Award No. 12469
Docket No. 12699

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle St. Chicago 3, Illinois

The First Division consisted of the regular members and in addition Referee Leverett Edwards when award was rendered

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PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of Engineer W. A. Norton, San Joaquin District, for 8 hours at 3/16ths of the daily rate for service performed on third shift, 11:00 P. M., July 22, to 1:10 A. M., July 23, 1938, in lieu of 2 hours 10 minutes overtime at 3/16ths of the daily rate account not being relieved at the end of the 8 hour shift, with check-back in Bakersfield Yard to date of this claim.

EMPLOYES' STATEMENT OF FACTS: On July 22, 1938, there were six yard engine assignments in Bakersfield Yard, assigned as follows:

	Assigned Hours	
Job No.	From	To.
605	8:00 A. M.	4:00 P. M.
608	4:00 P. M.	12:00 Mn.
609	12:00 Mn.	8:00 A. M.
607	7:00 A. M.	3:00 P. M.
611	3:00 P. M.	11:00 P. M.
610	11:00 P. M.	7:00 A. M.

Engineer W. A. Norton, regularly assigned to Bakersfield yard engine daily, Job No. 611, hours assigned 3:00 P. M. to 11:00 P. M., performed service July 22, 1938, 3:00 P. M. to 1:10 A. M., July 23, 1938. Approximately one hour before his eight hour day was up or about 10:00 P. M. July 22, 1938, instructions were given yard foreman to work the passenger trains and make trip to Cotton Compress for one car for Los Angeles. Work on passenger trains consisted of taking Los Angeles sleeper off Train No. 346 which arrived Bakersfield 11:05 P. M. July 22, 1938, and terminates at Bakersfield, placing sleeper on Train No. 56, it being handled Bakersfield-Los Angeles. Train No. 56 arrived Bakersfield 11:30 P. M. July 22, 1938, crew then proceeded to Compress which is approximately four and one-half miles from passenger station where he picked up the car for Los Angeles and returned with same, being released 1:10 A. M., July 23, 1938.

Claimed one day 3:00 P. M. to 11:00 P. M. and eight hours at time and one-half 11:00 P. M. to 1:10 A. M.

Allowed one day and two hours ten minutes overtime.

Overtime worked on assignments at Bakersfield taken from the register for the month of June, 1938, was as follows:

Date	Hours	Minutes	Date	Hours	Minutes
1	3	18	16	7	5
2	5	..	17	7	55
3	4	43	18	8	45
4	7	31	19	4	50
5	6	..	20	4	28
6	3	55	21	3	45
7	3	48	22	8	20
8	3	35	23	5	25
9	8	10	24	3	45
10	3	40	25	4	25
11	8	35	26	1	15
12	5	5	27	1	40
13	3	15	28	4	30
14	5	35	29	9	9
15	8	..	30	11	45

We also list below extra yard engines worked, Bakersfield Yard, from July 1 to August 15, inclusive, 1938:

Date	Extra Engines	First Shift	Second Shift	Third Shift	Overtime
1	1	....	3:30 P. M.	....	5-04
2	1	8:00 A. M.	....	....	6-20
3	.	....	....	....	2-55
4	.	....	....	....	6-05
5	.	....	....	....	2-00
6	2	8:30 A. M.	8:00 P. M.	....	7-05
7	2	7:00 A. M.	8:00 P. M.		6-40
8	3	7:00 A. M.	8:00 P. M.	11:00 P. M.	7-55
9	2	9:30 A. M.	8:00 P. M.		6-25
10	1	7:00 A. M.	....	....	3-00
11	1	....	10:00 P. M.	....	3-45
12	2	11:00 A. M.	....	11:00 P. M.	6-20
13	1	....	....	11:00 P. M.	4-45
14	2	8:00 A. M.	8:00 P. M.	....	7-00
15	2	7:30 A, M,	....	11:00 P. M.	6-35
16		Adv. 8:00 A. M.	....	Adv. 10:30 P. M.	6-40
17	1	....	7:00 P. M.	....	1-30
18	1	....	8:00 P. M.	....	4-15
19	1	....	3:00 P. M.	....	2-55
20	1	....	3:00 P. M.	....	7-54
21	.	....	....	....	5-05
22	.	....	....	....	6-45
23	1	8:00 A. M.	....	....	7-56
24	.	....	....	....	6-26
25	.	....	....	....	4-50
26	7	8:00 A. M.	....	....	6-50
27	2	5:00 A. M.	....	11:30 P. M.	18-01
28	1	7:00 A. M.	....	....	11-00
29	1	8:00 A. M.	....	....	6-16
30	.	....	....	....	8-10
31	.	....	....	....	5-25

Extra engines used in Bakersfield yard during first half of August, 1938, also overtime as shown by register of arrival:

Date	Extra Engines	First Shift	Second Shift	Third Shift	Overtime
1	.	....	....	....	6-05
2	.	....	....	....	4-00
3	.	....	....	....	5-40
4	.	....	....	....	6-30
5	.	....	....	....	3-30
6	.	....	....	....	4-25
7	.	....	....	....	4-35
8	.	....	....	....	2-28
9	1	....	6:35 P. M.	....	2-40
10	.	....	....	....	4-05
11	1	....	7:30 P. M.	....	7-40
12	1	....	6:00 P. M.	....	5-55
13	1	8:00 A. M.	....	....	9-55
14	2	4:00 A. M. 7:00 A. M.	....	....	17-25
15	2	6:00 A. M.	6:00 P. M.	....	14-06

POSITION OF EMPLOYES: Yard assignments were established and working under Section 1 (h), Article 11, Engineers' Agreement, reading:

"Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between 6:30 A. M. and 8:00 A. M.; the second 2:30 P. M. and 4:00 P. M.; and the third 10:30 P. M. and 12:00 midnight."

Sections 1(b) and (c), Article 11, Engineers' Agreement, read:

"(b) Eight hours or less shall constitute a day's work, overtime to be paid on minute basis at one and one-half times the hourly rate, according to class of engine. Time to begin when required to report for duty and to end at time engine is placed on designated track or engineer is released. Where engineers are required to register on and off duty, the time required to perform such service shall be construed to mean time on duty.

(c) 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 rules to be used, all time worked in excess of 8 hours continuous service in a twenty-four 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.

Should engineer be held on duty account failure of relief engineer to report at time specified, he will be paid on basis of time and one-half overtime until relieved from duty.

If engineer is held on duty beyond regular hours of assignment account of Company not furnishing relief, he will be paid a minimum of eight hours at time and one-half.

NOTE: An engineer sent to an outside point where extra list is not maintained to relieve man holding regular assignment in yard service, and during period relieving regular assigned man is used on second shift within a twenty-four hour period, will be allowed time and one-half for service on second shift.

Question 90, Int. No. 1, Supplement No. 24:

What compensation should be allowed for additional service where a crew is regularly assigned to work 12 Midnight to 8 A. M.

and (service performed not affected by exceptions outlined in this rule):

(a) Is required to cover the third shift on the same day—4 P. M. to 12 Midnight?

(b) Is required in an emergency to work 8:30 A. M. until 11:30 A. M.?

(c) Is required in an emergency to work 8 P. M. to 12 Midnight (4 hours) on the same day?

(d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11:00 P. M. and being relieved at 7:00 A. M., and consequently in the 24-hour period works 9 hours, but not more than 8 hours on a shift?

Decision: (a) Eight hours at time and one-half. (b) Eight hours at time and one-half. (c) Eight hours at time and one-half. (d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day."

It is noted from the facts that there were two engines in continuous service around the clock as follows:

Assignment	607,	First Shift	7:00 A. M. to 3:00 P. M.
"	611,	Second Shift	3:00 P. M. to 11:00 P. M.
"	610,	Third Shift	11:00 P. M. to 7:00 A. M.
"	605,	First Shift	8:00 A. M. to 4:00 P. M.
"	608,	Second Shift	4:00 P. M. to Midnight
"	609,	Third Shift	Midnight to 8:00 A. M.

Each engineer assigned was to be provided relief at the end of each 8 hour shift. The Company, however, failed to furnish relief, therefore Engineer Norton is entitled to 8 hours at 3/16ths of the daily rate for overtime worked under the provisions of Section 1(c), Article 11, Engineers' Agreement. The second paragraph of said rule provides that if the engineer should be held on duty account failure of relief engineer reporting at time specified, he will be paid on basis of time and one-half.

The third paragraph of the rule specifically provides that if engineer is **held on duty beyond regular hours of assignment** account Company not furnishing relief, he will be paid a minimum of 8 hours at time and one-half.

The second and third paragraphs of Section 1 (c), Article 11 were incorporated in the Engineers' Agreement December 29, 1922 following decisions in Cases 173 and 1278, Railway Board of Adjustment No. 1.

All facts and position of Committee have been furnished the Carrier.

Committee asks that claim be sustained.

CARRIER'S STATEMENT OF FACTS: On July 22, 1938, there were six yard assignments in Bakersfield Yard, assigned as follows:

	Assigned Hours	
Job No.	**From**	**To**
605	8:00 A. M.	4:00 P. M.
608	4:00 P. M.	12:00 MN.
609	12:00 MN.	8:00 A. M.
607	7:00 A. M.	3:00 P. M.
611	3:00 P. M.	11:00 P. M.
610	11:00 P. M.	7:00 A. M.

Engineer Norton was assigned on July 22, 1938, to job No. 611, 3:00 P. M. to 11:00 P. M., and performed service on his assignment on that date. He was instructed by proper authority prior to 11:00 P. M. that

it would be necessary for him, after completing other switching, to switch passenger trains Nos. 346 and 56 and also go to the cotton compress for one car destined to Los Angeles. Switching passenger trains Nos. 346 and 56 consisted of taking Los Angeles sleeper off train No. 346, which arrived Bakersfield at 11:05 P. M., and placing it on train No. 56, which arrived Bakersfield at 11:30 P. M. After switching said passenger trains, Engineer Norton proceeded to cotton compress for car destined to Los Angeles, returned with car, and was released from duty at 1:10 A. M., July 23.

Engineer Norton was allowed one yard day (8 hours) at straight yard rate of pay, 3:00 P. M. to 11:00 P. M., and in addition thereto, 2 hours 10 minutes overtime at one and one-half times the hourly rate, 11:00 P. M. to 1:10 A. M., under the provisions of Article 11, Sections 1(b) and (c), Engineers' current Agreement, which was in effect on July 22, 1938, and which provides:

"(b) Eight hours or less shall constitute a day's work, overtime to be paid on minute basis at one and one-half times the hourly rate, according to class of engine. Time to begin when required to report for duty and to end at time engine is placed on designated track or engineer is released. Where engineers are required to register on and off duty, the time required to perform such service shall be construed to mean time on duty.

(c) 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 rules to be used, all time worked in excess of 8 hours continuous service in a twenty-four 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.

Should engineer be held on duty account failure of relief engineer to report at time specified, he will be paid on basis of time and one-half overtime until relieved from duty.

If engineer is held on duty beyond regular hours of assignment account of Company not furnishing relief, he will be paid a minimum of eight hours at time and one-half.

NOTE: An engineer sent to an outside point where extra list is not maintained to relieve man holding regular assignment in yard service, and during period relieving regular assigned man is used on second shift within a twenty-four hour period, will be allowed time and one-half for service on second shift.

Question 90, Int. No. 1, Supplement No. 24:

What compensation should be allowed for additional service where a crew is regularly assigned to work 12 Midnight to 8 A. M. and (service performed not affected by exceptions outlined in this rule):

(a) Is required to cover the third shift on the same day—4 P. M. to 12 Midnight?

(b) Is required in an emergency to work 8:30 A. M. until 11:30 A. M.?

(c) Is required in an emergency to work 8 P. M. to 12 Midnight (4 hours) on the same day?

(d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11:00 P. M. and being relieved at 7 A. M., and consequently in the 24-hour period works 9 hours, but not more than 8 hours on a shift?

Decision: (a) Eight hours at time and one-half. (b) Eight hours at time and one-half. (c) Eight hours at time and one-half. (d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day.

Question 91, Int. No. 1, Supplement No. 24:

An extra man is worked on two 8-hour shifts within the same 24-hour period, or on one 8-hour shift and is started on another shift in the same 24-hour period that spreads into the next 24-hour period. How shall he be paid for such service?

Decision: It should be understood that under that portion of Section 1(c) applying to extra men when required to remain on duty in excess of eight hours in continuous service they will receive overtime at time and one-half on the minute basis. When they start a second trick within a 24-hour period, they will not be paid under the overtime rule, but will start a new day regardless of present rules and will receive for eight hours or less straight time rates. The intent of this is not to deprive extra men of extra work, which would result if time and one-half had to be paid for the second shift.

Question 92, Int. No. 1, Supplement No. 24:

What compensation should be allowed an extra man who is called and at 4 A. M. relieves a regular man, who is covering an assignment 12 Midnight to 8 A. M. and the assignment works until 9 A. M.?

Regular engineer working four hours?

Extra engineer working five hours?

Remainder of crew working nine hours?

Decision: Extra man will receive a minimum day only.

Question 94, Int. No. 1, Supplement No. 24:

If a yard crew was assigned for 10 hours and for some reason was relieved at the expiration of 8 hours, what number of hours is to be allowed?

Decision: A minimum of 8 hours. Assignments should be for 8 hours and time worked in excess thereof should be paid as overtime."

POSITION OF CARRIER: It is the position of this carrier that no affirmative award either in whole or in part can be made or would be warranted, because:

1. (a) Claim constitutes a blanket claim.

   (b) That portion of the alleged claim presented by petitioner for ". . . a check-back in Bakersfield yard to date of this claim" has not been handled under agreement with the carrier.

2. Claim constitutes a request for a new or additional rule not within the authority or jurisdiction of the Board to grant.

3. The agreement rule upon which claimant relies does not support the alleged claim.

Argument—Introductory

1. Claim constitutes a blanket claim:

The ex parte submission of the petitioner to the National Railroad Adjustment Board, First Division, constitutes a blanket claim without setting

forth either the specific dates or the facts upon which the claim is predicated except for his reference to July 22, 1938. Therefore, General Chairman, Brotherhood of Locomotive Engineers, through and by reason of his access to the National Railroad Adjustment Board, First Division, seeks to compel respondent carrier to search its records for the purpose of discovering, if possible, evidence to sustain the blanket claim for one or more dates, in derogation of all principles of law and equity and in defiance of the procedure provided for in Section 2, Second and Sixth, and Section 3 (i) of the Amended Railway Labor Act; hence, if for no other reason, the Board should dismiss the claim in its entirety, and respondent carrier hereby enters motion to dismiss the claim in its entirety. See Awards 2145 and 4712, National Railroad Adjustment Board, First Division, wherein this Board decreed its policy with respect to blanket claims.

1. (b) **That portion of the alleged claim presented by petitioner for ". . . a check-back in Bakersfield yard to date of this claim" has not been handled under agreement with the carrier.**

The claim submitted to this Board is not the same claim which was presented to the carrier and discussed in conference. Claim submitted to the carrier by General Chairman, Brotherhood of Locomotive Engineers, on February 20, 1939, and the claim discussed in subsequent correspondence and conference was for 8 hours at time and one-half for service performed 11:00 P. M. July 22 to 1:10 A. M. July 23, 1938 by Engineer W. A. Norton.

The jurisdiction of the Board is limited by provision of the statute (Section 3, Railway Labor Act as amended June 21, 1934, 45 U. S. Code 153) by which it was created. Section 3, paragraph (i) of the Act provides:

> "The **disputes** between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . **shall be handled in the usual manner,** up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment **in this manner,** the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis ours)

It is evident that the petitioner now attempts by his submission of this case to your Board to enlarge upon the scope and provisions of the alleged claim as it was handled with the Carrier in accordance with Section 3, paragraph (i) of the Railway Labor Act as amended; hence, if for no other reason, the Board should dismiss the claim and respondent carrier hereby enteres motion to dismiss.

2. **Claim constitutes a request for a new or additional rule not within the authority or jurisdiction of the Board to grant.**

There were no provisions in the agreement between the respondent carrier and the Brotherhood of Locomotive Engineers in effect on January 9, 1931, nor on any intervening date to and including July 22, 1938, nor subsequent thereto, that directly, by inference, or by implication, supports petitioner's claim. The presentation of this claim to the National Railroad Adjustment Board, First Division, is in effect an effort on the part of the Brotherhood of Locomotive Engineers to influence the Board to establish and write into the Engineers' Agreement that was in effect July 22, 1938 a rule which does not appear in that agreement. Therefore, said Brotherhood of Locomotive Engineers is soliciting the members of the National Railroad Adjustment Board, First Division, to award a new rule in violation of the Railway Labor Act and the authority delegated to the Board by said Act, and would have the Board expunge from the Engineers' Agreement of the respondent carrier, Article 11, Sections 1(b) and (c). In connection with the efforts on the part of the Brotherhood of Locomotive Engineers, respondent carrier directs the attention of your Board to that portion of Award 5080, which is as follows:

"If Mr. Rebscher is entitled to a 'new day,' rather than overtime, any employe under this schedule whose continuous service is even five minutes 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."

Under the Railway Labor Act the authority of this Board is defined and circumscribed. It does not permit this Board to make any change in, add to nor take away from any provisions in any contract or agreement which is in evidence or upon which claims that are presented to this Board are predicated; therefore, the carrier again moves for dismissal of the claim.

3. **The agreement rule upon which claimant relies does not support the alleged claim.**

Engineer Norton was allowed one yard day at straight time rate, computed from 3:00 P. M. to 11:00 P. M., in accordance with Article 11, Section 1 (b), and in addition, for service performed continuous therewith, 11:00 P. M. to 1:10 A. M., was allowed 2 hours and 10 minutes overtime at one and one-half times the hourly rate of pay, in accordance with Article 11, Sections 1(b) and (c).

There is no provision in the Engineers' Agreement nor has any practice been established on this property, that could be interpreted as sustaining General Chairman, Brotherhood of Locomoitve Engineers' position that for the service performed by the claimant between 11:00 P. M. and 1:10 A. M., he should be allowed an additional yard day at time and one-half rates. To the contrary, Article 11, Section 1(c), Engineers' Agreement definitely precludes the payment claimed—it expressly provides under the facts and circumstances in this case, that **all time worked in excess of 8 hours continuous service in a 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.**

As conclusive evidence that the payment of continuous time including actual overtime for time worked after the expiration of 8 hours has, in similar cases, been previously recognized as correct, we submit as Carrier's Exhibit "A", sheets 1 to 8, inclusive, and made a part of this submission, five letters addressed by carrier's representative to General Chairmen, Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen, in 1924, denying similar claims, and two subsequent letters addressed to Division Superintendents, copies of which were forwarded to General Chairman, BLE and BLF&E, also denying similar claims. It will be observed that General Chairmen withdrew one of the 1924 claims; no response was received nor exception taken to carrier's decisions in the other cases, indicating acceptance by the organizations of carrier's decisions.

Further and conclusive evidence that the payment made to the claimant in the instant case by respondent carrier conformed to the provisions of Article 11, Sections 1 (b) and (c), Engineers' Agreement, is attested by Awards 1297, 2535, 2902, 3475, and 5080 of the National Railroad Adjustment Board, First Division.

In Award 1297, the Board, without a referee, stated in its Findings:

"The record shows that this crew worked as a unit, simply working overtime and was properly paid for service performed."

Claim in that case was denied by your Board.

In Award 2535, the rules of the agreement on the property involved are not quoted; however, it is worthy of note that the circumstances were similar to those involved in the instant claim. Nevertheless, the Board denied the claim of the employes.

In Award 2902, the circumstances were similar to those involved in the instant case. Article 10 on the property involved is verbatim to Article 11, Section 1 (c) first paragraph, of the Engineers' Agreement on the respondent carrier's property except that Article 10 on the property involved carries an additional provision which is not relevant to this case. The Board denied the claim of the petitioner in its Award 2902.

In Award 3475, the circumstances are similar to those involved in the instant claim. Article 14 on the property involved is similar to Article 11, Section 1 (c), first paragraph, of the Engineers' Agreement on the respondent carrier's property. Nevertheless, the Board stated:

> "The claims made subject of dispute cannot be sustained under Article 20-A of agreement between the parties."

and denied the claim. In connection therewith, and especially with respect to Article 20-A of the agreement in evidence in Award 3475, attention is directed to the fact that there has never been any practice or rule on the respondent carrier's property by which engineers in yard service were allowed "arbitraries or special allowances" for "additional service performed during the course of or continuous after the end of the regularly assigned hours." Instead, it has been the invariable practice on the respondent carrier's property to compensate engineers in yard service for overtime worked continuous with and subsequent to the expiration of eight hours on duty at the overtime rate on the minute basis under, and in accordance with, the plain provisions of Article 11, Section 1 (b) and (c), of the Engineers' Agreement which has been in effect on this property for many years, except as provided in Article 11, Section 1 (c), third paragraph, which is not involved in the present case, and on which we will later comment.

In Award 5080, National Railroad Adjustment Board, First Division, with Referee Roval A. Stone sitting with the Board as a member thereof (Section 3-1, Railway Labor Act) denied a claim submitted by the Brotherhood of Locomotive Engineers for payment of a new day (8 hours) at time and one-half for service performed after the expiration of 8 hours from the time reported for duty for Engineer K. W. Rebscher of the Terminal Railroad Association of St. Louis for February 17, 1938. In that case Article 3 of the Engineers' Agreement of the Terminal Railroad Association of St. Louis, is verbatim with Article 11, Section 1 (c), first paragraph, of the Engineers' Agreement which was in effect on the respondent carrier's property on the date of this claim, that is, July 22, 1938.

Attention of the Board is directed to the fact that Award 5080 in its Findings stated:

> "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.**" (Emphasis ours.)

In connection with that part of the Findings above quoted, attention is directed to Section 3-L and 3-n of the Railway Labor Act; therefore, said award is the award of the National Railroad Adjustment Board, First Division, by a majority vote of all of the members of that Board.

The circumstances involved in Award 5080 are parallel to the circumstances and facts surrounding the work and the payment of the claimant, i. e., Engineer Norton, in the case which is now being discussed.

In Award 5080, Engineer Rebscher was assigned to work 12:00 midnight to 8:00 A. M. on February 17, 1938. On that date he worked until 9:30 A. M., or 1 hour 30 minutes beyond 8:00 A. M. Claim was made for payment of 8 hours or a new yard day, at the rate of time and one-half for service performed 8:00 A. M. to 9:30 A. M., February 17, 1938. The Board denied the claim and stated in part:

> "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 overtome. 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 (pro rata).

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.

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."

All that was said by Referee Royal A. Stone and adopted by the Board in its Award 5080, applies with equal force in connection with the claim now before this Board in favor of claimant, Engineer Norton. Therefore, if for no other reason, this Board should deny the instant claim.

General Chairman, Brotherhood of Locomotive Engineers, in his presentation of this claim to respondent carrier, stated in part:

"Claim of Engineer Norton is based on Section 1(c), Article 11, Engineers' Agreement, reading:

'If engineer is held on duty beyond regular hours of assignment account of Company not furnishing relief, he will be paid a minimum of eight hours at time and one-half.'

Question 90, Int. No. 1, Supplement No. 24:

What compensation should be allowed for additional service where a crew is regularly assigned to work 12 Midnight to 8 A. M. and (service performed not affected by exceptions outlined in this rule):

(a) Is required to cover the third shift on the same day—4 P. M. to 12 Midnight?

(b) Is required in an emergency to work 8:30 A. M. until 11:30 A. M.?

(c) Is required in an emergency to work 8 P M. to 12 Midnight (4 hours) on the same day?

(d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11:00 P. M. and being relieved at 7 A. M., and consequently in the 24-hour period works 9 hours, but not more than 8 hours on a shift?

Decision: (a) Eight hours at time and one-half. (b) Eight hours at time and one-half. (c) Eight hours at time and one-half. (d) On account of complying with the 48-hour provision, which makes is permissible to change beginning time, crews only entitled to a minimum day.' "

The claimant, Engineer Norton, was not held on duty beyond regular hours of assignment account company not furnishing relief, nor was he required to commence additional service under the circumstances outlined in Question 90, Interpretation No. 1 to Supplement No. 24.

That part of Section 1(c), Article 11, Engineers' Agreement, providing—

> "If engineer is held on duty beyond regular hours of assignment account of company not furnishing relief, he will be paid a minimum of eight hours at time and one-half."

together with its preceding paragraph,

> "Should engineer be held on duty account failure of relief engineer to report at time specified, he will be paid on basis of time and one-half overtime until relieved from duty."

was agreed to and incorporated in the Engineers' Agreement December 29, 1922, and has appeared in each succeeding Engineers' Agreement. The history leading up to the mutual agreement which incorporated these provisions in the agreement of December 29, 1922, had its inception in Case No. 173, Railway Board of Adjustment No. 1, dated August 21, 1918, in which the position of Committee was stated to be:

> "The controversy in question involves case of an engineer on an eight-hour assignment who, after completing the work, and the crew was sent to the relieving point, **was required to continue in service with another fireman and another switching crew.**" (Emphasis ours)

The Board's decision was:

> "The principle involved in this case was decided by the Commission of Eight.
>
> The original decisions of that Commission contained no definite provisions for such cases. Later, questions were submitted covering cases of yardmen working with an engine or crew on a succeeding or following shift, and under date of July 25th, 1917, that Commission rendered a decision that in such cases yardmen would be considered as starting a new day.
>
> As decisions of the Commission of Eight have been confirmed by General Order No. 13, cases growing out of their decisions are governed by their rulings. As this Board has stated in other decisions, it does not appear proper that the decisions of the Commission of Eight which plainly require changes in former practices, should be made to apply before they were distributed.
>
> Specific instances were not submitted in this case. Therefore, the Board decides that if this case covers instances occurring before the decision of July 25th, 1917, was received, the former practice of allowing overtime is not changed; in cases occurring thereafter, the decision of the Commission of Eight applies and pending claims should be adjusted accordingly."

Engineer Norton was not required to continue in service with another fireman or another switching crew but worked overtime with **his** crew **as** a unit. There was no failure on the part of the company to furnish relief for the reason that the crew assigned to Job No. 610 assigned to commence work at 11:00 P. M. **reported for duty and began service** at 11:00 P. M., July 22, 1938.

Subsequently, the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen went before the United States Railroad Labor Board in Docket 703, submitting the following:

> "Claim of B. A. McCarl, fireman, for eight hours, and time and one-half after completing regular assigned run."

Statement of Facts in that case read:

> "Controversy as to compensation for Fireman McCarl, regularly assigned to 8 A. M. to 4 P. M. switch engine, who, due to the

failure of the relief fireman to appear on time, was used on the succeeding shift from 4 P. M. to 4:30 P. M."

The Employes' Position was stated in part:

"It is our understanding that if Fireman McCarl **had remained in continuous service with the same crew with which he performed service under his assignment the 30 minutes would have been considered as overtime.** On the other hand, after having completed the service of his assignment as was evidenced by the fact that the balance of the crew was released, he began a day with another crew." (Emphasis ours)

The Board in its decision No. 1462 of December 8, 1922, denied claim of Fireman McCarl.

Disposal of cases submitted subsequent to December 29, 1922 (Exhibit "A"), and at a time when the third paragraph of Article 11, Section 1(c), cited by petitioner in support of claim, was in the Engineers' Agreement—conclusively confirm the understanding and accepted interpretation of that rule, to the effect that an engineer in yard service who was required to work beyond and continuous with the limits of his eight-hour assignment, is entitled to compensation at the rate of time and one half on the minute basis for service performed in excess of 8 hours continuous service under Section 1(b) and first paragraph of Section 1(c), Engineers' Agreement, but that he is not entitled to a minimum of eight hours at time and one half under the provisions of the third paragraph of Article 11, Section 1(c), except in instances where the company fails to furnish relief. As hereinbefore stated, there was no failure on the part of the company to furnish relief in the instant case; **relief engineer reported for duty and went to work at 11:00 P. M.**

It is obvious that Question 90, Interpretation No. 1, Supplement No. 24 is not relevant.

CONCLUSION

Upon the undisputed facts and the clear and conclusive evidence set forth in the foregoing position of carrier that Engineer Norton was properly compensated in accordance with the provisions of Article 11, Sections 1(b) and (c), Engineers' Agreement, by the allowance of one yard day at straight time rate and 2 hours 10 minutes at time and one-half, computed on a continuous time basis from 3:00 P. M. July 22 to 1:10 A. M. July 23, 1938, the Board, even if it assumes jurisdiction of this proceeding in spite of our objections, should conclude the alleged claim to be without merit and should deny it, and the carrier makes motion that it should be so denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

Carrier requests the privilege of an oral hearing.

(Exhibits not reproduced.)

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.

Claimant depends upon Article 11, Section 1 (c), the third paragraph, to support the claim made in this docket; however such provision is but one of several in the schedule rules having some reference to services performed beyond the hours of regular assignment.

One of the fundamental rules for interpreting any agreement is to give effect to all of its provisions if same can be done in a consistent manner; interpreting each section in the light of the others, and reconciling the whole whenever possible.

Article 11, Section 1 (b) provides in part, "Eight hours or less shall constitute a day's work, overtime to be paid on minute basis at one and one-half times the hourly rate . . ."; and the paragraph immediately following, being the first paragraph of Section 1 (c), contains a provision that, with certain exceptions, "all time worked in excess of 8 hours continuous service in a twenty-four 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."

To grant unqualifiedly the construction and application of the third paragraph of Article 11, Section 1 (c) as contended for by claimant herein, would have the effect of casting not only the foregoing sections, and others, of the schedule rules into an irreconcilable confusion; but would require the disregard of practices of ancient age.

The interpretation we are now making, however, does not destroy Article 11, Section 1 (c), third paragraph, but brings it into line consistent with other schedule rules concerning overtime. It remains quite possible under the present award to give force and effect to said third paragraph in a proper factual case. This docket presents, however, a situation in which the crew, as a unit, merely worked overtime in continuous service, and claimant was properly compensated under the overtime rule. Therefore, Article 11, Section 1 (c), third paragraph, is not applicable.

AWARD

Claim denied.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

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

Dated at Chicago, Illinois, this 22nd day of November, 1948.