Award No. 7823
Docket No. TE-7086

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD, BUFFALO AND EAST

STATEMENT OF CLAIM: Claim of the General Committee of the Order of Railroad Telegraphers on The New York Central Railroad, Buffalo and East, that:

(1) The Carrier is required by Article 7(a), where but one shift is worked and a meal period is not afforded, to allow employes thirty (30) minutes with pay in which to eat or make appropriate pay allowance in lieu thereof; and that

(2) L. Ryder shall be allowed payment for thirty (30) minutes at the time and one-half rate in lieu of time not afforded in which to eat, while Operator at South-Schenectady, New York, on the following days: May 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29 and June 2, 3, 4, 5, 6, 9, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25 1952.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties effective July 1, 1948, with amendments to January 1, 1953, referred to as the Telegraphers' Agreement.

The claimant, Mr. L. Ryder, was assigned to work from 6:00 A. M. to 3:00 P. M. at a temporarily established communications station at South Schenectady, New York, because of new rail being laid between South Schenectady and Voorheesville which necessitated moving trains in both directions on single track between these points. Claimant was the only employe assigned to perform work at this location which made it a one-man station, or one shift office. The work was of the nature that it was impossible for claimant to take a meal period between the beginning of the fifth hour and the ending of the sixth hour as provided for in Article 7(a).

The Carrier properly compensated claimant for the 60 minutes when it did not afford him the meal period required under the rule, but it failed to allow claimant 30 minutes in which to eat at the first opportunity as provided in this rule. Claimant was actually worked through the entire 9 hour day without being afforded time to eat under the provisions of Article 7(a).

The Carrier at one time acknowledged its responsibility in connection with the payment for the 30 minute period and made certain payments during the handling of the claim on the property, but later rescinded this and de-

The applicable portion of Article III-(c) reads:

"Employes shall not be required to work more than two (2) hours after completing regular established working hours without being permitted to take a second meal period and time so taken will not terminate the continuous service period and will be paid for up to thirty (30) minutes."

A review of the evidence presented on which the Board sustained the claim will show that the contention of the Employes that Berg was required to work the continuous overtime and was not permitted to take a second meal period is confirmed by the Carrier in the following statement:

"The Carrier recognizes that in instances where it is possible to relieve them for that purpose, employes subject to the Telegraphers' Schedule should not be required to work in excess of two hours after completing their regular established working hours without being permitted to take a second meal period, but submits that conditions then existing at Smithshire on the dates involved in the instant claim would not permit relieving the Agent-Telegrapher for a second meal period and the additional compensation claimed by the Employes is not supported by Article III-(c) relied upon by the Employes."

The sole question at issue in the above cited award related to penalty payment and not as to whether or not the claimant employe was afforded or had opportunity to take the second meal period as it was conceded by the Carrier that existing conditions would not warrant relieving the claimant for a second meal period.

CONCLUSION

Carrier has conclusively shown that the claim as set forth in President Leighty's notice letter dated May 25, 1954 has not been handled in accordance with Article 33 of the agreement, Circular No. 1 of the National Railroad Adjustment Board or the Railway Labor Act, and should therefore be dismissed. Without prejudice to its position in that respect, Carrier has also conclusively shown that the Employes have submitted no evidence and there is no evidence that claimant Ryder was not permitted to take and actually did not take 30 minutes in which to eat.

No facts or arguments have been herein presented that have not been made known to the Employes.

OPINION OF BOARD: Claimant occupied a temporary one-shift position from May 1 to and including June 25, 1952, in connection with a rail laying program by Carrier's Maintenance of Way forces that required a temporary Telegrapher to work with the Dispatcher to handle single track movements in double track territory between South Schenectady and Voorheesville, N. Y. on Carrier's West Shore Line as distinguished from its main line on the Mohawk Division.

Conditions were such that claimant was not able to have and enjoy "60 consecutive minutes, without pay, between the beginning of the fifth hour and ending of the sixth hour after starting work, for meal." He was allowed 1 hour at pro-rata rate for working through that period. The record does not show that he was allowed 30 minutes to eat during his 9 hour tour of duty.

Rule 7(a) provides for a meal hour within specified limits but the employe may be continued on shift when service requires without penalty on the Carrier except he must be allowed 30 minutes to eat at the first opportunity without deduction in pay.

Where the meal hour is not afforded within specified limits, the effect is to require Carrier to pay 8 hours for 7½ hours on 8 hour shift, and the same basis of computation and compensation to hold true on a longer or an extended shift. Unless the 30 minutes to eat is permitted and paid for by the Carrier, the result would be to extinguish all penalty that clearly is provided for by the rule.

Some dispute is in evidence in this docket over whether claimant was afforded an opportunity to eat. Carrier is of the opinion that he could have found time to eat and suspects that he did. Failure to complain is looked upon as a suspicious circumstance. The presentation of neither party to the dispute is as factual on this point as it is argumentative, but we do know that claimant was held on duty 9 hours under conditions that deprived him of the normal meal hour. He was entitled to 30 minutes with pay to eat. How and when that 30 minutes was made available to him under abnormal working conditions that deprived him of what some would consider a preferable meal allowance is not shown and we will not speculate. Moreover, we are disposed to say that unless the opportunity to eat conforms to a mutually recognized working condition for an established position or is taken at the direction of responsible supervision, one who is expected to work as directed should not be held accountable for failure to relieve Carrier against the penalty provisions of the rule.

Neither are we able to agree with Carrier's argument that the claim, as presented in the Statement of Claim, is barred by Article 33 and cannot be considered by this Board, based, as that argument is, upon a contention that the original claim was for pro-rata rather than punitive rates and did not include the dates June 11, 12, 13, 16, 17, 18, 19, 20, 1953.

Article 33 serves as a bar against time claims that are not handled in accordance with its terms. The rule has no bearing on the substance of a claim for alleged violation of rules, but does outlaw claims for money payments alleged to be due, when not timely filed. It seems to follow then, and we hold that time claims for the dates last above mentioned are invalid.

Obviously, the Carrier did not disallow the claim because of any difference of opinion over the rate of pay and for that reason any change therein that only involves compensation claimed is not inimical to the allowance of a valid claim if the rate of pay now contended for is supported by rule.

Claimant has been paid pro-rata for nine hours continuous service pursuant to the clear language of Articles 4(a) and 7(a), but 30 minutes in which to eat is yet to be reckoned for payment.

Article 7(a), so far as pertinent here, reads:

> "If the meal period is not allowed within the agreed time limit, the meal period shall be paid for at prorata rate and 30 minutes, with pay, in which to eat shall be afforded at the first opportunity."

Article 4(a) (b) provides:

> "(a) Except as otherwise provided, time worked in excess of eight hours, exclusive of the meal hour as provided in Article 7(a), on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate.
>
> "(b) For continuous service after regular working hours, time and one-half will be paid on the actual minute basis."

The manifest intent of the foregoing language is that the 30 minutes in which to eat will be paid for at the rate that is applicable to the "first opportunity". No other reason has been assigned and none occurs to us, why the parties would specify the rate applicable when the meal hour is not allowed within the agreed time limit and still leave open to interpretation the expres-

sion "30 minutes, with pay". That their intent was as we have here expressed it, is fortified by language of Article 4 which excludes from overtime the "meal hour (and not the meal period) as provided in Article 7 (a)". By the expression "meal hour", the parties must have meant the one and only 60 minute period that has been agreed upon. Also see Article 2, which defines a basic day as "eight consecutive hours, exclusive of a meal hour shown in Article 7 (a)".

Claimant having been held in continuous service after 8 consecutive hours without being allowed 30 minutes in which to eat, as we are compelled to rule on the basis of the record before us, the "30 minutes, with pay" provided by rule envisions compensation at the overtime rate, in our studied opinion.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 (1) sustained. Claim (2) sustained for all days except June 11, 12, 13, 16, 17, 18, 19, 20, 1953.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April, 1957.