**Award No. 5319**

**Docket No. CLX-5276**

# NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Angus Munro, Referee.**

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**PARTIES TO DISPUTE:**

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

**RAILWAY EXPRESS AGENCY, INCORPORATED**

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

(a) The wage and working agreements were violated through the method used in calculating compensation due train service employe J. H. Hollis regularly assigned to operate on Southern Pacific (Pacific Lines) trains 26-25/247-22-21 San Francisco, Calif.-Ogden, Utah Route on Western Pacific Railroad trains 40-1-2-39 San Francisco, Calif.-Salt Lake City, Utah route for the months of June and July, 1948.

(b) Management errs in its application of Rules 91, 65, 67, 72, 73 and 75 in compensating train service employes where vacation time, working time, overtime are involved in months where the schedule hours are 190 or more, and where vacation time, working time and overtime are involved in months where the schedule hours are less than 190, and

(c) Messenger-Baggageman J. H. Hollis shall now be paid the difference between the amount actually received and the amount he should have received for the months of June and July, 1948.

EMPLOYES' STATEMENT OF FACTS: Messenger-Baggageman J. H. Hollis with basic monthly salary of $293.10 for 190 hours or less, is regularly assigned in straight-away service to operate on Western Pacific Railroad trains 40-1-2-39 San Francisco, Calif.-Salt Lake City, Utah Route and is entitled to twelve (12) working days' vacation with pay each year. He was notified that his vacation for the year 1948 would be the period June 27 to July 8 inclusive and that he should be back to work on train 2 July 9.

He was relieved for vacation June 27 to July 8, 1948 inclusive and returned to work on train 2 July 9 instead of his own schedule which was not due out until train 40 July 13.

Messenger Hollis' schedule on position 293-8 for the month of June, to which position he was assigned at the beginning of that month, was as follows:

"Rule 65 states that 204 hours or less in regular assignment shall constitute a **basic month's work.** The monthly pay must be also for a basic month's work. They must coincide. The $192.40, is therefore the pay for 204 hours or less on regular assignment. It seems beyond question that the pay is not on an hourly basis but for the **assigned number of hours during a month,** although this may be translated into an hourly rate when necessary to comply with certain rules (see Rule 75 (c))."

Referee Wolfe in Decision E-1260

It does not contemplate payment of overtime in the calculation of the vacation allowance and the approval of that method, by the Referee in Decision E-1260 restricted the payment of overtime to the fractional parts of the month **actually worked** as set forth in Rule 73.

This complainant contends that employes should be paid for overtime accruing under their schedules while they are on vacation as a matter of right. This contention is not sound for it is in conflict with the wording of Rules 67 and 73. Rule 67 provides that overtime shall be paid "for all time on duty each month in excess of 190 hours" while Rule 73 dealing with overtime for fractional parts of the month, provides that "overtime will accrue after a ratable proportion of the 190 hours period **has been worked**". It further provides "overtime for such employes will consist of the time actually **on duty** in excess of the ratable proportion of the 190 hour period as above determined". The wording of both rules is clear that overtime will be paid only for time actually worked. Time on vacation obviously does not come within that category, nor is there anything in Rule 91 which would fairly permit of a construction that overtime be paid under any circumstances during the vacation period. While Exhibit No. 2 attached reflects overtime payments in favor of employe Hollis for the month of June while operating on the San Francisco-Ogden route, and similar payments for the month of July while operating on the San Francisco-Salt Lake Route, those payments consisted of the time actually worked in excess of the ratable proportion of 190 hours based on the ratio of the scheduled hours worked to the scheduled hours constituting the month's work for June and July as appropriate in accordance with the provisions of Rule 73. No other payment could have been made under the clear and unambiguous terms of the rules.

The claim of employe Hollis is wholly without merit and should be denied on the grounds: (a) That the Carrier has not violated Rules 91, 65, 67, 72, 73 and 75 as alleged and (b) that employe Hollis was properly compensated for the months of June and July, 1948 in accordance with the rules and practices as understood and interpreted by the parties since the vacation rule became effective January 1, 1938.

All evidence and data set forth have been considered by the parties in correspondence except as hereinbefore noted.

(Exhibits not reproduced.)

**OPINION OF BOARD:** On June 1, 1948, employe Hollis was the regularly assigned holder of what we will style for the purpose of simplification the Southern Pacific job. Petitioner avers this job for the month of June had a schedule of 211 hours of which said Petitioner performed his duties over a period of 25 hours on the run beginning on June 2, and over a period of 25 hours and 30 minutes on the run beginning on June 5. The next succeeding run for such employe would have started on June 10, however he bid in what we will style Western Pacific 16-12 job and under its schedule he could not begin a run until June 11.

For his services on the Southern Pacific job Hollis was compensated on the following basis, to-wit: the hours actually worked were multiplied by the pro rata hourly rate which result plus certain overtime amounted to $78.92. The important point to bear in mind is the hourly rate was deter-

mined by dividing the monthly pay of $293.10 by the monthly scheduled hours or 211. At any rate Hollis and Respondent are apparently not in disagreement over the compensation and method used to compute same and likewise there is no apparent disagreement over Hollis not working one day by reason of his election to change jobs and receiving no pay for same. Reference is here made to Carrier's Exhibit 2 for detailed explanation of computing said pay.

Hollis further avers the Western Pacific 16-12 job had a monthly schedule for June of 204 hours; that commencing with the June 11 run he actually worked 104 hours 25 minutes and beginning with the June 27 run he went on his annual vacation and so spent 52 hours and 30 minutes.

For his services on this job Respondent compensated Hollis in the following manner, to-wit: The hourly pro rata rate was obtained not by dividing the monthly pay by the scheduled monthly hours which Hollis claims to be 204 but by 178 alleged by Carrier to be the monthly scheduled hours and which is arrived at by adding vacation time of 26 hours to time worked or 151 hours and 30 minutes. Carrier then followed the same method as it did for the earlier June period and reference is here made to the exhibit hereinabove mentioned for a detailed explanation thereof. We will comment later herein with reference to the manner and method used to compute the vacation time. Carrier reached the figure of $217.14 for such period which with the pay for the first period totaled $296.39.

The aforesaid vacation terminated on July 8, and had Hollis remained on his assigned job he would not have commenced work until July 13, however Carrier directed him to perform the duties incident to what we shall style Western Pacific 16-2, and he began said duties on July 9. We will make comment later herein with reference to the reason of Carrier in so directing him. Hollis further averred this job had a monthly schedule for July of 204 hours, that the monthly schedule for July of Western Pacific 16-12 was 177 hours and fifteen minutes, that he worked 152 hours which he places in Western Pacific 16-2 and that he had 49 hours 30 minutes vacation time which he places in Western Pacific 16-12. However Carrier calculated the July compensation by using the monthly scheduled hours of Western Pacific 16-2 to determine the pro rata hourly rate and then proceeding in the manner hereinabove mentioned in said exhibit.

By reason of the above and foregoing acts on the part of Carrier the Petitioner contends the same constituted a violation of Rules 91 (vacation), 65 (month's assignment), 67 (overtime rate), 72 (pay for fractional part of month), 73 (overtime for fractional part of month), 75 (working during layover by regular employe).

The means, manner, and method used by Respondent in the hereinabove described calculations is better known as the drop back system or plan. Prior to the adoption of this plan, Carrier alleged situations frequently arose whereby the vacation period of an employe terminated at the same time the work period on said employe's schedule ended or during his layover period and the employe objected to remaining idle without pay until his next succeeding scheduled run and clamored for a change. Carrier did change and describes same as follows: "then adopted the plan of starting an employe's vacation on a day upon which he would otherwise start his run on the road, and then calling him upon the day after the twelve days vacation expired, regardless of whether this date fell upon a day which would, if he had not taken a vacation, been in his layover period. The result was that a large number of employes, after vacations, started their runs upon days other than those upon which they would have started if they had not taken vacation." This plan is styled pooling or bunching of runs.

Coming now to the method used to compensate employes under such plan and in particular the daily rate, Carrier states "it was necessary to relate the various schedules to a single work day in as equitable a way as possible. As working days have been construed to include layover days, the

most equitable manner to determine the average value of a single working day within a given schedule was accomplished by dividing the total number of scheduled hours contained in the complete cycle of the schedule by the number of days comprising the cycle". Thus Carrier calculated the June vacation period as 6 hours 23 minutes per day for four days.

The claim in Decision E-1121 is based on the theory that directing an employe to work on a day which would have been his rest day had he worked instead of enjoying his vacation constituted a violation of Rule 75 of the Schedule. The learned Referee, G. Stanleigh Arnold, held it did not. He noted the Brotherhood had not pleaded a violation of the vacation rule.

In Decision E-1122, the same learned Referee held employes on the extra board were not entitled to runs performed by regularly bulletined and assigned employes who, upon returning from vacation, were placed in an active duty status on a day which would have been a rest day had not their vacations intervened. Violation of the vacation rule was not pleaded and the opinion makes no reference to it.

The claim in Decision E-1260, alleged violations of Rules 72 and 73 of the Schedule and a monthly schedule less than the basic month was also involved. The opinion was by Referee Jas. H. Wolfe and makes reference to the vacation rule in that "working days" as used in the rule include rest days. Referee Wolfe points out that while an employe may as a result of changing schedules in the pool work more time than he otherwise would have nevertheless this condition is equalized in succeeding months. Whether Referee Wolfe considered what the result would be in the situation where the employe for any reason leaves the service before or at the end of the month during which he worked the increased time of course we do not know. The claim was denied in said Decision.

The next case cited by the parties hereto is Decision E-1580, opinion by Honorable Jno. Thad Scott, Jr. It is interesting to note the claim in such case alleged violation of Rule 73 of the Schedule, however the distinguished Referee did not limit himself to only the consideration of the rule pleaded as did G. Stanleigh Arnold but instead made inquiry as to whether Petitioner had established a violation of any portion of the Schedule. Mr. Scott concluded a violation had been shown. The Decision very clearly points out that which is stated in the vacation rule, i.e., the vacation will consist of a certain number of working days with pay. We think the gist of E-1580 is to the effect that the plain meaning of the vacation rule may not be circumvented by the application of other rules in the Schedule and from which spring the drop back rules. We further think the learned Referee in E-1580 had no intention or design to overrule those cases decided by Messrs. Arnold and Wolfe except as the drop back plan as applied in a particular case causes the employe to receive less than the working days with pay he is entitled to while on vacation. While under the authority of E-1121 it may not be said the change from Western Pacific 16-12 to Western Pacific 16-2 was a change in bulletined work it most certainly cannot be said it was not a change of the parts or elements comprising the bulletin. Nothing we have held herein is intended or is to be construed as in any manner affecting the rule that punitive or overtime pay is not to be allowed for duties or work not actually performed but it is intended to hold that Carrier may not change a portion of an assignment so as to change the compensation an employe would have received had he not been on a vacation. We are not unaware of the fact that Carrier under the vacation rule must extend a vacation to those employes coming within the terms of said rule but if the effect of this opinion be such as to cause Respondent to revert to the plan used prior to the Award in E-1121, but which was not agreed to by petitioner, the Brotherhood may not complain inasmuch as such effect would be but the result of its efforts herein.

**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 Agreement to the extent indicated in the above Opinion.

AWARD

Claim sustained in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of April, 1951.