Award No. 5978
Docket No. CL-6037

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the provisions of the Rules Agreement, effective May 1, 1942, particularly the Scope, by the use of so-called emergency employes to relieve regular positions of Freight Trucker, Freight Station, Louisville, Kentucky, on the relief day, effective March 24, 1946, and until the seven-day operation was changed to a six-day operation which terminated the claim as relief was not then required.

(b) Regular employes affected be allowed a day's pay at time and one-half for each such day—the rate of pay they would have received if they had worked. (Docket W-557)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representatives of the class or craft of employes in which the Claimants in this case held positions, and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes, between the Carrier and the Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Title I, Section 5, Third (e), of the Railway Labor Act and which has also been filed with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

Prior to, and during the period of this claim, positions of Freight Trucker at the Freight Station, Louisville, Kentucky, were considered and advertised as seven-day positions necessary to the continuous operation of the Carrier, with relief days of the positions being on various days throughout the week. Such positions are those described in Rule 4-A-2(a) which reads as follows:

III. **Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable Agreements between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the agreement between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement, and that the Claimants are not entitled to the compensation which they claim.

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

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimants, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all the same. Oral hearing is desired.

All data contained herein have been presented to the employes involved or to their duly authorized representatives.

(Exhibits not reproduced).

OPINION OF BOARD: The undisputed facts show that prior to and during the period of this claim, trucker positions at Louisville, Kentucky, were advertised as seven-day positions, with designated relief days on any one of the seven days in the week.

In order to fill the positions on the relief day of the position, the Carrier maintained a force of so-called emergency employes who were used for this purpose and to perform extra work. It is established by the record, the use of these emergency employes, who were without seniority rights under the written agreement, was improper by the Carrier.

Irrespective of these circumstances, the Carrier offered settlement at pro rata rate because no claimant here was required to work as contemplated by Rule 4-A-2 (a), to justify pay for unworked time.

The sole issue in dispute, as agreed to by the parties, is whether claimants should be paid pro rata rate or time and one-half.

Rule 4-A-2 (a) is the applicable rule. It is as follows: "Work performed on Sundays and the following legal holidays, namely—New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving and Christmas, (provided when any of the above holidays

fall on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday), shall be paid at the rate of time and one-half, except that employes necessary to the continuous operation of the carrier who are regularly assigned to such service, will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regular assigned seventh day off duty, will be paid at the rate of time and one-half. When such assigned day off duty is not Sunday, work on Sunday will be paid for at the straight time rate."

The Employes' position is, since the regularly assigned employes were denied the right to work their assigned rest days, in place of the emergency employes used, they should be paid a day's pay at time and one-half for each such day they were not permitted to work. This is the rate they would have received if they had worked, as provided in Rule 4-A-2 (a).

The Carrier contends that the rate of time and one-half in the stated rule only applies if employe is required to work on his assigned rest day.

It is true that awards differ on the subject here presented, and the holdings therein would tend to confusion in handling claims of this nature on the property, as evidenced by the record before us.

We are of the opinion, after a careful review of the cited awards by the Petitioners and the Carrier, that the language in the following awards squarely determines the issue in this case. Therefore we deem it of no particular value to elaborate on or to distinguish the cited awards.

Award 5271—this Division: "The basis of these claims is improper denial of the right to work on a rest day. The Claimants would have been entitled to the overtime rate had they worked the rest days; but if relief or extra men had worked, they would have been entitled to the straight time rate. It is settled by a long line of awards listed in Award 4244 that the Claimants are entitled to no more than the straight time or pro rata rate. See also Award 4728."

Award 3193—this Division: "It seems clear that the penalty rate for work lost because it was improperly given to one not entitled to it under this Agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work." The general rule is that the right to work is not the equivalent of work performed, so far as overtime is concerned. Consequently, time not actually worked cannot be treated as overtime unless the agreement specifically so provides. This conclusion is supported by Division Awards 2346, 2695, 2823 and 3049.

In Award 5929—this Division: "The established rule, as we have heretofore indicated, and we should add the one to which we are disposed to adhere in the absence of special or extraordinary circumstances making it inapplicable, is that the penalty rate for work lost because it was improperly given to one not entitled to it under a collective bargaining Agreement is the rate which the employe to whom it was regularly assigned would receive if he had performed it. Illustrating the general principle, see our Awards 3193, 4467, 5437, 5444, 5721, 5831 and 5895.

There is evidence in the record of settlements made between the parties subsequent to the effective date of the present agreement, which are in accord with both parties contentions. However, interpretations given a contract by the parties themselves will be adopted as controlling only when the contract is ambiguous. See Awards 561 and 3466, of this Division. Here, there is no ambiguity in Rule 4-A-2 (a) as adopted by the parties effective May 1, 1942 * * *. See Award 4447, this Division.

For the reasons given herein, claim (b) should be sustained at the pro rata rate.

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 the Agreement was violated.

AWARD

Claim (a) sustained. Claim (b) sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 31st day of October, 1952.