Award 16962
Docket 27944

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Donald F. McMahon

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY—EAST

STATEMENT OF CLAIM: "Claim of Iowa and Dakota Division, First District Engineer R. J. Kelly and Fireman J. A. Pavlosky, January 15, 1951; claims also made for all other engineers and firemen who submitted claims for 160 miles with overtime at the expiration of eight (8) hours computed from the time required to report for duty at the starting point until relieved at the end of the round trip."

EMPLOYES' STATEMENT OF FACTS: The engine crews in question operated in passenger service Train No. 2 Mitchell, South Dakota, to Canton, South Dakota; No. 11 Canton to Mitchell. The actual road mileage 79.2 in each direction.

On the dates for which time is claimed the engine crew reported for duty at the roundhouse at Mitchell at 6:30 A. M.; took the engine from that point to the depot, departed from Mitchell passenger station at 7:00 A. M. and upon arrival at Canton passenger station at 9:20 A. M. were required to turn engine on wye in advance of making the return trip Canton to Mitchell. After arriving at Canton and completing all work in connection with Train No. 2 the engine crew is relieved from duty for a period of one hour or more before departing on Train No. 11 Canton to Mitchell. No 11 scheduled to depart from Canton 2:40 P. M. due to arrive at Mitchell 4:50 P. M. and engine crew is relieved at the depot.

CARRIER'S STATEMENT OF FACTS: The claimant engine crews are regularly assigned in short-turnaround passenger service operating passenger Train No. 2, Mitchell, South Dakota to Canton, South Dakota and Train No. 11 Canton to Mitchell, in accordance with the provisions of Engineers' and Firemen's Schedule Rules 2 (b) and 3 (b), respectively, reading:

> "Engineers (firemen) on short turn-around passenger runs, no single trip of which exceeds 80 miles, including suburban and branch line service, shall be paid overtime for all time actually on duty or held for duty, in excess of eight hours (computed on each run from

the time required to report for duty to the end of that run) within ten consecutive hours; and also for all time in excess of ten consecutive hours computed continuously from the time first required to report to the final release at the end of the last run. Time shall be counted as continuous service in all cases where the interval of release from duty at any point does not exceed one hour. This section applies regardless of mileage made. "For calculating overtime under this rule the management may designate the initial trip.

NOTE:—The preceding paragraph applies, regardless of mileage made, to any passenger run, regular or irregular, including suburban service, no 'single trip' of which exceeds 80 miles. Engineers (firemen) may be released at the turnaround point and be paid a minimum of 100 miles, and in addition thereto such final terminal delay as may accrue under schedule rule, provided they are notified in the original call that they are wanted for a straight-away trip. This permits engineers (firemen) being released by reason of impassible track conditions caused by wrecks, snow blockades and washouts."

Since these rules were made effective in the contracts, the wording "ten consecutive hours" has been changed to "nine consecutive hours;" otherwise there has been no change in the provisions of either rule.

The actual trip mileage in each direction on this assignment computed from passenger station to passenger station is 79.2 miles. Thus, the entire trip mileage Mitchell to Canton and return to Mitchell is 158.4 miles.

In addition to the road trip mileage the enginemen and brakeman on this assignment are required to handle the engine from the roundhouse to the passenger station at Mitchell, and at Canton move the engine from the passenger station around the wye then to the roundhouse track, and when they again go on duty for return movement, Train No. 11, they are required to handle the engine from the roundhouse to the passenger station. For these movements with the engine, the enginemen and brakeman who accompany the engine are allowed two miles in addition to the trip mileage in accordance with the provisions of Engineers' and Firemen's Schedule Rules 1 (b), reading:

"Actual miles, or fractions thereof, made between roundhouse and train yard or passenger station, running for coal or water and turning on wyes, **will be computed with actual trip mileage,** provided that such mileage will not be allowed when the time so engaged is paid for under any other schedule rule." (Emphasis supplied)

Trainmen's Schedule Rule 14 (h) reads as follows:

"Actual miles, or fractions thereof, made between roundhouse and train yard or passenger station, running for coal or water and turning on wyes, **will be computed with actual trip mileage,** provided that such mileage will not be allowed when trainmen do not accompany the engine or train, nor when the time so engaged is paid for under any other schedule rule." (Emphasis supplied)

Conductors' Schedule Rule 10 (h) reads the same as Trainmen's Schedule Rule 14 (h) except the word "conductors" is used instead of "trainmen."

Due to the two miles allowed under Engineers' and Firemen's Schedule Rules 1 (b) for handling their light engine to and from the passenger station and around the wye at Canton, the Committees contend this increases the trip mileage in each direction to 80.2 miles which makes the trip mileage in excess of 80 miles for the single trip and for this reason enginemen's overtime cannot be computed on the basis outlined in Engineers' Schedule Rule 2 (b) and Firemen's Schedule Rule 3 (b), previously quoted:

The Committees contend that the overtime must be computed for these reasons on the basis of Engineers' and Firemen's Schedule Rules 2 (d) and 3 (d), respectively, reading as follows:

> "Engineers (firemen) on other passenger runs shall be paid overtime on a speed basis of twenty miles per hour computed continuously from the time required to report for duty until released at the end of the last run. Overtime shall be computed on the basis of actual overtime worked or held for duty, except that when the minimum day is paid for the service performed, overtime shall not accrue until the expiration of five hours from the time of first reporting for duty."

Thus, if the road trip mileage would be considered in excess of 80 miles as contended by the Committees, the claimant engineers and firemen would receive overtime after being on duty eight hours instead of after being on duty nine hours as provided in Engineers' and Firemen's Schedule Rules 2 (b) and 3 (b), respectively. Accordingly, the claims represent an additional one hour overtime on each date.

POSITION OF EMPLOYES: Claim is based on Engineers' Rule 2 (f) and Firemen's Rule 3 (f) reading:

> "Passenger runs may be operated as 'turn-arounds' the single trip of which is more than eighty miles and less than ninety miles, on the basis of actual miles run. Overtime on such runs to be based on a speed of twenty miles per hour, computed from the time required to report for duty at the starting point until relieved at the end of round trip; this to include time at turnaround point.
>
> "If engineer (fireman or helper) is released from duty at turnaround point, he will be paid on the basis of single trips, with a minimum of one hundred miles for each; overtime after five hours on duty.
>
> "Under this section turn-around runs will be definitely specified by the Company and terminal delay will not be paid for at turnaround point. This rule does not abrogate the payment of time under the provisions of 1 (d) and 21 (b)."

It is the position of the organizations the computing of overtime on runs in question is clearly provided for under the above quoted rule. In support of the employes' contention we desire to call the Board's attention to the term "single trip." The claimants are assigned to passenger service between Mitchell and Canton, South Dakota and the single trip from Mitchell to Canton on passenger Train No. 2 exceeds 80 miles because the crews operating on these trains commence work at the roundhouse at Mitchell and the distance from the roundhouse to the passenger station is eleven city blocks. Upon arrival at Canton they turn the engine on the wye and by so doing cover a distance of 28 city blocks. The actual mileage from the depot at Mitchell to the depot at Canton is 79.2 miles. The mileage covered between the roundhouse and depot at Mitchell and turning the engine on the wye at Canton is in excess of two miles. Therefore, the single trip Mitchell to Canton is 81 miles inclusive of the territory covered between the roundhouse and passenger depot at Mitchell and turning on the wye at Canton.

In further support of the employes' position Engineers' Rule 1 (b) and Firemen's Rule 1 (b) reads:

> "Actual miles, or fractions thereof, made between roundhouse and train yard or passenger station, running for coal or water and turning on wyes, will be computed with actual trip mileage, provided that such mileage will not be allowed when the time so engaged is paid for under any other schedule rule."

The Board's attention is invited to that portion of the above quoted rule which provides the mileage or fraction thereof, "will be computed with actual trip mileage." The carrier does not question the payment for 81 miles on Train No. 2 and has been and still is allowing this mileage for Train No. 2. This mileage together with the 79.2 miles made by Train No. 11 makes 160 miles for the round trip. It is the contention of the Organizations on the runs in question, the distance being 160 miles for the round trip, overtime should begin after the expiration of 8 hours. It is the position of the organizations the carrier's contention is incorrect in computing overtime after nine hours under Section 7 Short Turn-around Passenger Service and the Board's attention is called to the rule reading:

> "Engineers and firemen and helpers in other than steam power, on short turn-around passenger runs no single trip of which exceeds 80 miles, etc."

The recognized mileage made on Train No. 2 is in excess of 80 miles, and the term "no single trip of which exceeds 80 miles" clearly prevents the carrier from applying this rule to the runs in question, and deducting one hour for the period the engine crew is relieved at Canton between arriving time of No. 2 and the departing time of No. 11 at Canton and allowing overtime after nine hours.

The carrier may not consider the distance covered between the roundhouse and the Mitchell passenger depot and the distance covered in turning on the wye at Canton but the organizations hold it must be considered territory covered and distance traveled during the crew's trip, therefore, is trip mileage.

Claims should be sustained and the organizations respectfully request decision accordingly.

It is affirmed all data in support of the organizations' position has been presented to the carrier in writing and has been handled in conference.

The organizations do not request oral hearing unless the carrier makes such request.

POSITION OF CARRIER: The Carrier's position is that the actual road trip mileage is 79.2 miles in each direction computed from depot to depot at Mitchell and Canton, and consequently no single trip exceeds 80 miles and the engineers and firemen working on this assignment are properly compensated in accordance with the provisions of Engineers' and Firemen's Schedule Rules 2 (b) and 3 (b), respectively, and the claim for overtime after eight hours instead of after nine hours is not supported by schedule rule, agreement or interpretation.

The trip mileage of passenger runs is always computed on the basis of the mileage from passenger station to passenger station, and mileage made between roundhouse and passenger station, turning engines on the wye and other arbitraries are not considered in determining the trip mileage. This is substantiated by the fact that on inter-divisional passenger runs mileage due each seniority district is based on the actual trip mileage from depot to depot, and any mileage operated in the terminals between passenger stations and roundhouses, turning engines on the wye and other arbitraries are never taken into consideration in determining the mileage due engineers and firemen on any of the seniority districts involved.

Engineers' and Firemen's Schedule Rules 1 (b) are clear and need no interpretation. These rules clearly state that actual miles, or fractions thereof, made between roundhouse and train yard or passenger station, running for coal or water and turning on wyes, will be computed with actual trip mileage, with the further provision that such mileage will not be allowed when the time so engaged is paid for under any other schedule rule. Accordingly, it is very clear that this mileage is not a part of the trip mileage and cannot be determined in deciding the length of the run.

The mileage in handling the engines between the roundhouse and passenger station and turning on wyes is paid for in addition to the trip mileage provided that it is not paid for under any other schedule rule and is in addition to the trip mileage.

If such mileage was a part of the trip mileage as contended by the Committees, there would be no reason for stating it would be computed with the actual trip mileage and there would be no reason for the language providing such mileage will not be allowed when the time so engaged is paid for under any other schedule rule.

If the mileage made between roundhouse and passenger station and turning on wyes was a part of the actual trip mileage, there would be no provision in Conductors' Schedule Rule 10 (h) or Trainmen's Schedule Rule 14 (h) to disallow such payment when conductors and trainmen do not accompany the engine or train. Certainly, if this mileage was considered as a part of the trip mileage, such mileage could not be disallowed merely because conductors and trainmen do not accompany the engine or train in making the movements between the roundhouse and passenger station and around the wye.

The clear language of Engineers' and Firemen's Schedule Rules 1 (b), Conductors' Schedule Rule 10 (h) and Trainmen's Schedule Rule 14 (h) reveal that the mileage between the roundhouse and passenger station and turning on wyes is an arbitrary allowance **in addition to the trip mileage** and computed therewith when time so engaged is not paid for under any other schedule rule, and is computed with the actual trip mileage and not a part thereof.

The clear language of the schedule rules involved clearly reveals that the trip mileage is 79.2 miles in each direction instead of 80.2 miles as contended by the Committees and no single trip of the assignment exceeds 80 miles. Therefore, the claim for an additional one hour's overtime is not proper nor supported by schedule rule, agreement or interpretation and should be denied.

To sustain the Committees' position and claim would be in effect writing a new rule or writing additional language into the present rule, thus modifying or adding to the clear language of the rule as written.

The Carrier further contends that your Division has no authority to write a new rule nor to alter, amend or in any manner modify or add to the clear language of the schedule rule as written. This can only be done through negotiations and agreement between the parties involved on the property. Your Division has consistently so held with and without the services of a referee.

Your Division has consistently held in substance that where there is no exception written into the rule, you do not have the authority to make any exception to the rule and will not do so and have consistently decided the cases involved on the clear language of the rule as written into the contract, sustaining the claims of the employes when the clear language of the rule sustains the claim regardless of the Carrier's plea that an exception should be made, and has consistently denied the claims of the employes on the clear language of the rule as written into the contract regardless of the employes' plea that an exception should be made. In this connection your attention is directed to the following NRA Board, First Division Awards:

2122	2949	8812
2129	5400	10068
2168	5501	10869
2352	7438	11440
2522	7589	11544
2860	7824	14295

In Award 5400 rendered with the assistance of Referee Robert G. Simmons, January 15, 1941, the Findings contained this statement:

"* * * This Division does not have the right to alter or modify those agreements,* * *."

In Award 7589 rendered by your Division without the assistance of a referee January 6, 1943, the following statement is quoted in the Findings:

"The record does not disclose any authorized exception to the plain language of said rules and it is held that there can be no exception made thereto unless by negotiation and agreement between the parties to the controlling and prevailing agreement between them governing wages and working conditions of locomotive firemen, hostlers, and outside hostler helpers."

In Award 7824, your Division on its own motion without the assistance of a referee on March 9, 1943, stated the following in its Findings:

"There being no exception found in the record applicable at East Dallas, to the provisions of Article 7 (a) and (f) cited from Agreement between respondent carrier and its locomotive firemen, and Article 29 cited from Agreement between respondent carrier and its locomotive engineers, it is held that said Articles of Agreements warrant an affirmative award upon claims,* * *."

Award No. 10068 involved this Carrier on Lines West and the engineers' and firemen's general committees on Lines West and your Division, with the assistance of Referee Bruce Blake on December 20, 1944, in sustaining the claim stated the following in its Findings:

"The applicable rules (Engineers' 31 (a); Firemen's 33 (a)) contain no such exception. We are not warranted in writing the suggested exception into them. (See Award 7589)."

Award 10869 involved this Carrier on Lines West and the General Committee of the ORC on Lines West, and your Division without the assistance of a referee and on its own motion sustained the claim September 6, 1945 with the following in its Findings:

"The record does not disclose any permissible deviation from the application of Article 10, Rule 2 (b), even when short time within the sixteen hour limit is involved. Under these circumstances it is held that Article 10, Rule 2 (b), is applicable and claim is valid."

In Award 11544 rendered by your Division on May 27, 1947 with the assistance of Referee Wm. H. Spencer in denying the employes' claim stated the following in its Findings:

"* * * Under a familiar rule of construction, when an exception has expressly been made to a general rule, other exceptions, generally speaking, will not be made. In the circumstances, the claimant was properly paid."

In the light of the awards mentioned thus far clearly holding that your Division has no authority to alter, amend or modify schedule rules and has so consistently declined to do so, there should be no alteration, exception or modification made in the applicable schedule rules in this particular case and the claim should be denied on the clear language of the rules as written in accordance with the previous holdings of your Division.

Your Division's attention is also directed to the following awards wherein it was held your Division has no authority to grant or write a new rule into the contract and held in substance that this can only be done through negotiations and agreement between the parties involved on the property:

6641	12351
8184	12617
8344	13078
11675	13639
12110	14207

In Award No. 8344 your Division held: "In the absence of an agreement, as here, between the parties covering the subject matter of dispute herein the Division holds it is without jurisdiction."

In Award 11675 rendered with the assistance of Referee Thomas F. Gallagher on September 8, 1947, the following statement is contained in the Findings:

"In the absence of such evidence and authority if employes' claim were to be allowed here this Division would be writing a new rule into existing schedules. This Division does not possess such power. * * *"

In Award 12110 rendered with the assistance of Referee Clifford W. Potter, your Division stated in the Findings:

"Under the circumstances here, the facts of record support the conclusion that the practice complained of does not violate an existing rule, and the Division cannot write new rules.* * *"

In Award 12351 rendered with the assistance of Referee Robert O. Boyd, your Division in its Findings made the following statement:

"This Division is not authorized to make new rules."

In Award 12617 rendered with the assistance of Referee George E. Bushnell, the following was stated in the Findings:

"The Division does not possess the power to write a new rule into the existing schedule. The remedy is by negotiations for an applicable rule."

In Award 13078 also rendered with the assistance of Referee Robert O. Boyd, the following statement is made in the Findings:

"To grant the request would, in effect, be modifying an existing agreement. This Division has no such authority."

In Award 13639 rendered with the assistance of Referee E. B. Chappell on June 7, 1950, the following was stated in the Findings:

"The Division has no right or power to go beyond the terms of the existing agreement. Therefore, it concludes that the claim should be and is denied."

In Award 14207 rendered with the assistance of Referee Livingston Smith on January 24, 1951, the following is stated in the Findings:

"To concur with the respondent's interpretation and application of Rule 41, as practiced herein, would have the effect of adding by inference the words 'if available' to the rule. There is no restrictive condition in the rule. This Division has no authority to amend an existing rule or write a new one.

"No deed can be accomplished by implication which is not permissible if done directly."

The mentioned awards have clearly stated your Division has no authority to alter, amend, modify or write new rules into the contract and this should not be done in the instant case. The case should be decided under the clear language of the rule which does not provide payment of the additional one hour overtime as claimed.

The position of the Carrier is the claimant engineers and firemen have been properly compensated in accordance with the applicable schedule rules quoted and your Division cannot do other than deny the claims.

The Carrier affirmatively states that all data contained herein has been handled with the representatives of the employes on the property in correspondence and during conference.

Oral hearing is waived providing the Committees do likewise.

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claim is made for pay for one hour overtime in excess of eight hours, by the engineer and fireman, on a basis of one hundred sixty actual miles run on January 15, 1951, in addition to similar claims made by other engineers and firemen. In support of their position, the employes rely on Rule 1(b), and Rules 2(f) and 3(f) of their respective schedule rules with the carrier.

Carrier contends the employes were assigned to the passenger service involved herein under Rules 2(b) and 3(b) of their respective schedule rules, and were paid in addition to their actual trip mileage an arbitrary payment for two miles under Rule 1(b) of their respective schedule rules with carrier.

The record shows the station to station mileage covered by the employes is 79.2 miles. The parties agree an additional two miles is required to be traveled by the employes between the roundhouse and station at Mitchell, and the wye movement and movements between the station and roundhouse at Canton. The employes contend the additional two miles should be considered with the actual trip miles, in which event the crew would travel eighty miles. This would bring their claims under Rules 2(f) and 3(f) of their respective schedule rules and would support the claims made herein.

We find that under respective Schedule Rules 2(b) and 3 (b) the employes were properly compensated for their actual road mileage of 79.2 miles in each direction, and further, that the employes were properly compensated for the two additional miles they were allowed as arbitrary payments as provided by Schedule Rule 1(b) effective between the parties.

For this Division to find otherwise, where there is no ambiguity in the applicable rules, and no such contention is made, would be in complete disregard of Rule 1(b) and would be tantamount to rewriting Rules 2(f) and 3(f) of the respective schedule rules. This Division does not have that authority. We must give consideration to all the rules applicable to the claim before us. We are without authority to do otherwise, and for reasons stated the claims should be denied.

AWARD: Claims denied as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: (Signed) J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1955.