

Award No. 5750

Docket No. MW-5710

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

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

(1) That the Carrier violated the effective agreement and the Vacation Agreement of December 17, 1941, when they failed to allow Assistant Extra Gang Foreman George H. Whiteman vacation compensation based on the straight time and overtime work of his respective assignment;

(2) That Assistant Extra Gang Foreman George H. Whiteman be paid the difference between what he did receive as a vacation allowance in the year 1950 and what he should have received had the overtime work accruing to his position been included in the vacation allowance.

JOINT STATEMENT OF FACTS: George H. Whiteman is employed as Assistant Extra Gang Foreman in the Maintenance of Way Department on the Chicago Division at LaPaz, Indiana.

Mr. Whiteman was instructed by the Supervisor to work overtime daily before and after his regular tour of duty in order to transport employes in his gang to work and take them home following their regular tour of duty. This overtime ranged from one to one and three-quarters hours per day. Mr. Whiteman started his vacation on August 1, 1950, and while he was absent on vacation the employe who relieved him aggregated eleven and three-quarters hours overtime for the same reason. Mr. Whiteman's vacation allowance was determined on the basis of eight hours per day with no additional allowance for the overtime.

The agreement in effect between the two parties to this dispute dated April 17, 1930, and subsequent amendments and interpretations, and the Vacation Agreement of December 17, 1941 and supplements thereto, are by reference made a part of this Statement of Facts.

This dispute has been handled in accordance with the provisions of the Railway Labor Act as amended. No agreement on a settlement thereof having been reached between the parties, it is hereby submitted to the National Railroad Adjustment Board for decision.

POSITION OF EMPLOYES: Mr. George H. Whiteman, was assigned to the position of Assistant Extra Gang Foreman at LaPaz, Indiana, Chicago Division, on May 1, 1949.

"unassigned" overtime which, by reason of some service requirement, he might have secured had he remained at work.

What is meant by "unassigned" overtime has already been explained by this Division. By way of example, the Carrier has cited a quotation from one of this Division's awards (5001) dealing with this identical matter. In the case at hand, the criterion established by the Division has not been met by the employees. They have the burden of proving that this was a measure of "assigned" overtime; this they cannot do. Moreover, the Adjustment Board has held many times that without good cause and reason, it will not act to overrule a construction established by a series of awards.

SUMMARY: CHARACTER OF THIS OVERTIME.

A summary of the facts and evidence in this case demonstrates:

- (1) The overtime was not a part of the regular assignment. It could be authorized only on instructions issued daily by the Supervisor. If the work necessitating the overtime was not needed, then the overtime was not worked and nothing was said to the employee.
- (2) The overtime was not bulletined.
- (3) The overtime was worked only on those days when the employee was instructed so to work.
- (4) It was unknown from day to day whether the overtime would have to be worked at all the following day.
- (5) The amount of overtime was variable from day to day.
- (6) The performance of the overtime and the amount of the overtime worked was governed exclusively by the day-to-day requirements of the service.

For these reasons, the Carrier submits that the instant wage claim for vacation pay is not meritorious and respectfully requests that it be declined by this Division.

OPINION OF BOARD: The System Committee of the Brotherhood contends Carrier did not properly pay Claimant, Assistant Extra Gang Foreman George H. Whiteman, while he was on vacation. It asks that Carrier be required to do so.

The facts are not in dispute. Claimant was instructed by his Supervisor to work overtime daily before and after his regular tour of duty. This was for the purpose of transporting the members of his gang to and from their work. This overtime occurred daily but varied in the length of time required to perform it, ranging from one to one and three quarters hours.

Claimant started his vacation on August 1, 1950. While absent thereon his relief worked 11½ hours' overtime performing this work and was paid accordingly. However, Claimant, while on his vacation, was paid on a basis of eight hours per day. He contends he should have received compensation covering this overtime. The claim is made accordingly.

Article 7(a) of the Vacation Agreement provides:

"An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment."

By "Interpretations" dated June 10, 1942 this provision has been interpreted to mean:

"This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier."

Casual means happening without design and without being expected, that is, coming by chance, coming without regularity, occasional and uncertain. Therefore casual overtime means overtime arising from service requirements or events which depend upon contingency or chance, and without regularity.

Unassigned means that the work is not part of an assignment. Unassigned overtime means overtime work which, although it may be regularly performed, has not been assigned to a position the occupant of which is performing it.

This Claimant was assigned to the position of Assistant Extra Gang Foreman at LaPaz, Indiana. The overtime here involved was neither casual or unassigned but was overtime work assigned to the position of Assistant Extra Gang Foreman by the Supervisor to be performed each day by the occupant thereof as a part of his regular assignment. Payment thereof was included in the daily compensation which the occupant thereof received. If this Claimant does not receive payment during the period of his vacation which is based thereon then certainly he will be worse off for having taken it. That is what the interpretation of Article 7(a) says the rule does not contemplate shall happen. We find the claim is valid.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 1st day of May, 1952.