# Award Number 17917
# Docket Number TE-17858

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

David Dolnick, Referee

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## PARTIES TO DISPUTE:

## TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

## THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the New York, New Haven and Hartford Railroad, that:

CLAIM NO. 1

1. Carrier violated the Agreement when it blanked position at Waterford, Connecticut, March 20, 1967, and did not call S. S. Operator D. Dalzell on his relief day to cover the position.

2. Carrier shall compensate D. Dalzell eight (8) hours at the time and one-half rate of position of S. S. Operator-Clerk, Old Saybrook, Connecticut.

RR Docket 10734

CLAIM NO. 2

1. Carrier violated the provisions of the Agreement when it blanked the 5:00 P.M. to 1:00 A.M. position of S.S. Operator at Waterford, Connecticut when it failed to call and use the services of Mrs. Brown on his relief days to cover this job.

2. Carrier did compensate Mr. Brown for pro rata time for May 21 and June 4, 1967 but we feel that this position could only have been covered by the use of Mr. Brown on his relief days and this would have been paid at the punitive rate and we now feel this is what he is entitled to now.

3. Carrier shall now compensate Mr. Brown for the difference between pro rata time and punitive time for May 21 and June 4, 1967.

RR Docket 10779

CLAIM NO. 3

1. Carrier violated the provisions of the Agreement when it blanked the 5:00 P.M. position at Waterford, Connecticut and failed to call and use the services of Operator-Clerk Denis Dalzell on Monday, June 26, 1967.

2. Carrier did compensate Mr. Dalzell for 8 hours at the pro rata rate of his job at Old Saybrook, Connecticut, but it is our

position that he should have been paid at the punitive rate of his position per Article 6-A, Sec. V. Had Mr. Dalzell worked this position this is what he would have been entitled to.

3. Carrier shall now compensate Mr. Dalzell for the difference between pro rata and the punitive rate of his position at Old Saybrook, Connecticut.

RR Docket 10782

CLAIM NO. 4

1. Carrier violated the provisions of the Agreement when on Saturday, August 19, 1967 it called and used a spare man, F. Mastantuono at S.S. 133, Kingston, Rhode Island, instead of using the nearest senior qualified employee, namely Mr. W. J. Coutanche. Mr. Coutanche was also on his rest day and was the employee that should have been used in accordance with the November 8, 1960 "Short Vacancy" agreement.

2. Mr. Coutanche was compensated for 8 hours at the straight time rate, but it is our contention that had Mr. Coutanche had been called and used on August 19, 1967, his rest day he would have been paid the punitive rate in accordance with Article 6-A.

3. Carrier shall now compensate Mr. Coutanche for the difference between the straight time rate already paid and the punitive rate, for August 19, 1967.

RR Docket 10849

CLAIM NO. 5

1. Carrier violated the provisions of the Agreement when it failed to call and use the services of S. S. Operator R. A. Vincent to cover the second trick at Westerly Tower, Westerly, Rhode Island on Sunday, August 6, 1967.

2. Carrier did sustain the claim in behalf of Mr. Vincent at the pro rata rate, but we contend that this claim should have been sustained at the punitive rate of the position at Westerly Tower, Westerly, Rhode Island.

3. Carrier shall now compensate Mr. Vincent an additional 4 hours or half time for Sunday, August 6, 1967.

RR Docket 10868

CLAIM NO. 6

1. Carrier violated the provisions of the Agreement when it failed to call and use the services of S.S. Operator R. L. Goudreau on his relief days of Saturday, July 1 and Sunday, July 2, 1967.

2. Carrier did compensate Mr. Goudreau for eight (8) hours at the pro rata rate of his position at Promenade Street Tower, Providence, Rhode Island, but it is our position that he should have been paid at the punitive rate per Article 6-A, Sec. V. had Mr. Goudreau worked this position this is what he would have been entitled to.

3. Carrier shall now compensate Mr. Goudreau for the difference between pro rata rate that he has already been paid and the

Tower. This vacancy was covered on the dates of claim by Spare Operator J. J. Handrigan, who was on the rest days of his holddown assignment as Agent at South Providence, Rhode Island, when the claimant was ready and available for service.

CLAIM NO. 7—RAILROAD DOCKET 10762

Claimant owned regular assignment as Agent-Operator at Davisville, Rhode Island, with work days Monday through Friday. On Saturday, May 27, 1967, a vacancy existed on this assignment and a spare employe, who was not qualified at this position, was inadvertently assigned to cover this vacancy when the claimant was ready and available for service.

In each of these cases, the claimants were paid at the straight time rate of the position to which they would have been assigned with the exception of Claim No. 3 where the claim was erroneously paid at the higher rated position. However, because the difference between the two rates of pay was insignificant no adjustment was made. See Carrier's Exhibit "C."

Claims were initiated in behalf of each of the claimants for the difference between eight hours at the pro rata rate already paid and the punitive rate of the higher rated positions.

Claims were denied on the property on the grounds that had the claimants been used on the dates of claim, they would have been used in accordance with the provisions of the Agreement dated November 8, 1960 and that since they performed no service on such days, there was no basis for payment at the overtime rate.

Attached in exhibit form is copy of pertinent correspondence:

"A"—Carrier's decision—Claim No. 1

"B"—Carrier's decision—Claim No. 2

"C"—Carrier's decision—Claim No. 3

"D"—Carrier's decision—Claim No. 4

"E"—Carrier's decision—Claim No. 5

"F"—Carrier's decision—Claim No. 6

"G"—Carrier's decision—Claim No. 7

Copy of Agreement dated September 1, 1949, as amended, between the parties is on file with your Board and is, by reference, made a part of this submission.

(Exhibits Not Reproduced)

OPINION OF BOARD: The basic issue is the measure of damages occasioned by Carrier's breach of the Agreement. Employes contend that they are entitled to actual loss of earnings which is pay at the punitive rate. Carrier argues that Claimants were properly paid at the pro rata rate since they performed no service.

Each party has cited awards of this Division, including those with this Referee, to support its position. There is no unanimity among the awards so adopted by this Division. Some have held that only pro rata pay may be recovered and others have held that the Carrier is liable for actual wage loss. Awards with this Referee also hold both ways.

After a careful study and review of the awards on this subject, it is the considered judgment and the conclusion of this Board that the better logic, reasoning and the application of the legal principle of compensatory damages lies with those awards which hold that actual loss of earnings is the proper measure of damages where the Carrier has violated the Agreement. We are inclined to follow Awards 11333, 11558, 11571, 11878, 12786, 13315, 13738, 15048, 16254, 16295, 16528 and 16820.

But, says the Carrier, no work was "required" of the Claimants and they "rendered no service" to be entitled to the overtime rate as prescribed in Article 6-A, paragraphs I and V. Paragraph I says that Article 6-A is for the sole purpose of determining the compensation for employes who are required to work on their assigned rest days." And paragraph V reads:

> "V. Service rendered by an employe on his assigned rest day or days filling an assignment which is required to be worked or paid eight hours on such day will be paid for at the overtime rate with a minimum of eight hours."

Under the Rules of the schedule agreement, the Carrier was required to call the Claimants for work on their respective rest days. This much is acknowledged when the Carrier paid each of them at pro rata rate for each of the days the Agreement was breached. If they had been called, they would have been "required to work on their rest days" and if they had been so called they would have "rendered service". They did not voluntarily refuse to "render service," they were prevented from doing so by the Carrier's neglect in calling them. They would have "rendered" the "service" had not the Carrier breached the Agreement. In this respect we disagree with the conclusions reached in Awards 13191 and 17745.

An additional issue is involved in Claim No. 1. That Claimant was paid the rate of the position on which he would have worked had he been called. Employes say that he is entitled to be compensated at the higher rate which was the rate of his regular position and contend that Article 29 supports them. That rule applied only when an employe is diverted by the Carrier from his regularly assigned position to another in case of an emergency. It says that "In no event will the employe receive less pay than he would have received had he not been used in such emergency cases." No such emergencies existed on the dates in the claims.

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 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.