



Award No. 15594
Docket No. TE-14616

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

MAINE CENTRAL RAILROAD COMPANY

PORTLAND TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Maine Central Railroad, that:

CLAIM NO. 1

Carrier violated the Agreement between the parties hereto when on July 9, 10, 16 and 17, 1963, it failed to properly compensate Mr. A. D. Oulton, third trick operator at Royal Junction, for eight hours at time and one-half on these dates, his rest days.

Carrier shall be required to compensate Mr. A. D. Oulton for eight hours at time and one-half for Tuesday, July 9, Wednesday, July 10, Tuesday, July 16 and Wednesday, July 17, 1963, his rest days, as required by Article 10 of the Agreement. (Carrier's File TE-63-5.)

CLAIM NO. 2

Carrier violated the Agreement between the parties hereto when on July 4 and 5, 1963, it failed to properly compensate Mr. P. N. Farrell, relief operator at Danville Junction, for eight hours at time and one-half on his rest days.

Carrier shall be required to compensate Mr. P. N. Farrell for eight hours at time and one-half for Thursday, July 4, and Friday, July 5, 1963, his rest days, as required by Article 10 of the Agreement. (Carrier's File TE-63-6.)

EMPLOYEES' STATEMENT OF FACTS: The two claims in this dispute were handled separately but simultaneously on the property. For the reason that the issue giving rise to the claims is not dissimilar and the basic rules upon which the claims are premised have equal application, we have merged the two claims into a single submission.

performed by an available extra or unassigned employee who will otherwise not have forty hours of work that week, in all other cases by the regular employee.'

I would call your attention to the fact that the dates of the claim included part of a regularly assigned position, and, further, that no work was required by the Railroad of Claimant Oulton on his rest days; therefore, the above quoted paragraph of Article 10 would have no application in this instance.

I cannot agree that Article 15--Emergency Service has any application, as there was no emergency, and no requirement for the Claimant to perform service on his rest days, nor was he entitled to work on other than his regular assignment.

There is no merit to the claim, and it is respectfully declined." Exhibit C(2) reads in part--

"Claimant Farrell was regularly assigned to Relief Position RP-16 with various assignments at Danville Junction, Royal Junction, and Yarmouth Junction, Saturday through Wednesday, with Thursday and Friday assigned rest days. The claim involves his two rest days Thursday, July 4th, and Friday, July 5th, which were a part of another regular assignment and were covered on those days by an individual who was regularly assigned, who had volunteered to cover the Third Trick at Danville Junction while the regular incumbent voluntarily worked the Agent's position at Yarmouth Junction during his absence. There were no qualified spare men available.

I cannot agree with you that there is any merit to the claim under Article 10, Section (k), on which you based this claim, Article 6, or, in fact, any other rules.

Claim is respectfully declined."

The General Chairman, in separate letters dated December 2, 1963 (copies attached as Carrier's Exhibits D(1) and D(2)) stated in each letter that the decision of the General Manager was not satisfactory, and he intended to appeal the claim to the President of his Organization to handle to a conclusion.

(Exhibits not reproduced.)

OPINION OF BOARD: Two separate claims have been consolidated by the parties involving the same fundamental issues. Both claims are bottomed on the premise that a regularly assigned employee has a right to work his position on designated rest days when neither the regularly assigned relief employee nor a qualified extra employee is available for service.

Claim No. 1 resulted from Carrier's use of an employee, regularly assigned to another position at a different location, to work the third shift towerman position at Royal Junction, Maine on four claim dates instead of Claimant, the regularly assigned occupant. Neither the regularly assigned relief employee nor a qualified extra employee was available for service on any of the claim dates.

Claim No. 2 resulted from Carrier's use of an employee, regularly assigned to another position at a different location, to fill a temporary vacancy at Yarmouth Junction, Maine on July 4 and 5, 1963, instead of Claimant, a regular rest day relief employee, whose regular assignment included one day, Monday, as Agent at Yarmouth Junction. No extra employee qualified to work at Yarmouth Junction was available on the claim dates. Claimant, the regular assigned rest day employee, contends that he had a superior right to such work over that of the other employee assigned such work by the Carrier, who had no previous connection with the assignment.

Carrier asserts that the regularly assigned employees used to cover the temporary vacancies here in dispute performed such work on a voluntary basis in accordance with long standing practice. Although Carrier offered no probative evidence in support of its contention that the disputed work was performed on a voluntary basis, it did cite, without contradiction, specific instances in which assignments of a similar nature had been made without objection by Petitioner.

The pertinent provisions of the Agreement are contained in Article 10, and are similar to those contained in other agreements which have been considered and interpreted by this Board on numerous occasions. Awards 4728, 4815, 5333, 5475, 6524, 9393, and others. We have consistently held that work on rest days should be assigned in the following order:

First, to the regularly assigned relief man, if any;

Second, to an extra man, if any;

Third, to the regular occupant of the position, if neither the regularly assigned relief man nor an extra man are available.

Accordingly, we must conclude that Carrier violated the provisions of Article 10 because it used an employee regularly assigned to another position instead of Claimant in Claim No. 1 to work the rest days of Claimant when neither the regular relief man nor a qualified extra man was available.

We find no valid distinction between a "regular assignment" and a "regular relief assignment" when a vacancy occurs on a job that is part of either type of assignment. Analogous are prior Awards of this Board which find no distinction between such assignments in applying applicable rules for pay purposes. Awards 7828 and 11076. Thus, we must further conclude that Carrier violated the provisions of Article 10 when it used an employee regularly assigned to another position instead of Claimant in Claim No. 2 to work the rest days of Claimant when a qualified extra man was not available.

The remaining issue for determination is the proper measure of damages. Petitioner seeks the premium rate of time and one-half for the unworked overtime hours that should have gone to the claimants. Carrier contends that in no event should damages exceed the pro rata rates, and, further, that Petitioner had acquiesced in the past when similar assignments were made by Carrier. Although Petitioner has apparently failed to object to previous assignments by Carrier similar to those herein found violative of the Agreement, such previous acquiescence cannot estop Petitioner from now seeking to enforce the expressed rules of the Agreement. Moreover, there is no evidence that Carrier relied upon Petitioner's passivity to its detriment.

Under these circumstances, we reject Petitioner's demand for damages based on what the Claimants would have received if they had been given the overtime work to which they were entitled. Instead, we find that Claimants will be sufficiently compensated if they are paid at straight time rates since the persons who actually performed the disputed work were so compensated. However, premium pay should be paid to Claimant Farrell for July 4, 1963, a holiday properly compensable at the premium rate.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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.

AWARD

Claim sustained as modified by Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May 1967.