

Award No. 4924

Docket No. TE-4963

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Pittsburgh & West Virginia Railway Company, that

(1) The Carrier violated the Agreement of November 1, 1936 when it made a separate agreement with each of the individual employes, agent-operator at Avella, Pa., and agent-operator at Monessen, Pa., to perform service outside and in advance of their assigned hours at a rate of compensation other than provided for in Article 3 (c) of the Agreement of November 1, 1936, and

(2) The Carrier shall compensate both such employes, the agent-operator at Avella and the agent-operator at Monessen, as contemplated and provided for in Article 3 (c) of the effective Agreement dated November 1, 1936, for each instance on each separate calendar day that such employes performed service to which Article 3 (c) is applicable, beginning on the date the Agreement referred to in Item 1 were made effective and continuing until the conditions of Article 3 (c) are currently complied with.

EMPLOYEES' STATEMENT OF FACTS: An Agreement bearing date of November 1, 1936, as to rates of pay and rules of working conditions is in effect between the parties to this dispute.

Avella	Agent-Telegrapher	\$195.00 per month
Monessen	Agent-Telephoner	\$180.00 per month

The rates applicable to both positions have been subsequently converted to an hourly rate and progressively increased to \$1.912 and \$1.825 cents per hour respectively.

The regular assigned hours for the Agent-Telegrapher position at Avella are 8:00 a.m. to 4:00 p.m., seven days per week.

The regular assigned hours for the Monessen Agent-Telephoner position are 10:30 a.m. to 6:30 p.m., seven days per week.

The Carrier arranged with the Agent-Telegrapher at Avella, beginning June 21, 1946 and continuing through May 1, 1949, to report for work one hour in advance of regularly assigned starting time or at 7:00 a.m. each morning, for the purpose of checking the cars on the Acme Coal cleaning

a separate agreement with the Claimants. As shown in the Carrier's Statement of Facts, no separate agreements were made. On the contrary, the General Chairman was fully aware of and gave written concurrence with the agreement.

The Employees also state in "(1)" that the claimants performed service "outside and in advance of their assigned hours". This work was performed continuously with their assigned hours, which under Article III (b) is to be paid for at overtime rates. Article III (b) does not, as some agreements do, limit overtime to either work in advance of, or work after, the assigned hours; but merely says "in excess of" eight hours. Article III (b) is quoted as follows:

"Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis, at time and one-half rate."

The Carrier informed the General Chairman in conference that Article III (b) was applicabel in these cases, but he contended that they would have to be paid a minimum call under III (c). Article III (c) is quoted blow:

"When called to work outside of established hours, employees will be paid a minimum of two (2) hours at overtime rate. This does not apply to men who are notified before going home that they will be required to work after regular working hours."

This rule in this agreement, and similar rules in agreements in other crafts, was intended to provide proper compensation for employees who were called out after having gone home from their assignment. It has been so interpreted, on this as well as on other carriers. As stated before, all of the work in question was continuous with their assignment and was in excess of 8 hours and was properly paid for under rule III (b).

In "(2)" of the Statement of Claims in this case, the Employees request that the claimants be compensated on the basis of a call under Article III (c), "beginning on the dates the agreements referred to in Item 1 were made effective." It is presumed the Employees refer to the so-called "separate agreements", which, as the Carrier has shown, were not made and do not exist. Rather, the General Chairman was in accord with the arrangement, as shown in his letter of June 8, 1946 in Exhibit "A" hereof, and it was not until June 11, 1948, two years later, that he wrote to the Sup't. of Transpostation in the initiation of the present claim. During the years prior to the General Chairman's letter of June 8, 1946 and for two years afterward, the Employees were agreeable to the arrangement and did not consider it a violation of the Agreement.

The Carrier has shown that no "separate agreements" were made with the individual employees and that Article III (c) is not applicable. The Carrier therefore requests that claims (1) and (2) of the Employees be denied.

(Exhibits Not Reproduced.)

OPINION OF BOARD: The Carrier had a continuous arrangement with the Agent-Telegrapher at Avella and with the Agent-Telephoner at Monessen to check cars in the yards. They paid the Agent at Avella at pro rata rates and the Agent at Monessen at time and one-half, the latter rate being greater to compensate for the distance the Agent had to travel. These Agents performed this work during the hour preceding their regular assigned shift.

The contention of the Organization is that these Agents have been paid less than the contract rate as prescribed under Article III (c) of the Schedule. The Carrier contends that Article III (b) applies; that the Organization had for a great number of years accepted this interpretation and that the General Chairman had acquiesced in the application of III (b) to this situation. (The cited Articles are set forth in the above statements by the parties.)

Prior to 1946 the arrangement at Avella had been to pay the Agent for an extra one hour. (See General Chairman's letter of June 8, 1946, Exhibit "A".) This work, at the time of the letter, had been discontinued and the Operator required to perform it during his assigned hours. Upon the protest being made, the former practice of paying one extra hour was reinstated. On July 12, 1946, the Carrier advised the General Chairman that they were paying the Agent-Operator at Avella for one hour in addition to his regular assignment and declined to pay overtime to a Third Trick Operator, as had been requested, because the work was performed during his assigned hours. There is no record of a reply from the General Chairman to this letter of July, 1946. Previously, and on June 8, 1946, the General Chairman, in referring to the arrangement previously in effect, said, "There was no complaint to this method."

The language of Article III is ambiguous; and under such circumstances recourse may be had to the interpretation and practice of the parties under it. As may be seen from the correspondence, the Organization and the Carrier were not in dispute over the method of paying for the extra work prior to June, 1946, and when the method was reinstated, no objection was made until June, 1948. While past practice may not create new terms of an Agreement, it may be utilized in determining the meaning of ambiguous provisions of an Agreement. Whether Article III (b) applies only to hours of work immediately following a regular assignment or applies only to hours of work performed immediately precedent and contiguous to the regular assigned shift is the ambiguity to be resolved. There is no specific provision in the Schedule denying that time worked immediately prior to a regular shift could be construed as "time in excess of 8 hours" to which the phrase, "except as otherwise provided in these rules", might apply. The plain reading of the Rule would indicate that "time in excess of 8 hours" might mean time prior to the shift as well as time after, particularly in the case where the arrangement for the "excess" time was made in advance, as was done here.

However, it appears from the correspondence of record that the construction placed on this Rule by the parties in the past has resulted in their interpreting Article III (b) to mean that the "time in excess" may be both immediately following or immediately preceding an assigned shift.

It should be noted that the overtime rate for a minimum of 2 hours, as provided in Article III (c), does not apply where the employe is notified before going home that he is to work after hours. This exception gives strength to the conclusion that the premium payment provided in Article III (c) is to compensate the employe when he is called to work after his regular shift and before his assigned starting time, thus interrupting his rest and private plans. But if this is the reason for the premium payment provided in Article III (c), then for the same reason such provision of the Agreement does not apply where a continuous arrangement has been made for the employe to perform extra service for a period prior and continuous with his regular assigned shift.

Of course, the Carrier may not make an agreement with an individual covered under a collective bargaining Agreement that is in derogation of the Agreement. (Awards 2217, 2636). The submissions indicate that no such agreement was made. The method employed by the Carrier in computing the extra pay was designed to equal the pay due under Article III (b). If it has not had that result, the deficiency should be paid. Subject to this provision, the claims should be denied.

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

Article III (c) of the Agreement does not apply to the facts of record.

AWARD

Claim denied per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of July, 1950.