Award No. 4743
Docket No. MW-4711

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GALVESTON WHARVES

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood: (1) That J. A. Pinto, Leodice Richard, J. D. Hartnett, D. Sanchez, Juan Macias, V. Cisneros, F. Janurez, R. Wisegarber, G. De Ranieri, Ennis King, G. T. Hogan, and Gus Haglund, covered by the agreement of May 1, 1940 were not paid in accordance with the provisions of Article 7 (a) of the Vacation Agreement of December 17, 1941, while on vacation in 1945; and

(2) That J. A. Pinto be paid the difference between the compensation he received on the basis of eight hours a day and what he was entitled to receive on the basis of his regular assignment of ten hours a day, and that the other claimants be paid the difference between the compensation received by them on the basis of eight hours a day and what they were entitled to receive on the basis of their regular assignments of nine hours a day.

EMPLOYES' STATEMENT OF FACTS: J. A. Pinto, Leodice Richard, J. D. Hartnett, D. Sanchez, Juan Macias, V. Cisneros, F. Jaurez, R. Wisegarber, G. De Ranieri, Ennis King, G. T. Hogan, and Gus Haglund were granted vacation by the Carrier during the year 1945 as follows:

J. A. Pinto, Assistant Mechanic	July 9 to July 14, 1945
Leodice Richard, Hoist Fireman	May 28 to June 2, 1945
J. D. Hartnett, Hoist Fireman	July 9 to July 14, 1945
D. Sanchez, Track Foreman	July 2 to July 15, 1945
Juan Macias, Track Laborer	April 30 to May 12, 1945
V. Cisneros, Track Laborer	May 14 to May 26, 1945
F. Jaurez, Track Laborer	May 28 to June 11, 1945
R. Wisegarber, Hoist Fireman	March 5 to March 10, and July 9 to July 14, 1945
G. De Ranieri, Hoist Fireman	April 16 to April 28, 1945
Ennis King, Truck Driver	June 25 to July 9, 1945
G. T. Hogan, Truck Driver	June 11 to June 23, 1945
Gus Haglund, Auto Mechanic	May 28 to June 11, 1945

J. A. Pinto was allowed a vacation of six days in 1945. Leodice Richard and J. D. Hartnett also were allowed vacation of six days in 1945. Twelve days vacation was granted to each of the remainder of the claimants in 1945.

The gang to which Pinto was assigned, prior to the time he was on vacation, was working an assignment of ten hours a day; they continued to work assignments of ten hours a day while he was on vacation and after he returned from his vacation.

10-E —Dispute between this Brotherhood and the Detroit, Toledo, & Ironton Railroad.

25-W—Dispute between this Brotherhood and Kansas City Terminal Railway.

27-W—Dispute between this Brotherhood and Southern Pacific Company (Pacific Lines).

We attach as Employes' Exhibit "D" the Decisions in these referred to cases as rendered by the Vacation Committee February 2, 1947.

All the above referred to cases are similar to this instant case and a sustaining award by this Board will be consistent with the decision rendered in these previous instances. We respectfully request this claim be allowed.

CARRIER'S STATEMENT OF FACTS: Claim has been presented to your Honorable Board by the above named Organization, as set out in the foregoing caption. The caption does not correctly describe the claim, but it is used for identification purposes only. The foregoing claim has not been progressed in the manner prescribed by law or the rules of the Board or in the manner set out in the National Vacation Agreement, and the Galveston Wharves respectfully requests that it be denied for the reason set out above.

Each of the employes listed was given a full vacation during 1945. These claims have not been progressed in the proper manner on this property, nor has proof of the claims or argument setting out the reasons for each of the claims been furnished the Galveston Wharves. There have been no decisions under the Vacation Agreement which support the claim that these men, who were permitted to take their vacation and who were not relieved while they were on vacation, should be allowed more than 8 hours per day, their regular assignment.

The Galveston Wharves has worked some overtime in its various departments. The men for whom the claim was submitted in this case were not assigned to work more than 8 hours per day regularly. When these men were on vacation we were short some employes, including the ones who were on vacation, and did work some overtime with remaining forces. It cannot be said that if all of our employes were available and ready to work that we would have worked our forces any overtime, or as much overtime as was worked during that period.

There is no basis under the Agreement or in decisions that have been made by the National Vacation Committee or your Board that support the claim that men who were granted a full vacation should be allowed overtime because the remaining forces (not relief forces) worked some overtime while they were taking vacation. As previously stated, no adequate proof of the contentions made in the claim was presented in conference, and has not been presented at this time.

The Galveston Wharves respectfully requests an opportunity to appear before the Board in oral hearing and make such answer to the Organization's submission in this case as may be deemed proper.

The Board is respectfully requested to dismiss this claim because it is not properly before the Board.

(Exhibits not reproduced).

OPINION OF BOARD: This is a claim by twelve employes that the National Vacation Agreement was improperly applied in calculating their vacation pay. Each claimant was paid on the basis of an eight-hour day for his vacation period. The claim is that there was overtime assigned to the positions which should have been taken into consideration in determining the vacation pay.

The record establishes that the National Vacation Agreement of December 17, 1941, was incorporated into the Maintenance of Way Agreement by a

Memorandum Agreement negotiated in 1944 and that such Vacation Agreement was negotiated into the Agreement dated August 1, 1944, with the employes operating and firing locomotive hoists. All claimants to this dispute are within one or the other of these two Agreements.

It is the contention of the claimants that they were working overtime which was other than casual or unassigned overtime within the meaning of Article 7 (a) of the agreed upon interpretations of June 10, 1942, to the National Vacation Agreement. The Carrier asserts that the overtime was casual and unassigned within the meaning of the same provision. The dispute requires a consideration of the evidence in the record to determine this issue.

The claimants assert that they were working regularly assigned overtime each day prior to going on vacation. Eleven of the claimants were working nine hours each day and the twelfth claimant was working ten hours each day. They assert that the same assignments were continued upon their return from their vacation and that such assignments of overtime were also worked by the employes working the positions during the respective vacation periods of these claimants. The evidence indicates that these employes were directed to perform overtime each day of one and two hours, respectively. It was not a contingent assignment under the record submitted by the Employes. The reasoning supporting this conclusion will be found in Award 4498.

The Carrier contends that the overtime worked was casual overtime. Carrier admits the working of overtime by claimants on a substantial number of days prior to their respective vacation periods. Whether the overtime was regularly worked on consecutive days before and after the vacation period, the Carrier does not reveal. The pay-roll records of the Carrier would have determined the correctness of the claimants' contentions on this important element of the case, but Carrier did not see fit to produce them. Consequently, the claim that the overtime worked was casual and unassigned is a mere conclusion of the Carrier unsupported by evidence.

We are of the opinion that claimants made a case. The Carrier for some reason did not see fit to refute the evidence of the claimants. If their allegations as to their assignments of overtime were untrue, the pay-roll records of the Carrier would have shown it. We must conclude, under such circumstances, that the evidence preponderates in favor of the claimants. An affirmative award is required.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 2nd day of March, 1950.