Award No. 5222
Docket No. CL-5210

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Mr. Henry Cowx, Trucker, a tonnage employe, should have been paid on the basis of the average earnings per day for the last two (2) semi-monthly periods preceding his vacation, and,

2. That Mr. Cowx shall now be paid the difference between payment made and his actual average earnings during the two pay periods immediately preceding his vacation period, (July 12th, 1948 to July 24th, 1948, inclusive,) in accordance with Article 7 (d) of the Vacation Agreement.

EMPLOYES' STATEMENT OF FACTS: Mr. Henry Cowx was a regular assigned Trucker at Akron, Ohio, Freight Transfer as of the date his vacation started and was paid for services rendered in accordance with tonnage agreement in effect at that point. With the exception of a few employes all employes in gang formation composed of a Checker, Caller and two (2) Truckers, work on a tonnage basis, subject to a minimum daily guarantee of eight (8) hours work at the hourly rate of pay. When there is no tonnage work available, employes are used on a day work basis at the convenience of the Carrier.

Mr. Cowx was entitled to twelve (12) days vacation and took his vacation during the period July 12th, to 24th, 1948, inclusive. He was paid on the basis of a daily average of $12.77 per day during his vacation period.

This claim was considered by the Vacation Committee on April 19, 1950, resulting in a decision "Committee unable to Agree."

POSITION OF EMPLOYES: There is in effect between the parties Vacation Agreement of December 17, 1941, which contains the following Articles:—

> 7—Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:—
>
> (a) An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.

The Carrier has established that there has been no violation, that vacation payment was made in accordance with Article 7, paragraph (d) of the National Vacation Agreement and that the Claimant is not entitled to the additional extra compensation which he now claims.

Therefore, the Carrier submits that your Honorable Board should dismiss the claim of the Employes in this matter.

(Exhibit not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood makes this claim in behalf of Freight House Platform Trucker Henry Cowx, a tonnage or piece-work employe. It claims he was not paid in accordance with Article 7 (d) of the Vacation Agreement while on vacation. It asks that he now be paid the difference between what he received and what it claims he should have received.

This claim was presented to and considered by the Vacation Committee and, on April 19, 1950, it came to the conclusion that it was unable to agree. The dispute is properly here for our determination.

Claimant was regularly assigned to work eight hours per day, except Sundays and holidays, at Carrier's Freight Transfer, Akron, Ohio. He was paid on a tonnage or piece-work basis with a minimum daily guarantee of eight hours at hourly rate of pay. He had earned twelve days' vacation with pay. He took this vacation over the period from July 12 to 24, 1948, inclusive. Carrier paid him a daily average of $12.77 per day during his vacation. The Committee claims he should have been paid $13.87 per day.

The factual situation out of which the claim arises is simple and not in dispute. The last two semi-monthly periods preceding claimant's vacation, during which he worked on more than sixteen different days, covered the month of June, 1948. During this period claimant worked his regular assignment for eight hours on twenty-six days, or a total of 208 hours, for which he received a total of $331.95. He had 191¼ hours on tonnage or piece-work and 16¾ hours at his regular hourly rate. It is on this amount that Carrier based its vacation payment of $12.77 per day. In addition thereto claimant, during the month of June, worked 18¾ hours of overtime for which he received $28.75, or an average of $1.10 a day for twenty-six days. It is this difference for which this claim is made, that is, claimant contends he should have been paid $13.87 per day during his vacation.

The question here present is, should casual or unassigned overtime worked by employes being paid on a tonnage or piece-work basis be included in computing their average earning per day as provided in Article 7 (d) of the Vacation Agreement?

The provisions of Article 7 of the Vacation Agreement between the parties signed December 17, 1941, as far as here material, provide as follows:

> "7. Allowances for each day for which an employe is entitled to a vacation with pay will be calculated on the following basis:
>
> (a) An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.
>
> * * * *
>
> (d) An employe working on a piece-work or tonnage basis will be paid on the basis of the average earnings per day for the last two semi-monthly periods preceding the vacation, during which two periods such employe worked on as many as sixteen (16) different days."

The following interpretation of Article 7 (a) of the Vacation Agreement was agreed to by the parties as of June 10, 1942:

"This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier."

Necessarily, this interpretation relates to employes coming within the provisions of Article 7 (a). It is true, as Carrier contends, that Rule 7 (a) of the Vacation Agreement applies to employes having regular assignments, which claimant had, and that, by the interpretations agreed to as of June 10, 1942, it need not, in computing the daily compensation which it has agreed to pay the incumbents thereof while on vacations which they have earned, include casual or unassigned overtime. But Article 7 (d) is a rule relating specifically to a particular group of employes classified by the fact that the work they perform is paid for on a piece-work or tonnage basis. Consequently, they are not included in, but excepted from the provisions of Article 7 (a) and the interpretation thereof. Claimant comes within the provisions of 7 (d) and we must look to it for a determination of his rights.

In passing, it should be noted that Rule 20, Sections (a) and (b), of the parties' Agreement effective, as amended, July 1, 1945, are minimum guarantee rules of the hours per day and basis of pay and not here controlling.

Article 7 (d) of the Vacation Agreement provides that employes coming within the provisions thereof, who have earned a vacation, will be paid during the period thereof "on the basis of the average earnings per day for the last two semi-monthly periods preceding the vacation". By its terms 7 (d) does not exclude anything the employe has earned while working on his assignment. In fact, the language used clearly indicates that the amount to be paid while on vocation is intended to be the average of everything he has earned by his services through each day. It includes his earnings on the job, whether it be from casual or unassigned overtime or otherwise, just so it derives its source from the work which he performs for the Carrier.

To here put a limitation on the language used is not our prerogative. We must take the Agreements of the parties as made and interpret them according to their language when the language used is clear. We find Carrier should have paid the claimant on the basis of all his earnings during the month of June, 1948, or $13.87 per day.

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

That Carrier violated the provisions of the parties' Vacation Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 16th day of February, 1951.