Award No. 13155
Docket No. CL-13330

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

TULSA UNION DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5137) that:

1. Carrier violated the terms of the current Agreement between the parties when on July 27, 1960, and subsequent dates, it called extra mail and baggage handlers to work on a part-time basis at Tulsa Union Depot, using them for approximately four hours and allowing them only four hours' pay for their tours of duty on each date.

2. Calvin Parker, Arlington Haney, H. A. Surratt, Robert McCloud and W. E. Jemison now be allowed the difference between what they were allowed on each date as shown below, and a minimum of eight hours at pro rata rates:

Employe	Dates
Calvin Parker	July 28, 29, 30, 31, August 1, 4, 5, 7, 8, 11, 12, 13, 14, 15, 20, 24, 25, 26, 27, 31, September 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, October 10, 11, 13, 14, 21, 23, 24, 25, 28, 29, 30, November 1, 3, 4, 10, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, December 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 24, 26, 27, 28, 29, 31, 1960; January 2, 3, 4, 5, 6, 9, 13, 14, 20, 22, 25, 27, 30, February 3, 5, 9, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 28, March 2, 3, 4, 17 and 24, 1961.
Arlington Haney	August 20, 22, 23, 25, 26, 27, 28, 29, 30, 31, September 15, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, Octo-

	ber 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 26, 27, 28, 29, 30, 31, November 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, December 3, 4, 5, 6, 7, 26, 28, 1960; January 14, 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, February 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, March 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, 1961.
H. A. Surratt	July 29 and August 3, 1960.
Robert McCloud	July 27, 28, 29, August 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 27, 28, September 1, 2, 9, 11, 24, 26, 28, 29, 30, October 2, 7, 8, 29, and November 4, 1960.
W. E. Jemison	July 30, August 29, 30, September 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 30, October 1, 2, 3, 4, 5, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22 and 25, 1960.

EMPLOYES' STATEMENT OF FACTS: On July 27, 1960 and subsequent dates, the Carrier called one or more extra mail and baggage handlers to augment its force of regularly assigned employes at Tulsa Union Depot sometimes calling only one man and sometimes two or three, as indicated in the dates shown for each of the claimants. The mail and baggage handling force at the time of these claims included four mail and baggage handlers assigned to work 3:30 P. M. to 11:30 P. M. and one mail and baggage handler 3:30 A. M. to 12:30 P. M. Due to the amount of work necessary in the handling of mail and baggage, the regular force of four mail and baggage handlers assigned 3:30 P. M. to 11:30 P. M. were unable to handle all of the duties connected with the handling of mail and baggage, which made it necessary to call extra employes. The Carrier called one or more extra employes each day to augment the regular force in the handling of mail and baggage and prevent delays to trains. These extra employes were called at approximately 7:00 P. M. or 7:30 P. M. and held on duty for four hours after which they were released, and paid only for the time actually on duty, which resulted in the filing of these claims.

These claims have been handled with management up to and including Mr. T. P. Deaton, Director of Personnel, the highest officer to whom appeals may be made, but not composed. See Employes' Exhibits 1(a) to 1(d), inclusive. Claims filed subsequent to those referred to in Employes' Exhibit 1(a) were denied by the Carrier in the following language:

> "Investigation into these particular claims indicates that they are the same as or similar to the claims advanced to this office on appeal with your November 29, 1960 letter, and the instant claims are hereby declined for the same reasons outlined to you in my letter of January 11, 1961."

under the current Rules Agreement of January 1, 1946, as amended, and the claimants are entitled to nothing more than that which has already been paid. The claim in its entirety should be denied. See Special Board of Adjustment No. 169, Award No. 65, attached hereto as Depot Company's Exhibit C.

Under no circumstances is there any contractual or other basis for the claim as presented, and it should be denied. The Board is requested to so find.

(Exhibits not reproduced.)

OPINION OF BOARD: From approximately July, 1960, to March, 1961, roughly a period of seven and a half months, the Carrier called one or more extra mail and baggage handlers to supplement its force of regularly assigned employes at the Tulsa Union Depot, sometimes calling only one man and frequently two or three, as shown on the dates submitted on behalf of the five Claimants. The mail and baggage handling force at the time of these claims included four mail and baggage handlers assigned to work 3:30 P. M. to 11:30 P. M. and one mail and baggage handler 3:30 A. M. to 12:30 P. M. Because of the amount of work involved, the regular force of four mail and baggage handlers assigned from 3:30 P. M. to 11:30 P. M. were unable to properly cope with it, thereby necessitating the calling of the Claimants. The evidence reveals that these employes were called at approximately 7:00 P. M. or 7:30 P. M. and held on duty for four hours, after which they were released. They were paid for the time actually held on duty, which resulted in the filing of these claims.

It is the contention of the Petitioner that the principal rules involved in this dispute are Rule 38, Day's Work; Rule 39, Reporting and Not Used; and Rule 41, Continuous Duty, the pertinent parts of which are quoted below:

"RULE 38. DAY'S WORK

Except as provided in Rule 41, eight consecutive hours' work, exclusive of the meal period, shall constitute a day's work."

"RULE 39. REPORTING AND NOT USED

(a) Employes required to report for work at regular starting times and prevented from performing service by conditions beyond control of the Carrier will be paid for actual time held, with a minimum of two hours.

(b) If worked any portion of the day under such conditions, up to a total of four hours, a minimum of four hours shall be allowed. If worked in excess of four hours, a minimum of eight hours shall be allowed.

(c) All time under this rule shall be at pro rata rate.

(d) This rule does not apply to employes who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces; nor, shall it apply to regular employes who lay off of their own accord before completion of the day's work."

"RULE 41. CONTINUOUS DUTY

For regular operation requiring continuous hours, eight consecutive hours without meal period may be assigned as constituting a day's work, in which case twenty minutes shall be allowed in which to eat between the ending of the fourth hour and the beginning of the seventh hour, without deduction in pay."

The Petitioner argues that Rule 38 is clear and unambiguous, and that stated simply, it provides that eight hours, exclusive of the meal period, shall constitute a day's work; that the only exception contained in the rule is the provision of Rule 41, that these provisions mean that for regular operation requiring continuous duty, eight consecutive hours without a meal period, may be assigned as constituting a day's work, in which case 20 minutes shall be allowed in which to eat, between the ending of the fourth and the beginning of the seventh hour, without deduction in pay; further, that this rule also provides for eight hours constituting a day's work. The Petitioner also propounds the argument that Rule 39, quoted above, has no applicability to the instant dispute because conditions beyond the control of the Carrier referred to in the rule, have been interpreted to mean conditions such as acts of God over which neither the Carrier nor the employes have control, that since the work performed by these Claimants continued over such a prolonged period of time, such work could not be considered as fluctuating work, that there is nothing in the Agreement permitting Carrier to call and use employes for less than 8 hours or to pay them for less than 8 hours. They further allege that the only exception to this is 39 (d), fluctuating work, and that this is not germane to the dispute. In addition, the Petitioner answers Carrier's defense of past practice by stating that this does not change or modify the terms of the Agreement, and that the Carrier is required to correct that violation when it is called to its attention.

The Carrier contends that employes engaged in part time mail and baggage handlers' work from 1946 to 1957 had been paid under both the fluctuating work rule of the Agreement, and/or call rule of the current Agreement, depending on whether or not it was fluctuating or part time regular work.

Rule 52, captioned "Basis of Pay", reads as follows:

"RULE 52.

Employes subject to this agreement will be paid on daily basis. Basic rates shall be those in effect at Tulsa Passenger Station as of May, 1931.

Nothing herein shall be construed to permit the reduction in days for the employes covered by this rule below five per week, excepting that this number may be reduced in a week in which holidays occur by the number of such holidays.

RULE 53.

The guarantee covered in Rule 52 will not be construed to apply to those who are employed to take care of the fluctuating work that cannot be handled by regular forces."

The Respondent contends that the contracting parties recognized the practice that had been in existence since the beginning of the Depot Company and when the Agreement of January 1, 1946, was entered into, the above rules were agreed upon to cover such fluctuating work. It is the respondents' position that the work under claim should fall into one or the other of the two following categories.

1. Work recognized by the parties as fluctuating work and that no additional compensation is due Claimants or

2. Regular part time work, as distinguished from fluctuating work, for which the respondent should allow Claimants the difference between pro rata and time and one-half rate for actual hours worked under the call rule of the Agreement.

The Respondent urges us to dispose of this claim under number 1 above.

An examination of Rule 39 convinces us that it applies to regular employes who are required to report for work at regular starting time and that if prevented from performing services by conditions beyond the control of the Carrier may be paid less than eight hours. The Carrier has not claimed that the employes were prevented from performing such services by conditions beyond its control, nor does it allege that Claimants were required to report at regular starting times. Nevertheless, the Carrier relies on the one hand on 39 (b) as justification for paying for time actually worked, while on the other hand maintaining throughout the record that the work performed was fluctuating work. Yet, an examination of 39 (d) reveals that this rule is not applicable to employes engaged to take care of fluctuating work. This appears to us to be a non-sequitur.

We now direct our attention to Rule 53, which simply states that the guarantee contained in Rule 52 shall not apply to those who are employed to take care of fluctuating work. If we were to agree with the Carrier that the work actually performed in this case was indeed fluctuating work, we cannot agree that either Rule 39 or 53 has any pertinency or relevancy to the instant dispute. The guarantee to which the rule makes reference is the guarantee of 5 days per week. The language in Rule 53, as in Rule 39 (d), implies only that the respondent may have or could have people employed to take care of fluctuating work, but neither rule, nor any other rule in this Agreement gives it the right expressly and categorically to employ people for such fluctuating work.

Factually speaking, the Claimants in this case were called upon each and every day over a long protracted period of time, as indicated by the dates contained in the claim, a fact which mitigates against the theory of fluctuating work advanced by the respondent. The next question to which we address ourselves is whether or not it can be considered part time work, and if so, what applicable rule of the Agreement governs such work. A careful analysis of this Agreement convinces us that there is no provision either for the use of part time employes or for part time work. The work involved was regular work, to which the employes were entitled by reason of their seniority. Rule 38 of the basic Agreement, quoted infra, is clear, concise, unambiguous, and non-susceptible of misinterpretation. It has been analyzed in the crucible of labor–management relations of this industry innumerable times. We do not think it necessary to refer to the many awards of this Board on the precise language contained in Rule 38, but suffice it to say that the

Agreement in this case, specifically Rule 38, was violated, and we, accordingly, sustain the claim.

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

That the parties waived oral hearing;

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.