

Award No. 246

Docket No. 244

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

A. R. MARSH

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: 1. A claim that A. R. Marsh, Sergeant of Police, Cleveland Division of the Pennsylvania Railroad, is entitled to the same rate of pay paid to the other sergeants for the same work performed for said railroad at the same period of time.

2. A claim that A. M. Marsh, Sergeant of Police, Cleveland Division of Pennsylvania Railroad, is entitled to pay at the rate of one and one-half times his regular rate, for work performed in the course of his employment, by the order of the railroad, on relief days and for hours in excess of the scheduled working days as governed by the ruling put into effect by the management on June 1, 1934, and the working schedule as assigned and worked by the other members of the department between the dates of March 1, 1935, and March 1, 1943.

EMPLOYEE'S STATEMENT OF FACTS: The following are the facts as believed to exist by the employee. This separate statement is made for the reason that the Railroad Company, through its Chief Operating Officer, Mr. J. C. White, General Manager of Central Region at Pittsburgh, Pennsylvania, has refused to join in the preparation and submission of a joint statement of facts, though requested by the petitioner to do so prior to the formal submission of the matter.

POSITION OF EMPLOYEE: On August 28, 1933, the petitioner, A. R. Marsh, was employed by the Pennsylvania Railroad Company, on the Cleveland Division, at Cleveland, Ohio, as a Patrolman and was placed on a seven day week rate of pay, later known as a high rate of pay, for said position. He worked as a Patrolman on this rate until March 1, 1935, at which time he was promoted to the position of Sergeant, and at the same time was transferred from Cleveland to his present territory, with headquarters at Orrville, Ohio.

Prior to the 1st day of March, 1935, however, the Company did, effective June 1, 1934, enter and issue the following order:

"Mr.....
Mr.....
Mr.....
Superintendent.

Effective June 1st, 1934 and superseding all instructions to the contrary, the working day arrangement in effect for all minor super-

vision prior to the establishment of the "RE" day plan, except where assignments have been definitely changed and rates adjusted on a 6 day basis, be restored. The incumbent of all such supervisory positions as of May 31, 1934, will continue to be paid at their present basic rates of pay on assignments contemplated by such basic rates.

Effective as of June 1st, 1934, when vacancies occur in any of these positions for any cause or where new positions are created, the assignments of the new incumbents will be on a 6 day week (313 days per year basis), and rates of pay established accordingly. These 6 days per week (313 days per year) rates for the Region are as follows:

Present Basis Monthly Rate		Authorized Monthly Rate Effective June 1, 1934, (313 days per year)
Lieutenant of Polics	225.00	205.00
Sergeant of Police	200.00	185.00
" " "	190.00	175.00
" " "	180.00	165.00
Patrolman	165.00	150.00
"	155.00	140.00
"	145.00	130.00"

This order effected what was known as a new pay day working week, for new men hired or promoted after that date.

The petitioner was promoted after that date, to-wit, on the 1st day of March, 1935, and his pay thereafter was based upon the above order.

Prior to this order, all members of the Police Department, were working on a seven day week working schedule and the pay, of course, based upon that number of days. When, however, the six day week was established the rate of pay was accordingly reduced. Later, on January 1, 1942, however, certain employes, who had been receiving the high rate of pay based upon the seven day week, were placed on the same working schedule as those receiving the low pay rate, based upon the order of June 1, 1934, but no change was made in the rates of pay between these two groups of employes.

The petitioner, therefore, having been performing the same work for the same Company, under the directions of the same superiors, during this period of time, to-wit, from January 1, 1942, to date, December 30, 1943, and receiving therefor \$15.90 per month less wages, has been discriminated against and is, therefore, entitled to the difference in pay which amounts to \$381.60.

The petitioner on many occasions requested his Superior, Captain Worthington, to pay him the same rate of pay as paid the other employes of similar rank performing the same services and for pay for the overtime worked by the petitioner.

The petitioner further petitioned Mr. Krick, the Superintendent at Cleveland, Ohio, and on February 6, 1942, Mr. J. B. Jones, Acting Superintendent at Cleveland, Ohio, and Mr. Nancarrow, General Superintendent of the Railroad at Cleveland, Ohio. He further petitioned for relief to Mr. P. E. Feucht, General Superintendent at Cleveland, and later went to the office of Mr. J. C. White, General Manager, Central Region, and was there referred to Mr. Sersch, his assistant.

On April 19, 1943, the petitioner received a letter from Mr. J. C. White, General Manager of the Pennsylvania Railroad, Central Region, Pittsburgh, Pennsylvania, advising the petitioner that Mr. Feucht, General Superintendent, would communicate with the petitioner in regards to settling the complaints and on the 24th day of April, 1943, the petitioner received a letter

from Mr. Feucht offering to settle or adjust the dispute by granting to the petitioner 145 days off duty with pay at the present rate without any complete adjustment of the disputes involved.

On March 1, 1935, at which time the petitioner was promoted to the position of Sergeant, he was placed upon a six day working week of 10 hours per day or a 313 day year basis with four relief days off per month.

Captain A. T. Worthington, who was in charge of the Department on the Cleveland Division, instructed the petitioner that it would be impossible for him to take many of the assigned relief days off duty, owing to the great amount of work connected with the large territory for which the petitioner was responsible.

Under the direct instructions of the management the petitioner worked in excess of 60 hours per week as set forth and described in the order of June 1, 1934, and was unable to take his four monthly relief days as provided therein, and as a result thereof the petitioner worked many days and hours over time for which he has received no compensation whatsoever.

The following are schedules denoting rate of pay for the year or period specifically described, including the number of hours and relief days the petitioner worked over the regularly assigned work time upon which the petitioner's regular pay was based for that period.

From March 1, 1935, until July 1, 1941, the regularly assigned tour of duty was 10 hours based upon a six day week, but on the 1st day of July, 1941, the Company through its Captain issued orders to the members of the Cleveland Division Police Department establishing an 8 hour working day thereby raising the hourly rate of pay.

PERIOD	HOURS SHOULD HAVE WORKED	TOTAL HOURS WORKED	OVERTIME
March 1st to Dec. 31, 1935	2510	3916	1406
BASE PAY \$1,980.00	DAYS PER YEAR 313, with 12 days vacation	STRAIGHT TIME .362 per hour	OVERTIME .948 per hour
Total amount due and unpaid on overtime for period \$1,332.88			
1936	3020	4350	1330
\$1,980.00	313, with 12 days vacation	.632 per hour	.948 per hour
Total amount due and unpaid on overtime for period \$1,260.84			
1937	3010	4621	225
Jan. & Feb.			848
March-July			538
Aug.-December			-----
Entire period			1611
Jan. & Feb. \$1,980.00	313, with 12 days vacation	.632	.948
March-July \$2,100.00	301	.67	1.005
Aug.-December \$2,225.40		.71	1.065
Total amount due and unpaid on overtime for period \$1,638.51			

PERIOD	HOURS SHOULD HAVE WORKED	TOTAL HOURS WORKED	OVERTIME
1938	3010	4163	1153
Jan.-March \$2,225.40	313, with 12 days vacation	.71	1.065
April-December \$2,345.40		.749	1.123
Total amount due and unpaid on overtime for period \$1,269.06			
1939	3020	4255½	1235½
BASE PAY \$2,345.40	DAYS PER YEAR 313, with 12 days vacation	STRAIGHT TIME .749	OVERTIME 1.123
Total amount due and unpaid on overtime for period \$1,387.46			
1940	3020	4564½	1544½
\$2,345.40	313, with 12 days vacation	.749	1.123
Total amount due on unpaid overtime for period \$1,735.24			
1941			
Jan. to June (10 hour day schedule)			625
July to Dec. (8 hour day schedule)			449
BASE PAY			
Jan. to June \$2,345.40	313, with 12 days vacation	.749	1.123
July-August	" "	.936	1.404
Sept.-Nov. \$2,465.60	" "	1.024	1.536
December \$2,590.20	" "	1.034	1.551
Total amount due and unpaid on overtime for first six months \$702.18 Last six months \$666.76 Total \$1,368.94			
1942	2408	3061	653
\$2,590.20	313, with 12 days vacation	1.034	1.551
Total amount due and unpaid on overtime for period \$1,012.80			
1943	400	457½	57½
Jan. to Feb. \$2,590.20	313, with 12 days vacation	1.034	1.551
Total amount due and unpaid on overtime for period \$89.18			

The petitioner represents to the Board that overtime worked between March 1, 1943, and September 15, 1943, amounted to 484 hours and was ordered compensated for by Mr. P. E. Feucht, General Superintendent of the Railroad, at a meeting in the office of the General Superintendent at Cleveland, Ohio on September 15, 1943.

The Company requested the petitioner to take the overtime off duty and to receive pay while off duty and it was agreed that the overtime amounted to 10 weeks and four hours. Up to date the petitioner has been unable to comply.

The petitioner further contends and represents that as a result of the two claims above set forth and described there is due him from the Pennsylvania Railroad Company the sum of \$11,476.51 for which he requests an award.

The petitioner was directed by the Railroad management to work and perform his regular duties on 166 relief and vacation days and overtime on other days during this period and as above specifically set forth and described.

The relief days are denoted by the management under its order and ruling of June 1, 1934, and are particularly shown by the working schedule as assigned and worked by the petitioner and other members of the Department.

The award requested, therefore, includes the \$381.60 set forth and described in the first claim and the \$11,094.91 in the second claim, making a total above requested, to-wit, \$11,476.51.

All data submitted as Exhibits and in support of the employee's position was orally submitted to the employer's proper agents or presented by way of written communications on records requested kept by the petitioner in his ordinary course of employment.

The petitioner respectfully requests the Board for an oral hearing and submits herewith his Exhibits which he desires to be made a part of the record or statement of facts to be used in sustaining his position.

CARRIER'S STATEMENT OF FACTS: A communication dated December 10, 1943, from the Secretary of the National Railroad Adjustment Board, Fourth Division, to Mr. J. C. White, General Manager of the Central Region of The Pennsylvania Railroad, contains the information of receipt of notice signed by A. R. Marsh, advising that he will, on December 30, 1943, file ex parte submission with this Division, in the claim outlined in his letter.

This letter indicates that A. R. Marsh claims an unadjusted dispute is pending between him and The Pennsylvania Railroad Company, referred to therein in the form quoted at the beginning of this submission.

Arthur R. Marsh entered the service of the Police Department of the Pennsylvania Railroad on the Cleveland Division as a temporary patrolman on August 28, 1933; was closed out of service October 23, 1933, and was reemployed as a regular patrolman on the Cleveland Division on December 19, 1933. He was appointed Sergeant on March 1, 1935.

Prior to June 1, 1934, the rates of pay and assignments of all the sergeants and patrolmen in the Police Department of the Pennsylvania Railroad were based on 341 days' service per year. In other words, these assignments (commonly referred to as seven day assignments) contemplated that such employees would be allowed two relief days off duty per month without any deduction in their monthly rates of pay. These monthly rates of pay, however, comprehended all service which might be required of the employees during the month.

On June 1, 1934, in recognition of the general trend in industry toward a shorter work week, the Carrier decided to place into effect for those employees (including sergeants and patrolmen) whose monthly assignments and rates of pay at that time contemplated service in excess of six days per week, a program which, without imposing a hardship on employees then so assigned, would eventually result in the rates of pay and assignments of all monthly rated employees being established on a six-day-per-week basis.

In compliance with this program, employees then working on assignments contemplating service in excess of six days per week were not disturbed. However, when a new man was employed or when an employee was initially promoted to a higher grade or class (such as from patrolman to sergeant) the assignment to which promoted or for which employed was at that time changed to contemplate 313 days' service per year, and the rate of pay was based on

313 days' service per year. In other words, these assignments (commonly referred to as six day assignments) contemplated that employees would be allowed one relief day off duty each week, without any deduction from their monthly rates of pay. These monthly rates of pay, however, comprehended all service which might be required of the employees during the month.

In accordance with this program, A. R. Marsh who was, prior to June 1, 1934, assigned as a patrolman on a 341-day-per-year basis, continued to be so assigned until March 1, 1935, at which time he was promoted to sergeant to fill a vacancy theretofore filled by an employee who had been assigned on a 341-day-per-year basis, and in accordance with the aforesaid program, Marsh thereupon was assigned to that position as a sergeant on a 313-day-per-year basis and paid the rate applicable to such an assignment, or \$165.00 per month for sergeants with less than two years' service. The comparable rate for sergeants working on a 341-day-per-year basis on the Cleveland Division at that time was \$180.00.

Effective January 1, 1942, all employees (including sergeants) whose assignments in accordance with the program of June 1, 1934, had been continued on a 341-day-per-year basis were placed on a 313-day-per-year basis. The rates of pay of such employees, however, were not reduced but each such employee continued to be paid the rate of pay applicable to his former 341-day assignment, as an incumbent rate so long as he remained assigned continuously to the former 341-day position. No change was made in the rates of pay or assignments of those employees (including the Claimant) who were found working on 313-day-per-year assignments on January 1, 1942.

Sergeants and Patrolmen in the Police Department of The Pennsylvania Railroad Company have never been covered by any Schedule Agreement. The Pennsylvania Railroad Company and the Long Island Railroad Company Police Officers' Benevolent Association, Inc., was, in 1943, duly designated and authorized to represent them for the purposes of the Railway Labor Act, and the Carrier and that Organization are now engaged in negotiating a Schedule Agreement to govern the rates of pay and working conditions of Police Officers below the rank of Captain on The Pennsylvania Railroad Company.

The first written request of the Claimant to the Carrier that his position be re-classified from a basis of 313-days-per-year to that of 341-days-per-year was contained in a letter dated January 10, 1942, addressed to the Captain of Police of the Cleveland Division, his immediate superior officer. Previous to this he had orally requested the Captain of Police that he be placed on a 341-day basis at the rate applicable to such an assignment, and had subsequently presented a similar oral request to the Superintendent of the Cleveland Division. No action was taken as a result of these conversations. As stated above, the first written communication to the Carrier by the Claimant was the letter dated January 10, 1942, which is reproduced below:

"Orrville, Ohio, January 10, 1942.

Mr. A. C. Fasolas
Captain of Police.

Sometime ago I talked to you and asked you to take the matter of my pay rate up with the proper company official in an effort to secure some definite understanding concerning this rate. As you know it is my contention as it has been since my promotion to the position of Sergeant and my transfer to Orrville that I am entitled to receive the high rate of pay for my services. In this connection I thought I would again bring this matter to your attention and lay all the facts on which I base my claims before you for consideration.

Another matter also in connection with this pay rate has come to my attention and which I do not understand and I would appreciate your explaining it to me. The matter is my understanding that effective

as of January 1, 1942, the members of our police department who had been receiving the high rate of pay prior to this date and who had been working on the seven day week work schedule, were placed on a six day week work schedule without any change in the rate of pay. If this is true these men are working on the same work schedule on which my pay is based and are receiving \$15.90 more per month for their services than I receive.

On August 28, 1933, I was hired as a temporary patrolman on the Cleveland Division, at Cleveland and worked in this capacity until December 19, 1933, when I was appointed as a regular patrolman with my pay rate based on the seven day week pay rate for that position which was in effect at that time.

On March 1, 1935, I was promoted to the position of sergeant and was transferred to my present territory with headquarters at Orrville and working between Akron and Columbus, Ohio. This territory had been policed prior to my promotion by former Sergeant C. E. Smith, who had received the high rate of pay in effect at that time for his services.

On being transferred to Orrville and on receiving the appointment to the position of sergeant I was told by former Captain A. T. Worthington that I would receive a new rate of pay for my services, which would allow me to have four relief days off per month. However Captain Worthington assured me that he would try and have me placed on the high pay rate, as he was of the opinion that owing to the large territory I was responsible for policing and the number of hours it would take to do this job, that I would be entitled to the high rate of pay.

Captain Worthington later advised me that he had taken the matter of my rate of pay up with Mr. Krick and had been told that the pay rate could not be changed. I later went to Mr. Krick personally and asked to be placed on the high rate, as I explained to Mr. Krick that I had not been receiving my relief days for which I was not being paid and I thought I was entitled to the high rate of pay. Mr. Krick advised me that he could do nothing in regards to changing the pay rate as the rate had been set up by the management of our company effective June 1, 1934, and being as I was promoted after that date nothing could be done. However I cited to Mr. Krick the case of another officer in the police department and located at Pittsburgh who was promoted after I received my promotion and had been placed on the high rate of pay. Mr. Krick stated to me that he would look into the matter and let me know later, however I never heard any thing further from him on the matter.

On numerous occasions since I was promoted in 1935, I have been assigned to special duties on this and other divisions which necessitated my working the full seven days per week during these assignments, resulting in my working more than 100 relief days for which I have never received any compensation or have I been allowed to take the days off at a later date. I have also worked several thousands of hours in excess of the hours worked by some of the other sergeants who are receiving the high rate.

My understanding of the rate on which my salary is based, is that I am paid for six days per week with the seventh day for my relief day and for which I am not paid. If this is correct during the time between the date I was promoted and until you took charge of the department in December 1937, Captain Worthington assigned four relief days per month or a total of 48 relief days per year or four days less per year than I should have received.

I would appreciate it very much if you could arrange for me to meet personally with whoever you feel will have authority with this matter, as I believe I can explain the matter better verbally than I can in this letter.

Thanking you in advance for any consideration you may secure for me, I am.

Respectfully yours,

/s/ A. R. Marsh
A. R. Marsh
Sergeant of Police."

In a letter dated February 21, 1942, Marsh wrote to Mr. F. H. Krick, Superintendent of the Cleveland Division as follows:

"Orrville, O., February 21, 1942.

Mr. F. H. Krick,
Superintendent.

On August 28th, 1933, I was hired on the Cleveland Division of the Pennsylvania Railroad as a temporary Patrolman and on December 19th of the same year was appointed regular patrolman on seven day week rate of pay. March 1st, 1935, I was promoted to position of Sergeant and immediately transferred to Orrville, Ohio, to fill vacancy created by the dismissal of Sergeant C. E. Smith who was receiving seven day week rate of pay.

After I was established at Orrville, I was informed by former Captain of Police A. T. Worthington that I would receive six day week rate of pay. However, he assured me he would talk with you on the matter, as he was of the opinion that I was entitled to seven day week rate, which was around \$16.00 more per month. Some time later, Captain Worthington advised me that he had taken this matter up with you and that you had advised him that my rate could not be changed.

Mr. Krick, as you no doubt know, since my assignment in the Orrville District, I have worked many hours in excess of my daily routine and I have also worked on over one hundred of my relief days for which I was never compensated in days off or pay. I have also worked thousands of hours more than some of our other sergeants who are receiving the higher rate of pay. I believe that I am justly entitled to the high rate of pay, basing my opinion on the fact that I was a seven day week patrolman receiving the high rate of pay at the time of my promotion and was immediately assigned to the position of Sergeant to fill the vacancy created by the dismissal of Sergeant Smith, who at the time, was working a seven day week or drawing the higher rate of pay. I know of cases where sergeants were given the high rate of pay since my appointment, and on the strength of these facts, I believe that my grievance is justified and is deserving of consideration by the Management.

Will you therefore please arrange for a hearing in this matter where I can better explain my grievances.

Sincerely yours,

/s/ A. R. Marsh
A. R. Marsh
Sergeant of Police."

In a letter dated June 29, 1942, Marsh, apparently after receiving verbal advice that the request for reclassification was not granted, wrote the Superintendent of the Cleveland Division as follows:

"Orrville, Ohio, June 29, 1942.

Mr. F. H. Krick,
Superintendent.

I have just talked to Captain Fasolas in regards to my request, relative to my being placed on the high or 7 day week pay rate for sergeants and have been advised by the Captain that this request has been considered, by the management, and rejected.

As you know, Mr. Krick, this dispute regarding this rate has been going on for a long time and I have written it up and have talked to you a number of times about it and have tried to explain the facts on which I base my claims to be entitled to this high rate of pay. In all fairness to you and the management, I believe that were these facts known and thoroughly understood, my request would not have been turned down. Therefore, feeling as I do, and understanding that the management's rejection is final in so far as our company's policy is concerned, I request your permission to present my case before the Railroad Labor Board for hearing and settlement.

It is with great regret, Mr. Krick, that I am asking your permission to take this before the labor board, but there is no other alternative left for me. As you personally know I have always been a loyal employe and have always worked for the best interests of our company. I have never connected myself with any group, or labor union, and have always held to the theory that a dispute between employe and management could and should be settled without being taken before out-siders for airing. However I now feel that there is no other course for me to follow.

To refresh your memory in regards to this case and for your information, I have listed some of the points on which I base my claims and which I expect to present to the labor board. These points are as follows:

No. 1. That at the time of my promotion to the position of sergeant in the year 1935, I was receiving the high or 7 day week rate as a patrolman.

No. 2. That I was transferred and was placed on a territory, where I have performed the duties previously performed by a sergeant who received the high rate of pay.

No. 3. That during my first 2½ years on this assignment, I was not assigned to work a six day week, but was obliged to work long hours and received relief days only when my work would permit my leaving the job. In connection with this when a relief day was to be taken by me, the matter of where I was going on this relief day would have to be taken up with and approved by the Captain of Police before he would grant the relief day.

No. 4. That on numerous times I was taken off my assigned territory and was assigned to special duty on strikes, floods, investigations, etc., where I was obliged to work long hours and the 7 day week, along with other sergeants who were on the high rate of pay. In connection with these assignments I worked more than 150 relief days for which I was never compensated.

No. 5. I expect to show that I have worked more hours, per day, week, month and year than the hours set forth to be worked by sergeants who are receiving the high rate of pay.

No. 6. That the ruling made by our management relative to the six day week, or low rate, and effective as of June 1, 1934, has been broken since my promotion.

No. 7. That on January 1, 1942, the sergeants who had been receiving the high rate of pay, were placed on the same working schedule as I have been supposed to be working, but their pay rate is still \$15.90 per month higher than the rate I am receiving.

Hoping to receive an early reply from you in regards to my request and thanking you for your efforts in my behalf on this case,

Respectfully yours,

/s/ A. R. Marsh

A. R. Marsh

Sergeant of Police."

On March 1, 1943, Marsh personally appealed to the General Manager of the Central Region of the Carrier, at which time he contended that if he had actually been placed on a 313-day-per-year basis when appointed Sergeant on March 1, 1935, he would have had no complaint but alleged he was required to fill the position practically on a 341-day-per-year basis from the time of his appointment March 1, 1935 to January 1, 1942, when all positions were changed to the 313-day-per-year basis.

Marsh contended that he should have been paid on the 341-day basis from March 1, 1935 to March 1, 1943, and was therefore underpaid the difference between the 341-day-per-year rate and the 313-day-per-year rate for this period or \$1500.30, # and that he should continue to receive the 341-day-per-year rate as long as he remained on the position of Sergeant.

On April 19, 1943, the General Manager of the Central Region wrote Mr. Marsh as follows:

"April 19, 1943

Mr. A. R. Marsh
425 S. Main Street
Orrville, Ohio.

Dear Sir:

This refers to discussion had at meeting held on March 1, 1943, for the purpose of affording you an opportunity to present argument in support of your contention that you have not been properly compensated for service rendered as Sergeant of Police since March 1, 1935, the effective date of appointment to said position.

(#) This amount was based on the following rates for Sergeants which were in effect during the periods indicated:

Period	Rate of Pay Based on 313 Days Per Year	Rate of Pay Based on 341 Days Per Year	Difference Per Month	Total
3/1/35 to 2/28/37	\$165.00	\$180.00	\$15.00	\$360.00
3/1/37 to 7/31/37	*175.00	190.00	15.00	75.00
8/1/37 to 2/28/38	**185.45	201.35	15.90	111.30
3/1/38 to 11/30/41	***195.45	211.35	15.90	699.60
12/1/41 to 3/ 1/43	****215.85	231.75	15.90	254.40
				<hr/> \$1,500.30

* Step-rate increase \$10.00 per month account 2 years' service.

** General wage increase \$10.45 per month.

*** Step-rate increase \$10.00 per month account 3 years' service.

**** General wage increase \$20.40 per month.

This matter has been referred to your General Superintendent for handling, and Mr. Feucht will communicate with you regarding same.

Yours truly,

(Signed) J. C. White
General Manager."

The General Superintendent of the Lake Division (the Lake Division includes the Cleveland and E. & A. Divisions of the Carrier) met with Marsh on April 24, 1943, at which time Marsh advised the only basis of settlement that would be acceptable would be the reclassification of his position to a 341-day-per-year basis, with retroactive adjustment in pay to the date of his appointment to Sergeant, March 1, 1935.

The General Superintendent, in a letter dated April 28, 1943, proposed the following basis of settlement:

"Cleveland, Ohio, April 28, 1943.

Mr. A. R. Marsh,
425 S. Main Street,
Orrville, Ohio.

Dear Sir:

Referring to discussion had with you in my office April 24th in connection with your contention that you have not been properly compensated for service performed as Sergeant of Police since being appointed to such position March 1, 1935:

In accordance with the advice given you on the date referred to, I am agreeable to disposing of your grievance on the basis of granting you 145 days off with pay at your present rate, representing the number of relief days which you claim to have worked since March 1, 1935, or if this cannot be done, then I am willing to compensate you for the equivalent of 145 days at your established rates of pay obtaining at the time involved.

Upon receipt of advice from you that this proposal is acceptable, I will immediately make arrangements to have it placed in effect.

Yours truly,

(Signed) P. E. Feucht
General Superintendent."

Marsh rejected this proposed settlement in letter dated May 15, 1943, reading as follows:

"Orrville, Ohio, May 15, 1943.

Mr. P. E. Feucht
General Superintendent
Lake Division, Penna R. R. Co.
Cleveland, Ohio

Dear Sir:—

Your letter of April 28th, 1943, relative to your offer of settlement in connection with my grievance concerning my present rate of pay, etc., received.

Referring to the discussion had with you on April 24th, 1943, at which time I rejected your offer granting me 145 days off with pay at present rate, or compensation for the days at the rate of pay at time involved, in settlement of this case.

Mr. Feucht, as you are aware, it is my opinion that the settlement of this case should be based at the incumbent or high rate of pay for sergeants, retroactive to the time of my appointment as Sergeant. March 5th, 1935. It is my belief that I have shown very decisive facts in this connection to warrant a settlement on this basis.

Trusting to hear from you in the very near future in order that I may take further procedure on the matter, providing a amicable settlement cannot be reached.

Very sincerely yours,

(Signed) A. R. Marsh
Sergeant of Police."

The General Superintendent replied to this communication under date of May 29, 1943, as follows:

"Cleveland, Ohio,
May 29th, 1943

Mr. A. R. Marsh
425 S. Main Street
Orrville, Ohio.

Dear Sir:

Referring to your letter of May 15th in regard to mine of April 28th, in which I proposed to compensate you for 145 relief days which you claim to have worked since March 1st, 1935, or a similar number of days off duty with pay.

The proposed settlement of your claim is considered adequate, since it contemplates either in the form of time off with pay equal to the number of relief days worked during the period of your claim or monetary payment for said days, and settlement on any different basis is accordingly declined.

Yours truly,

(Signed) P. E. Feucht
General Superintendent."

The Claimant in letter addressed to the General Superintendent dated May 31, 1943, advised he would submit the matter to the National Railroad Adjustment Board, Fourth Division.

On the property Mr. Marsh's claim was merely that his position should be reclassified to a 341-day-per-year basis, with retroactive adjustment at the rate applicable to the 341-day assignment as Sergeant to March 1, 1935.

At no time did Marsh present to the Carrier a claim for compensation at the rate of time and one-half times his regular rate of pay for work he alleged to have performed on his relief days and he did not present to the Carrier any claim for compensation in addition to that paid him at his regular rate of pay for work alleged to have been performed by him on his scheduled working days.

Under the provisions of Section 3 (i) of the Railway Labor Act, such claims are not properly before the Board because not "handled in the usual manner up to and including the Chief Operating Officer of the Carrier designated to handle such disputes" (the General Manager) and should not, therefore, receive any consideration by the Board. By filing this submission the Carrier does not waive its objection, set forth above, that these claims are not properly before the Board, since they have not been handled in accordance with the requirements of the Railway Labor Act.

So far as the Carrier is able to anticipate the basis of the claim, the questions in this dispute are:

1. Whether your Honorable Board has jurisdiction over this claim;
2. If so, whether the Claimant was entitled to have his monthly rate of pay adjusted to the rate provided for sergeants assigned to work 341 days per year; and whether in addition thereto he is entitled to payment at the rate of time and one-half times his regular rate of pay for work alleged to have been performed on relief days and on certain scheduled working days.

POSITION OF CARRIER: A. The Pennsylvania Railroad Company respectfully submits that the National Railroad Adjustment Board, Fourth Division, is without authority or jurisdiction to proceed in the matter above entitled and referred to, and protests against and objects to any proceedings therein whereby such National Railroad Adjustment Board, Fourth Division, shall assume or undertake authority or jurisdiction therein for the reasons that:

(1) Under Section 3, First, subsection (i) of the Railway Labor Act the jurisdiction of the National Railroad Adjustment Board is limited to disputes arising out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. The claim in the above entitled matter does not involve the interpretation or application of an agreement concerning rules, rates of pay or working conditions, since no such agreement exists or ever did exist between The Pennsylvania Railroad Company and any of its Sergeants in the Police Department.

(2) The Claimant presented no claim to the Carrier for compensation in addition to his regular rate of pay for work performed on the scheduled working days of his assignment nor any claim for compensation at the rate of one and one-half times his daily rate for work performed on relief days and did not handle such claims "up to and including the chief operating officers of the Carrier designated to handle such disputes" (the General Manager), as required by Section 3, First, subsection (i) of the Railway Labor Act.

(3) The Pennsylvania Railroad Company asserts that it has not received due and proper notice of the claim made against it in the above entitled matter, in that it has not been informed of the grounds and nature of said claim with sufficient particularity to enable it to answer and defend itself therefrom, which notice and information are required by Section 3, First, subsection (j) of the Railway Labor Act and by the Fifth Amendment to the Constitution of the United States, and protests against and objects to any proceedings therein by the National Railroad Adjustment Board, Fourth Division, unless and until the Carrier has been given full and specific information as to the claim made against it by the above-named person and adequate opportunity to answer and defend the same.

B. The Pennsylvania Railroad Company, having filed with said National Railroad Adjustment Board, Fourth Division, a request that it be served with a copy of Claimant's submission setting forth the grounds and nature of said claim in order to enable said Railroad Company adequately and properly to answer the same, and said Railroad Company having been put in such position where it must either undertake to file this answer without knowledge of the actual nature and grounds of said claim or else submit to having said claim decided against it by said Board by default, does hereby, to the best of its knowledge and ability under the circumstances, submit this answer to what it supposes by way of anticipation such claim to be, reserving all objections or the right at any time to make the same, as to the above-mentioned dispute, or any proceedings therein, and without waiving any objec-

tions that it has or may have to the validity of the Railway Labor Act or to the validity or regularity of any acts or proceedings of the National Railroad Adjustment Board, Fourth Division, in said matter.

The Carrier will show that:

I. The National Railroad Adjustment Board, Fourth Division does not have jurisdiction over the instant claim, since the claim does not involve the interpretation or application of an agreement covering rules, rates of pay, or working conditions.

II. No Agreement exists covering the rules, rates of pay, and working conditions of the class of employes known as Sergeants and, therefore, the Claimant is not entitled to the compensation claimed.

Each of the points of the Carrier's Position will be discussed in the order set forth above.

I. The National Railroad Adjustment Board, Fourth Division, does Not Have Jurisdiction Over the Instant Claim, Since the Claim does Not Involve the Interpretation or Application of an Agreement Covering Rules, Rates of Pay, or Working Conditions.

Under Section 3, First, subsection (i) of the Railway Labor Act, the jurisdiction of your Honorable Board extends only to disputes involving the interpretation or application of agreements concerning rules, rates of pay, and working conditions. That the intention of Congress in passing the Railway Labor Act was thus to limit the jurisdiction of the Board becomes evident upon a study of the testimony presented in 1934 before the Committee on Interstate Commerce of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives, in the course of the hearings conducted by those Committees while considering the proposed Railway Labor Act which was finally sent to the President for approval on June 18, 1934. For instance, part of the testimony presented before the Senate Committee by Mr. George M. Harrison, President of the Brotherhood of Railway Clerks, was as follows: (Hearings S. 3266, 73rd Congress, 2nd Session, pages 33 and 34):

"THE CHAIRMAN. Now, will you explain—I suppose I ought to know this, but I don't—just what kind of controversy is to be settled by these Boards, and what kind by the boards of mediation. I haven't got it clearly in my mind.

"MR. HARRISON. I will be glad to. Being so familiar with the law, I probably didn't go into that as thoroughly as I ought to. There are two classes of controversies that develop. One is what we call major changes, when we attempt to write a new contract or to revise a contract covering wages, rules, and working conditions.

"THE CHAIRMAN. On all the railroad systems in the country?

"MR. HARRISON. That is right. Now, that is handled in this fashion: You have a conference with the officers of the railroad and endeavor to agree. If you are unable to agree then, either party has the privilege of invoking the aid and service of the United States Board of Mediation. The Board of —

"THE CHAIRMAN. (interposing). Will have under the law?

"MR. HARRISON. Yes; there is no change in that. Now, the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. For instance, we may have a claim for time claiming that the rule of the contract

should provide for the payment of so much. The railroad may dispute that and claim that they understand it to be another way. We may have a grievance concerning seniority of a man; we may have a grievance concerning the dismissal of a man, the promotion of a man, reduction of force. There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The parties in the first instance have agreed on the contract; they have laid down rules."

Mr. Harrison made the following statement before the House Committee (Hearings, H. R. 7650, 73rd Congress, 2nd Session, page 80):

"The next general question covered by the act is that of establishing machinery to settle controversies that grow up between management and employees over the meaning or the allocation of the contracts that have previously been made. Now, as a brief explanation of the character of those disputes, they might very well concern a man's seniority, whether or no his date is the proper date; might very well concern whether or no he has been paid the proper amount of compensation for a particular class of work performed, as the contract provides should be paid. It may very well concern the separation of an employe from the service, whether or no he has been unjustly dismissed. It very well may concern the promotion of a man, whether he should have been accorded promotion, in accordance with his ability and his seniority in keeping with the rules of the contract; whether or no he was laid off in his seniority order; if he had not been taken back in his seniority order.

"That is the class of disputes that this adjustment machinery proposed in this act will take care of." (Emphasis supplied.)

Likewise, the Honorable Joseph B. Eastman, Federal Coordinator of Transportation, appearing before the Senate Committee, commented as follows (Hearings, S. 3266, page 158):

"It is not essential that section 3, which provides for the National Board of Adjustment, should apply to short lines. However, I cannot see any very good reason why it should not apply. The Board would not handle major issues relative to wages, rules, and working conditions. All that it would handle would be minor issues relating to the interpretation of such rules as exist and to grievances of employees under the established rules. If the employees of the short lines are as well satisfied as Mr. White says that they are, there would be no issues for the Board to consider. The act permits and encourages local adjustment of such matters. And if an issue did arise, an interpretation of a rule or a grievance on a short line does not differ in essence from a similar issue on a trunk line." (Emphasis supplied.)

Before the House Committee Mr. Eastman made the following statement (Hearings, H. R. 7650, page 64):

"COMMISSIONER EASTMAN. Mr. Cooper, do not make any mistake about this: You have referred to wages. The whole matter of working rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon. It is a question of interpreting them. It is minor matters of that kind, and not the questions either of wages or of working rules. The basic matters are left for the processes of mediation." (Emphasis supplied.)

The Report of the Committee on Interstate and Foreign Commerce of the House of Representatives (H. Rep. No. 1944, June 11, 1934) shows clearly

the intent of the legislators with regard to the jurisdiction of the National Railroad Adjustment Board. The following paragraphs are particularly applicable (pages 1, 2 and 3):

"The purposes of this bill are:

"1. To prohibit any interference with freedom of association among employes and to prevent the denial of the right of employes to join a labor organization as a condition precedent to their employment.

"2. To provide for the complete independence of carriers and of employes in regard to self-organization in order to carry out the purposes of this act.

"3. To provide for the prompt and orderly settlement of all disputes growing out of grievances and out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, so as to avoid any interruption of commerce or of the proper operation of any carrier engaged therein."

"7. The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances,' which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions. The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and the employes have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employes and the carriers shall be equally represented on the board.

"Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employes have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." (Emphasis supplied.)

The wording of Section 3, First, subsection (i) of the Railway Labor Act as it was finally passed is the same as that contained in the bills considered by the Senate and House Committees. It is evident, therefore, that the Railway Labor Act was intended to give to the National Railroad Adjustment Board, and does give, jurisdiction only over disputes or grievances which arise out of the interpretation or application of existing agreements concerning rules, rates of pay, and working conditions.

The Pennsylvania Railroad Company has never entered into an agreement, either written or oral, with the Sergeants or Patrolmen in its Police Department, covering the rules, rates of pay, or working conditions of such employes. This Company has never agreed with the Sergeants in its Police Department, or with any of them, that they will be entitled to any compensation in addition to their monthly rate of pay for service performed on relief days or for service performed on any day, nor has there ever been any agreement or practice upon which Sergeants in the Police Department may base

claims to hold any positions in that class other than the positions to which they are assigned by the Carrier and at the rate of pay and working conditions established for such positions by the Carrier. The Carrier submits, therefore, that since no agreement exists upon which the instant claims for compensation may be based, your Honorable Board does not have any jurisdiction over the instant dispute.

It should be pointed out, further, that the Board has no basis for making an award where the Carrier has not violated the provisions of any agreement.

The Claimant asserts that because he was required to work on certain of his relief days following his appointment on March 1, 1935, as Sergeant on a 313-day-per-year basis and rate, he should have been and should now be permanently assigned at the rate of pay applicable to Sergeants assigned on a 341-day-per-year basis. The right asserted by the Claimant on this proceeding is a right which can exist only by virtue of an Agreement between the Carrier and the class of employees or employee involved, providing for the creation or grant of such right. The Claimant is thus claiming the right to be permanently assigned on a working basis different from, and at a rate of pay higher than, that designated for the position by the Carrier, all of which was well known to the Claimant at the time the Carrier appointed him to Sergeant on March 1, 1935. Such a right does not exist in any employment relation independently of an agreement creating the right. In other words, an employer is at liberty to hire, discharge, promote, demote, increase or decrease the rate of pay; or transfer his employees as he thinks appropriate, unless he agrees with such employees to restrict his freedom of action in some way. Since this is so, the employer's activity is restricted only to the extent that he agrees to it, and no further. If such rights on the part of employees existed in the absence of any agreement creating the rights, there would be no purpose in collective bargaining and it would be meaningless and unworkable.

What in fact is involved in this case is an attempt to establish rules, rates of pay, and working conditions for a class of employees which has never been governed by any agreement in its employment relation with the Carrier. If the Board should undertake to grant the claim being asserted here it would in reality be writing an agreement governing the rules, rates of pay, and working conditions of Sergeants in the Police Department, and requiring the Carrier to accept it. This is a function which the Railway Labor Act has not assigned to the jurisdiction of the National Railroad Adjustment Board but, on the contrary, has left to the processes of collective bargaining between employers and employees and to the offices of the Mediation Board when invoked. That this is true is made clear by the statements taken from the Hearings on the Railway Labor Act and from the Report of the House Committee, which the Carrier has quoted above. As Commissioner Eastman stated before the House Committee in 1934, the Board has "no right to determine what the working rules shall be."

Furthermore, and in any event, since the claim for compensation "at the rate of time and one-half times his regular rate" for service performed on scheduled working days and on relief days has not been handled by the Claimant "up to and including the chief operating officer designated to handle such disputes" (the General Manager), as required by Section 3, First, of the Railway Labor Act, this claim is not within the jurisdiction of your Honorable Board to hear and determine.

The Carrier therefore submits that for the above reasons the instant claim should be dismissed by your Honorable Board.

II. No Agreement exists Covering the Rules, Rates of Pay, and Working Conditions of the Class of Employees known as Sergeants, and, therefore, the Claimant is not Entitled to the Compensation Claimed.

As pointed out above, no agreement exists concerning the rules, rates of pay, or working conditions of Sergeants in the Carrier's Police Department, the class of employees of which the Claimant was a member.

The Claimant contended before the Carrier that effective March 1, 1935, his position as Sergeant should have been re-classified from a 313-day-per-year basis, on which basis the Carrier had appointed him to it, to a 341-day-per-year working basis and rate of pay. This claim apparently was based on the theory that since certain other sergeants in the Police Department were assigned on a 341-day-per-year working basis and rate of pay, the Claimant, having worked on certain of his relief days subsequent to March 1, 1935, had the right to be assigned as a sergeant on the same basis. It is obvious that he had no such right. No such right can exist in the absence of an agreement providing that a position of sergeant should be reclassified under such circumstances. It is axiomatic that an employer has absolute discretion to select his own employees and to establish rates of pay and working conditions for them as he sees fit, unless he has by agreement placed limitations upon such exercise of discretion. No such limitation existed in the instant case, since the Carrier had not entered into any collectively bargained agreement with the class of employees of which the Claimant was a member, under which the Claimant might have the right to require the Carrier to change the rate of pay of his position, nor did any individual employment contract between the Carrier and the Claimant provide for such a right. Likewise there was no contract between the Claimant and the Carrier specifying that the Claimant would receive any compensation in addition to his monthly rate of pay for any service required of him during the duration of his employment by the Carrier. The Carrier was free to assign the Claimant to the position of Sergeant, which it believed the Claimant had the capacity to fill, and to fix the rates of pay and working conditions for such position. No agreement between the Claimant and the Carrier gave to the Claimant the right to receive any other rates of pay. Under these circumstances the Carrier's action in assigning the Claimant as sergeant on a 313-day-per-year working basis and rate of pay did not violate any agreement or established principles as to its conduct and was entirely proper.

The facts presented to your Honorable Board in this case show that there is no basis for the Claimant's request for compensation or for the reclassification of his position. While it is true the Claimant in the period between 1935 and 1942, intermittently and in an informal manner on several occasions verbally requested that his rate of pay be increased, he made no active or diligent effort to pursue the matter to a conclusion, but continued to perform the work of the assignment at the rate of pay fixed by the Management. The first protest of record and the first statement of his claim is found in a letter* which the Claimant wrote to the Captain of Police on January 10, 1942, approximately seven years after he was appointed to the position of Sergeant by the Carrier. The Claimant's delay in presenting the claim for the higher monthly rate of pay, and his failure to present any claim for overtime pay to the Carrier, are conclusive evidence of the Claimant's acceptance of the position and rate of pay therefor which had been fixed by the Carrier. The Carrier at no time agreed in any manner to pay the Claimant any compensation for the work he performed other than the compensation which he has already received, the established monthly rate of pay of his position.

Furthermore, the Carrier has never established any custom or practice of paying additional compensation to Sergeants in its Police Department for work performed outside their regular working hours or on relief days. So far as the Carrier has been able to determine from its records, no such additional compensation has ever been paid or claimed for work performed on relief days. Likewise, in only one instance has the Carrier ever paid any

(*) This letter is quoted in the Carrier's Statement of Facts.

overtime compensation to Sergeants for work performed outside their regular hours on an assigned working day, and in that instance the payment was erroneously made because of a misinterpretation of instructions. No claims for such overtime compensation have been presented to the Carrier prior to the present case.

Since January 1, 1942, the Carrier has allowed compensating time off duty to Sergeants in the Police Department when they are required to perform service on their relief days. As pointed out in the Carrier's Statement of Facts, the Carrier has offered to pay to the Claimant, in settlement of these claims, compensation at his established rate of pay for the 145 relief days when he alleged that he was required to perform service during the period in question, or in the alternative, to grant him 145 days off with pay. This offer was made solely in order to dispose of the claims and was not based on or in recognition of any right of the Claimant to receive additional compensation for the work he performed. The Carrier submits that the Claimant, in the absence of any agreement providing for compensation in addition to the monthly rate of pay of his position, is not entitled to the payment claimed, or to any other compensation in addition to that already paid him from the date of his appointment to Sergeant, March 1, 1935.

CONCLUSION

The Carrier has shown that no collectively bargained agreement exists or has ever existed between it and its employees of the class of which the Claimant was a member, and that therefore, since the claim does not involve the interpretation or application of such an agreement, your Honorable Board does not have jurisdiction over the instant dispute; and furthermore that the claim for overtime compensation has not been handled with the Carrier in accordance with the Railway Labor Act and is not properly before the Board.

Furthermore, the Carrier has shown that in the absence of an agreement, the Claimant is not entitled to any position, working conditions and rate of pay, except such position, working conditions, and rate of pay as are agreed to between the Carrier and the employe, or which he accepts when assigned by the Carrier, and that therefore, the Claimant is not entitled to the compensation he claims.

Therefore, the Claimant has established no basis for the instant claim, and the Carrier respectfully requests that the claim of the said A. R. Marsh be denied.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same. Oral hearing is desired.

All data contained herein have been presented to the Claimant.

OPINION OF BOARD: The carrier contends that since the claim for compensation at the rate of time and one-half his regular rate for services performed on scheduled working days and on relief days has not been handled by the claimant up to and including the chief operating officer designated to handle such disputes, the claim is not within the jurisdiction of the Board.

The Act, under GENERAL DUTIES

"Sixth. In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such em-

ployes, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: **And provided further,** That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

and NATIONAL BOARD OF ADJUSTMENT, Sec. 3, First (i) provide the jurisdiction of this Board.

Under these provisions the Board has appellate jurisdiction from a claim properly presented to the carrier on the property. It must be presented here on the same basis as presented below and if not presented below then it cannot be presented here for the first time.

The record discloses that A. R. Marsh, a patrolman, was on March 1, 1935, promoted to the rank of sergeant. Prior to the first day of March, 1935, the company entered and issued an order effective June 1, 1934, which contained the following: "Effective as of June 1, 1934, when vacancies occur in any of these positions for any cause or when new positions are created the assignments of the new incumbents will be on a six day week (313 days per year basis) and rates of pay established accordingly." It then sets forth the rates of pay, which include that of sergeant, based on the previous seven day week or 341 days per year basis and that to be paid for the six day week or 313 days a year basis.

The petitioner, being promoted after June 1, 1934, was paid on a six day week or 313 day year basis, which was lower than the seven day or 341 day year basis. Prior to his appointment as a sergeant, and while working in the capacity of a patrolman, he had been on the seven day week or 341 day per year basis.

In a letter of the claimant to Mr. A. T. Worthington, Captain of Police, dated August 28, 1935, he states: "Hope you can take this up with Mr. Krick and get things fixed up so that I can get the higher rate of pay, as it is a hardship trying to get along on the low pay, when I have to work longer hours than the men on the high rate."

In his continued correspondence with the carrier culminating in his letter of February 21, 1942, addressed to Mr. F. H. Krick, Superintendent, the claimant sets forth his grievance on the same basis, which letter is as follows:

"On August 28th, 1933, I was hired on the Cleveland Division of the Pennsylvania Railroad as a temporary Patrolman, and on December 19th of the same year was appointed regular patrolman on the seven day week rate of pay. March 1st, 1935, I was promoted to the position of sergeant and immediately transferred to Orrville, Ohio, to fill a vacancy created by the dismissal of Sergeant C. E. Smith, who was receiving the seven day week rate of pay.

"After I was established at Orrville, I was informed by former Captain of Police A. T. Worthington, that I would receive the six day week rate of pay. However, he assured me he would talk with you on the matter, as he was of the opinion that I was entitled to the seven day week rate, which was around \$16.00 more per month. Sometime later, Captain Worthington, advised me that he had taken this matter up with you and that you had advised him that my rate could not be changed.

"Mr. Krick, as you no doubt know, since my assignment in the Orrville district, I have worked many hours in excess of my daily routine and have also worked on over one hundred of my relief days for which I was never compensated in days off or pay. I have also worked thousands of hours more than some of our other sergeants who are receiving the higher rate of pay. I believe that I am justly entitled to the high rate of pay, basing my opinion on the fact that I was a seven day week patrolman receiving the high rate of pay at the time of my promotion, and was immediately assigned to the position of sergeant to fill the vacancy created by the dismissal of Sergeant Smith, who at the time, was working a seven day week or drawing the higher rate of pay. I know of cases where sergeants were given the high rate of pay since my appointment, and on the strength of these facts I believe that my grievance is justified and is deserving of consideration by the management.

"Will you therefore please arrange for a hearing on this matter, where I can better explain my grievance.

Sincerely yours,

Signed—A. R. Marsh
Sergeant of Police"

On May 15, 1943, in writing to Mr. P. E. Feucht, General Superintendent, he stated as follows:

"Mr. Feucht, as you are aware, it is my opinion that the settlement of this case should be based at the incumbent or high rate of pay for sergeants, retroactive to the time of my appointment as sergeant, March 1, 1935. It is my belief that I have shown very decisive facts in this connection to warrant a settlement on this basis."

From a careful survey of the claimant's position during all his negotiations with the carrier, he at no time presented the contention that he was entitled to overtime pay at the rate of one and one-half times his regular pay for work performed on scheduled working days and on relief days. Since this matter was not presented to the carrier in the claimant's negotiation for settlement and is presented here for the first time, we cannot properly consider it here and that part of claim is not properly before the Board.

The record shows that A. R. Marsh died on March 10, 1944, while the matter was pending but before the Board made an award. The executrix of the estate of the deceased sought to have the matter revived in her name but this was denied by the Board.

The Act provides:

"GENERAL PURPOSES (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;"

"SEC. 3. First.

"(m) the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award."

"(p) when action brought upon the award for failure to comply

'Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment shall be prima facie evidence of the facts therein stated.'"

"(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective Divisions and not in conflict with the provisions of this section."

There is no provision in the Act or in the rules of the Board relating to revivor.

It is apparent from the foregoing provisions of the Act that while the decisions of the several Divisions may result in the award of money owing the employe or employees, they are only final and binding upon the parties on all matters other than such money awards.

The general purpose of the Board is to settle disputes between an employe or group of employes and the carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions and thereby to avoid interruption to commerce or to the operation of any carrier engaged therein. Since the Congress did not make any provision in the Act for revivor, we have no authority to insert such provision. The individual claimant having died while the action was pending and there being no one within the contemplation of the Act before the Board, the claim must be dismissed. Whatever rights the deceased employe may have, arising out of the contract of employment with the carrier that do not abate with his death and belong to his estate, can be enforced by the representative bringing action in the proper court.

In view of these holdings we do not discuss or pass upon the merits of the employe's claim for they may be presented to the proper forum for determination.

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

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

This Division of the Adjustment Board had jurisdiction over the dispute involved herein at the time filed.

In view of the foregoing Opinion, the claim is dismissed without prejudice.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: R. B. Parkhurst
Secretary

Dated at Chicago, Ill., this 22nd day of June, 1944.