

Award No. 5080

Docket No. 5821

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

The First Division consisted of the regular members and in addition Referee Royal A. Stone when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of Engineer K. W. Rebscher for a new day at time and one-half for services performed after 8:00 A. M. February 17, 1938, and subsequent dates, instead of on overtime basis.

JOINT STATEMENT OF FACTS: Two of the passenger yard assignments on each shift are designated as "cab runs," used to transport employes to and from work. These runs are listed on the Joint Time Table as trains Nos. 50-71; 70-51; 54-77; 76-53; 56-79; 78-55. These crews work in "passenger and bum service" when not actually engaged in handling these runs.

These crews have been in three-shift service, relieving each other. On or about February 15, 1938, the first shift crew was marked to start from the 14th Street engine terminal and the third shift crew to turn in at that point, both regularly.

On February 17, 1938, Engineer Rebscher was not relieved at 8:00 A. M. after his return with run 50-71, but was used in the passenger yard until 9:30 A. M. He was paid eight hours at the straight time rate and one hour and thirty minutes at the overtime rate of time and one-half.

POSITION OF EMPLOYES: Ever since the establishment of the 8-hour day, these particular runs have been three shift, "around-the-clock" service, relieving each other 8:00 A. M., 4:00 P. M. and 12:00 midnight.

When this change was made and Engineer Rebscher held out and required to work one hour and thirty minutes into the first shift, February 17, 1938, it was a deliberate plan to have the third shift crew do the work formerly done by the first shift crew. The first shift relief was just as available on this date as they had been every day since these assignments were established, and could have relieved the third shift crew in the same manner as always heretofore. When they were refused relief and continued into the first shift it constituted the beginning of a new day.

Article 2 of the Agreement—Provides, "Eight (8) hours or less shall constitute a day's work."

Engineer Rebscher had worked eight hours and returned to his quitting point.

Article 4—Provides, "Regularly assigned crews shall have a fixed starting time, and the starting time of a crew will not be changed without at least forty-eight (48) hours advance notice."

Engineer Rebscher's starting time at 12:00 midnight automatically fixed his quitting time at 8:00 A. M.

Article 5—Provides, "(a) Engineers shall have designated points for going on and off duty. Such points are not confined to any definite number of feet, but rather indicate a definite and recognized location. Relief points cannot be changed without forty-eight (48) hours advance notice, and are as follows:

"(b) Passenger Yard Engines: Between Twelfth Street and Twenty-first Street."

Engineer Rebscher had returned to his designated point for going off duty, at the designated time; he had therefore finished his day.

Question 90, Interpretation No. 1, Supplement No. 24 to General Order No. 27, of United States Railroad Administration, and numerous Awards of this Board, particularly Awards 510 and 2646, sustain this claim.

POSITION OF CARRIER: As outlined in the Joint Statement of facts, the engine crews used to operate the cab runs are engaged in passenger and bum service before and after making the runs, which consume approximately one hour and twenty-three minutes each. These and other engine-men are marked up daily on the assignment lists as per Article 25 of the current agreement. Marking on the list has always been considered as equivalent to and accepted as a call, as these lists are the equivalent of call systems on other lines.

Under our agreement and practices, enginemen are either relieved or marked on the assignment lists to turn in at terminals. There was nothing irregular in our action in marking up the first shift crew to start from the 14th Street engine terminal and the third shift crew to turn in at that point, as also outlined in the Joint Statement of Facts, instead of working them in three shift relief service as had formerly been done.

There is nothing irregular or in violation of the agreement or past practices in requiring men to work in excess of their assignments and there is only one rule in the agreement dealing with payment for service in excess of eight hours; i. e., Article 3, overtime, reading:

"Except when changing off where it is the practice to work alternately days and nights for certain periods, working through two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required by schedule rule to be used, all time worked in excess of eight (8) hours' continuous service in a twenty-four (24) hour period shall be paid for as overtime, on the minute basis, at one and one-half times the hourly rate according to class of engine."

There is no rule providing for the start of a new day after a man has been in service eight hours or longer, and neither is there an automatic release rule. An engineman in our service does not complete his assignment until he is ordered to turn in at a terminal or is relieved by another engineman.

Our service is diversified and has been during all the years that agreements with the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen have been in effect. In some instances engine crews work with various yard crews during their tour of duty; engines in passenger service operate with various passenger trunk line train crews; pusher engines work with various yard crews, and some engine crews start in advance of the starting time of yard crews. It was this diversification of service that prompted the United States Railroad Administration to rule that ours was "unclassified service" and accord our

employes compensation on basis of through freight rates notwithstanding the fact that our service as a whole is mainly yard switching performed entirely within switching limits and that the working conditions under which the service is performed are such as are applicable to engineers and firemen in yard service. Incidentally, the trainmen working with all of our engine crews are compensated on basis of yard switching rates.

After the United States Railroad Administration ruling, our contract with the engineers and firemen, joint at the time, was revised to include the provisions of Supplement No. 15 to General Order No. 27 and interpretations thereof by a supplemental agreement of December 5, 1919, retroactive to January 1 of that year. That supplemental agreement contained an overtime rule reading, "Overtime shall be paid for on the minute basis at not less per hour than one-eighth of the daily rate according to the class of engine or other power worked." During the course of these negotiations the question of a "new day" after eight hours' service was never raised by organization representatives.

After the issuance of Supplement No. 24 to General Order No. 27 and interpretations, effective December 1, 1919, we entered into negotiations looking toward a further revision of the agreement, still joint with the engineers and firemen. These negotiations extended over a considerable period and finally culminated in the schedule of December 1, 1920, which was after the expiration of Government Control. During all of these negotiations, a portion of which were during the period of Government Control, the question of "new days" applicable under our schedule did not arise nor were any such claims filed by the organizations. The schedule of December 1, 1920, contained the following overtime rule, "Overtime shall be paid for on the minute basis at the rate of time and one-half."

The basis of all time claims for a "new day" must necessarily be two or more kinds of service specifically differentiated by agreement. On most of the lines it is common practice to differentiate the service into four types; i. e., passenger, through freight, local freight and switch, none interchangeable and each specifically defined. Under this analysis, which we think is fundamentally sound, it is impossible to start a new day where all engines are grouped into one class of service. That is the case with our company as all engines are in "unclassified" service and paid through freight rates. Paragraph (a) of Article 1 of the current agreement reads as follows:

"All engines will be considered in unclassified service and the following through freight rates will apply: * * * *"

This language was inserted during the course of the last contract revision for the purpose of shortening but not changing the intent of preceding agreements, which read:

"Rates for engineers, firemen and helpers in through and irregular freight, pusher, helper, mine run or roustabout, belt line or transfer work, wreck, construction, snow-plow, circus trains, trains established for the exclusive purpose of handling milk, and all other unclassified service, shall be as follows: * * * *"

There has never been a crew unit rule in joint or separate schedules with the engineers and firemen, in fact such a rule could never have been applied to our service as the agreement provides for starting and stopping engine crews at different points and at different times from train crews. (See Article 5, paragraph (o), and Articles 7 and 8.) Furthermore, we frequently use men of one shift on another, part or full time, because of shortage of forces or failure of the assigned relief to report on time or at all. This means there will be a first shift fireman working with a second shift engineer and train crew, and in all instances the man worked beyond his shift is allowed overtime at the time and one-half rate regardless of the number of hours worked. It has also been the practice for years for indivi-

dual enginemen to relieve one another prior to the starting time of the shift, which means that men of one shift work with men of another. For example, a second shift fireman might relieve the first shift fireman before the second shift engineer shows up, thus working with the first shift engineer and train crew until the second shift engineer affects relief.

For years all of our enginemen have enjoyed system seniority, whereas the seniority of the trainmen with whom they work is confined to districts. This system seniority for both the engineers and firemen is recognized by the management and the agreements between the men are included in the current contracts with the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, dated May 15, 1935.

It is significant to note that "new day" claims were never advanced by the organizations under any of our contracts until 1927 notwithstanding the fact that the rules in the current agreement relating to the basic day, overtime, etc. are the same as they were in agreements extending back to 1918. It is also significant to note that these rules have not been changed since the issuance of Decisions Nos. 174, 175 and 281 of the Southwestern Regional Train Service Board of Adjustment notwithstanding the fact that the circumstances and conditions incident to the present claim are the same as they were when those cases, all of the same principle though differing in detail, were submitted to the Southwestern Board.

Careful consideration of our conclusions, which are summarized for ready reference, preclude payment for service in excess of eight hours on any other than the overtime basis specifically provided in the current and preceding agreements:

- 1—The inclusion in our agreement of only one rule dealing with service in excess of eight hours; i. e., the overtime rule.
- 2—The miscellaneous nature of our operations.
- 3—The inclusion of all our engines in "unclassified" service.
- 4—The assignment of train and engine crews without respect to each other.
- 5—The working of some engine crews with various train crews.
- 6—The absence of a crew unit rule.
- 7—The absence of an automatic release rule.
- 8—The absence of specific contract provisions regarding the start of a "new day" in the current agreement and preceding ones.
- 9—Past practices extending over a period of many years.

All data submitted in support of our respective positions has been presented to the duly authorized representatives of the employes and the carrier and made a part of the particular question in dispute.

We desire to be present at the oral hearing.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The claim is denied, for the reasons and upon the grounds stated in the accompanying memorandum of the Referee, which is hereby made a part hereof.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

ATTEST: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 26th day of September, 1940.

REFEREE'S MEMORANDUM ACCOMPANYING, AND A PART OF
AWARD NUMBER 5080, DOCKET NUMBER 5821.

Engineer Rebscher finished his eight-hour shift at 8:00 A. M. Instead of being relieved, he "was used in the passenger yard until 9:30 A. M." He has been paid straight time for eight hours, and overtime for the extra hour and thirty minutes. His present claim is "for a new day at time and one-half (emphasis supplied) for services after 8:00 A. M., February 17, 1938, and subsequent dates, instead of on an overtime basis."

This case must go to decision upon Articles 2 and 3 of the schedule. They read as follows:

"ARTICLE 2.

Basic Day

Eight (8) hours or less shall constitute a day's work."

"ARTICLE 3.

Overtime

Except when changing off where it is the practice to work alternately days and nights for certain periods, working through two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required by schedule rule to be used, all time worked in excess of eight (8) hours' continuous service in a twenty-four (24) hour period shall be paid for as overtime, on the minute basis, at one and one-half times the hourly rate according to class of engine."

Under Article 3, demands for a new or additional day and overtime, for a part of the same continuous service, are so opposed as to be mutually exclusive. To assert one is to deny the other. If a "new day" had started at eight o'clock, Mr. Rebscher would get his eight hours although he worked but one hour, thirty minutes. But if it were a "new day" of less than eight hours, he could get no overtime. His service having been continuous, the extra ninety minutes was simple overtime to be paid for accordingly.

The schedule, as a contract, must be considered as a whole, each part interpreted in whatever light may be shed on it by any or all others. This claim for an additional or "penalty day" is based upon the rule of Article 2 that "eight (8) hours or less shall constitute a day's work."

Neither that rule, nor any other, says that a new day shall begin at the expiration of the eight hours, or less, of a regular assignment. Rather, the next and controlling provision, Article 3, declares that all time worked in excess of eight hours continuous service in a twenty-four hour period, "shall

be paid for as overtime." That general rule is determinative in the absence of stated exceptions. The schedule creates many such exceptions, none of them covering such cases as this. For example, Article 10 assures all engineers who are required to transfer engines from one district to another "after completing a day's work," a minimum of four hours (prorata).

This claim is frankly one for a penalty. Penalties are not awarded under a contract unless it clearly so provides. The contract does not expressly so provide. If penalty is to be awarded it must be based upon implication. Such implication as there is runs the other way, for the reason that the contract in the numerous cases indicated provides for additional pay for stipulated arbitrary periods, even though the work requires much less time. Silence of the contract concerning a minimum day's pay in such cases as this is convincing that it was not intended.

If Mr. Rebscher is entitled to a "new day," rather than overtime, any employe under this schedule whose continuous service is even five minutes more than eight hours must have a "new day's" pay for five minutes work. If the provision for overtime does not apply to all such cases it applies to nothing. To deny Article 3 of all effect, as we must to allow this claim, is to expunge it from the contract. That can rightfully be done only by a new agreement of the parties amending the schedule. We have no right to do this for them.

The claim for the Brotherhood is that there was "a deliberate plan to have the third shift crew do the work formerly done by the first shift crew." If so, and the first shift crew lost time in consequence, they are the ones to get paid accordingly.

Wrongfully to deprive one shift of its regular assignment, in order to favor another, would be a breach of the contract. But to pay damages as here demanded to the crew which profits from the wrong, rather than to those who have lost by it, just does not make sense.

If such an astonishing result had been intended; if the thought was, in case of breach, to give a premium to those profiting by it, instead of compensating the unfortunate losers, surely it would have been so plainly expressed in the schedule as to leave no room for doubt.

The Brotherhood's theory is that Mr. Rebscher should get 12 hours pay for 90 minutes work because, for the 90 minutes he was doing work of which a brother engineer was wrongfully deprived. Assuming both wrong and resulting deprivation, Rebscher has been compensated at contract rates. If more be allowed as penalty or damages, it should go, not to Rebscher, who has been paid, but to the brother who lost both work and wage and who has not been paid.

Jurisdictional and other rules protecting jobs and wages are indispensable. They should be enforceable by penalty or damages, whichever is called for in the contract. Where, as here, no breach is shown, there is no basis for an award. But, assuming a breach, the resulting award should go to the man or men on whom the loss has fallen.

If this conclusion is legally wrong, it must succumb to the test of litigation. If ethically or economically erroneous, it is equally vulnerable to the searching analysis of publicity.

The issue is highly important to Railroad Labor, because if these penalties are to continue, they should go to the men who lose, rather than to those who gain by whatever wrong there is.

It is important to Labor generally. If the system is right for railroad men, it is equally so for all industry, and should be spread over the whole field.

The question is highly important to the public also—to the shippers and passengers who foot the bills. How much these “penalty days” are costing, the referee has no means of knowing. If the huge payments involved are to continue, not only for no equivalent in service, but also to those who profit rather than to those who lose by the supposed wrong, it is, the referee respectfully submits, a situation so utterly indefensible as to demand reversal by legislation, if it defies correction by existing agencies.

The correction should be made in the interest of Labor itself. A course so unjust and contrary to the common good, not only threatens its own defeat; also and inevitably, it must react detrimentally on those who originate and long sustain it.

The correction is most needed in the interest of collective bargaining, the success of which is essential to industrial peace and security. To be long successful, it must be free from any injustice so gross as to be abhorrent to common sense and universal standards of conduct.

To assess one party to a contract in damages for a breach, (or penalty if the contract calls for a penalty), is simple justice. To give that award to another party who has gained, while denying it to him who has lost, by the breach, is gross injustice. Equally so would be a rule requiring a wrongdoer to pay twice, once to the party damaged by the wrong and again to him who has already gained by it.

Collective bargaining, to be successful, must result in real contracts, binding as such on all the parties and to be enforced as written. If either party can dictate the result by its “economic power,” or by a threat to exercise that power, rather than by law and reason, what was intended to be a contract is converted into a mere deceptive bit of paper and collective bargaining thwarted of its essential purpose.

So far as the other awards which have been urged as precedents are based on special and particular provisions not present here, they are irrelevant to this inquiry. So far as they are based on the eight-hour rule, with nothing more, my deferential but confident submission is that they are erroneous. The standard eight-hour rule does not say that, the service being continuous, a new day shall start at the end of the first eight hours. At that point the overtime rule takes hold and is determinative, unless the controlling schedule has an applicable exception. This schedule has none.

In conclusion, it may be said with frankness and it is hoped with propriety also, that in this matter the Referee has tried his best to act judicially and not as mere mediator or arbitrator. He has considered the schedule as a contract to be interpreted and applied by the same standards of decision as other written contracts. If such agreements are not to be so interpreted and applied, they are not contracts.

(Signed) Royal A. Stone