calling an employee for service at 1:00 A. M., and by separate or intermittent calls for short periods, of say from thirty (30) to forty-five (45) minutes each, use the services of the employee in each hour throughout practically the whole twenty-four (24) hours, to 11:59 P. M., that day, upon payment of five hours and twenty minutes at the overtime rate, or eight hours at straight time rate, unless the employee actually worked excess of a total of four hours.

The Employees direct attention to the record of Docket CL-6019, page 51, to the effect that the Bureau payrolls will show, on days other than Sunday or holidays, it recognized the principle of Rule 35, paragraphs (e) and (b), wherein Parker, the claimant, was paid for two calls. The details are set out. We take cognizance of the same.

The Employees say the same words are used in the first sentence, and logic requires they be given the same meaning. This matter was not discussed by the Referee in Award 5932, apparently for the reason that he was interpreting Rule 35 (c) which specifically applies to Sunday or a specified holiday. While the Employees' argument may lend some force to negotiating a new rule, it is not pertinent here. This Board, in numerous awards, has held

in effect that we are not a rule-making body, nor are we privileged to legislate as to what we believe a rule should contain. Our function is to interpret the rule as we find it.

The Employees cite U. S. R. L. B., Decision 4085. This was the case between the Order of Railroad Telegraphers v. Southern Pacific Company. The claim was for two special calls, September 21, and 22, 1923. The Carrier allowed one call for September 21, 1923. This telegrapher was called on that date at 8:45 P. M., released at 9:00 P. M., called again at 9:40 P. M., and released at 10:15 P. M. September 22, 1923, he was called at 7:50 P. M., released at 8 P. M., called again at 10:14 P. M., released at 10:34 P. M., then called at 11:15 P. M., and released at 11:25 P. M. On this date the Carrier paid for two calls and 5 minutes overtime at time and one-half. Rule 5 (a) was involved, "Telegraphers notified or called to perform work not continuous with the regular period will be allowed a minimum of three hours for two hours' work or less, and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis." Carrier took the position that under the above rule the telegrapher was entitled to one call (time and one-half) for two hours' work or less, and if held on duty in excess of two hours, time and one-half will be allowed on a minute basis. The Opinion stated that when an employe on call is released, he shall, if called again, be compensated as specified in paragraph (a) Rule 5 of the Agreement, on the basis of an additional call. The claim was sustained.

The Employees assert, applying that principle to the Claimant in the instant case, the Claimant would be allowed an additional call since he was released from the first call and called again. We have no quarrel with the correctness of the above decision under the rule therein involved. The rule is apparently a standard rule, as distinguished from Rule 35 (c) which we believe to be a specific rule relating to Sundays and specified holidays.

We might say at this point that we are cited to other rules of various Agreements that make provision for pay allowances to employes for work on Sundays which were previously in effect. We have considered the same but they bear no pertinency to this dispute.

We have also been cited to Decision 2009, Docket 2726, Decisions of the United States Railroad Labor Board, Vol. IV, 1923. It is true, the employe concerned was called or notified for three separate periods of service on Sunday, which totaled two (2) hours and thirty (30) minutes within a spread of seven (7) hours and twenty (20) minutes, which were within the employe's regular week day hours. The Board permitted the Carrier to treat the employe as in continuous service. There is no doubt but that the decision was correct under the circumstances therein. Rule 65, therein discussed, is quite dissimilar to Rule 35 (c) here being discussed. This case is not in point.

There is much discussion with reference to Rule 35 (c) being brought forward from the Clerks' Agreement on the Chicago, Milwaukee, St. Paul and Pacific Railroad, which subject matter was not before the Referee in Docket CL-6019, Award 5932. This subject matter has been examined. The manner in which claims were filed and determined on that Carrier's property involving a like rule is certainly not binding on this Bureau. It bears no relevancy here, and we refrain from discussing this part of the record.

In the instant case, the following is applicable: "Unless palpably wrong this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous award construing the identical provisions of their contract." See Awards 2517, 2526.

From an analysis of the record in its entirety, we adhere to the interpretation placed on Rule 35 (c) thereunder by the Referee in Award 5932. This award should be accepted as binding on the parties. While the presentation made by the Employees lends force that the rule may be inadequate, this matter is one for negotiation between the parties. Negotiation apparently was had

on the Chicago, Milwaukee, St. Paul and Pacific Railroad as is evidenced by the present Rule 34 (d) between the parties on that Carrier.

For the reasons given herein, the claim should be denied.

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 Employees involved in this dispute are respectively carrier and employees 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 should be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1954.