

Award No. 5837

Docket No. CLX-5735

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

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

- (a) The agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, effective September 1, 1949, was violated at Jackson, Mississippi, July 4, 1950, when regular chauffeurs F. C. Comfort and Wardell Hawkins were denied the right to work their assignments, and
- (b) They shall now be compensated at time and one-half rates for 8 hours, at \$246.93 per month basic.

EMPLOYEES' STATEMENT OF FACTS: F. C. Comfort is a regularly-assigned chauffeur at the Jackson, Mississippi Agency, with seniority dating from May 10, 1943, hours of service 7:00 A. M. to 4:00 P. M., meal period 12:00 Noon to 1:00 P. M., days of rest Saturday and Sunday, salary \$246.93 basic per month.

Wardell Hawkins is a regularly-assigned Chauffeur at the Jackson, Mississippi Agency, with seniority dating from October 5, 1934, hours of service 9:00 A. M. to 6:00 P. M., meal period 12:00 Noon to 1:00 P. M., days of rest Saturday and Sunday, salary \$246.93 basic per month.

Calendar Tuesdays were not excluded from either of their assignments.

July 3, 1950, Terminal Agent W. R. Sudduth posted bulletin, indicating that employees Comfort and Hawkins would be off duty July 4, 1950, account holiday. (Exhibition "A".) Investigation developed the fact that regular delivery routes, identified as positions No. 1 and 3, group No. 88, were worked by furloughed employees July 4, 1950. August 21, 1951 Local Chairman J. C. Lancaster filed claim in favor of Comfort and Hawkins at time and one-half rates, with Agent L. S. Tague. (Exhibit "B".) Subsequent thereto, Local Chairman Lancaster secured sick leave and did not return to service.

November 29, 1950, Agent Tague addressed Local Chairman D. L. Luckey, confirming his verbal advice that Management was agreeable to disposing of these claims at pro rata rates, but declining punitive pay. (Ex-

the basis of a long line of precedents established by this Board, the claim should be allowed only at the pro rata rate." Again in Award 5240, Referee Boyd said "On the principle heretofore well established, the allowance should be at pro rata rate." And again in Award 5249, "* * * based on the well established precedents of this Division, they are entitled to reparation at the pro rata, not the punitive rate."

In Award 5261 Referee Robertson held that "* * * there is no doubt that the applicable rate is pro rata and not punitive." And in Award 5266, "The right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. The proper penalty in this instance is the pro rata rate of the position for the number of hours lost because of Carrier's failure to properly apply the Agreement."

In Award 5321 Referee Robertson and in Award 5325 Referee Munro followed the long line of precedents established and sustained claims at the pro rata rate only where punitive rate had been claimed.

Carrier asserts that it has amply demonstrated that its offer in the instant case to dispose of it in the field on the basis of pro rata rather than at the time and one-half basis was proper and should have been accepted by the Employees. Under all of the circumstances and in view of the long line of precedent awards cited, the claim for overtime rate for work not performed is without merit and should be denied.

All evidence and data have been considered by the parties in correspondence and conference.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no substantial dispute as to the controlling facts which give rise to this claim. The claim is on behalf of F. C. Comfort and Wardell Hawkins by the Organization. These two were regular chauffeurs for the carrier.

Under the Rules of the Agreement the carrier had the right to dispense with their service on holidays. If, however, their service was not dispensed with they were entitled under the terms of the agreement to pay at the rate of time and one-half of the pro rata rate. Also, if others performed work in the positions they were entitled to pay at the time and one-half rate.

Notice was given that Comfort and Hawkins would be off duty on July 4, 1950, a holiday. However, on that day work was performed by others in the positions to which they were entitled by seniority. Claim was made on their behalf for compensation at the time and one-half rate. The carrier offered to pay the pro rata rate, which was refused.

The carrier in defense of the claim for pay at the time and one-half rate relies upon the decisions of this Division wherein it was held that where no work was performed by the claimant the pay should be only at the pro rata rate. The precedent of those decisions can have no application here. The rate under the agreement on a holiday was time and one-half of the pro rata rate. There was under the agreement no other rate. It could not be reduced no matter who performed the work. The pro rata rate could under no circumstances apply to it. To apply the rule contended for in the present instance would be to reduce the penalty below the agreed rates to be paid for the work of the position when performed on holidays. To do so would amount to an invasion and modification of the terms of the agreement between the parties.

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 Employees involved in this dispute are respectively Carrier and Employee 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 claim has been sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of June, 1952.