

Award No. 5894

Docket No. CL-5936

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul G. Jasper, Referee

PARTIES TO DISPUTE:

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

**THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY**

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

(a) The Carrier violated the Clerks' Agreement when it required Employee Norris E. Shay to leave his regular position of Assistant Chief Timekeeper and Accountant in the Central Accounting Bureau, Hoboken, N.J., and perform special duties of supplying information and records to the Carrier's officers and attorneys at Bloomsburg and Scranton, Pa., on April 17, and 24, 1950, and

(b) That he be paid at his regular rate of \$284.97 per month for six hours on April 17 and eight hours on April 24 at the pro rata rate for the time that he was thus withheld from his assigned position in the Central Accounting Bureau, Hoboken, N.J., this, in addition to the amount he has actually been paid for working at Scranton and Bloomsburg, Pa., and

(c) That he shall be paid time and one-half times his regular rate for 17½ hours for services performed before and after his regular assignment in waiting and traveling on April 17 and 24, 1950.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, Norris E. Shay, during the interim of time involving the instant claim, was the regularly assigned incumbent of one of approximately fifty-seven positions fully covered by the scope and operation, of the applicable Clerks' Agreement involved, at the Central Accounting Bureau, located at Hoboken, N.J. The rate of pay for Mr. Shay's position titled Assistant Chief Timekeeper and Accountant was \$284.97 per month, with hours of service 8:30 A. M. to 12:30 P. M. and 1:00 P. M. to 5:00 P. M., from Monday through Friday, with assigned rest days Saturday and Sunday. His assigned duties were the preparation of bills and vouchers, handling miscellaneous accounts, and he assisted in the preparation of payrolls.

He was required to suspend work on his regular assignment for six hours on April 17, and eight hours on April 24, 1950, and also was required to perform 17½ hours overtime service in waiting and traveling, by reason of his having been assigned on the dates in question, to travel from Hoboken, N.J., to and from Scranton and Bloomsburg, Pa., for the purpose of furnish-

Here, the parties have provided a specific rule, the claimant was paid under it, and he is not entitled to anything more.

In Award 3966, the rule involved was substantially the same as here. The Board sustained the claim because the claimant in that case was used on his rest day. However, it is very clear that if this had not been the case the Board would have no difficulty in denying the claim. The Board said:

"The rule is plain and, in our opinion, covers attendance on both courts and investigations, because there is no other rule in the Agreement which separately refers to attendance at investigations. * * * We would have no difficulty with the case were it one in which the employe had been interrupted in the performance of his 'regularly assigned duties'." * * * (Underscoring added.)

Neither April 17 nor April 24 were rest days of the claimant in the instant case.

Ever since we have had agreements with the Clerks it has been the practice under Rule 48 to handle cases of this kind as properly compensable under that rule as specifically applicable to such cases. This is the first claim of its kind ever presented to the carrier.

Mr. Carlo's notion that a fair interpretation of the Clerk's Agreement requires "the Legal Department people" to appear at the office of an employe and develop the witnesses' testimony after office hours clearly demonstrates the absurdity of this claim. Carried to its conclusion, this notion would mean that the lawyers for the parties in cases where the carrier is a litigant would have to appear after the close of office hours at the office of every witness in every case, instead of following the pre-trial procedure under the practice of the Pennsylvania courts, assembling the witnesses, developing their testimony and reducing it to a stipulation wherever possible, as was done in this case at the Columbia County Court House in connection with the suit of D.L. & W. RR. Co. vs. Mahlon Levingood and Claude Reppert.

The notion now set forth by Mr. Carlo for the first time would result in the nullification of Rule 48, a specific rule. In the language of this Board:

"In the face of it, rules relied upon by Claimant can have no bearing on the issue."

Moreover, an acquiescence of over twelve years "* * * is clearly relevant to a determination of the intent of the parties as to the applicability * * *" of a rule (Award 3343) and, as said in First Division Award 13688:

"The parties to a contract know best what is meant by its terms and are least likely to be mistaken as to its intention. Each party is alert to protect its own interests and to insist on its rights. Whatever is done by them during the period of the performance of the contract is strong evidence of the meaning of its terms as they understood and intended they should be." The claim is without merit and should be denied.

The data herein has been handled in conference with the Employes on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Shay was Assistant Chief Timekeeper and Accountant at Hoboken, New Jersey, in December 1944. His regular assigned hours were from 8:30 A. M. to 5:00 P. M. with 30 minutes off for

lunch. His rest days were Saturday and Sunday. Neither of these are involved in this claim.

On April 17, 1950 the Claimant was required to leave Hoboken at 10:30 A. M. and proceed to Scranton, Pennsylvania, for the purpose of discussing evidence to be given in a law suit involving the Carrier, but not involving the Claimant. Shay departed Scranton at 6:30 P. M. arriving back in Hoboken at 9:55 P. M. on the same day.

Shay claims six hours' pay at pro rata rate for the time suspended from his regular job during regular assigned hours, and overtime from 5:00 P. M. to 9:55 P. M., at time and one-half rate.

April 24, 1950 Shay was required by the Carrier to leave Hoboken at 1:05 A. M. for Scranton, then go to Bloomsburg, Pennsylvania to attend a pre-trial conference in a law suit in which Carrier was involved. The pre-trial conference was held at the Court House with lawyer and witnesses from both sides and the Judge hearing the matter.

The Claimant returned to Scranton, departing Scranton at 6:28 P. M., arriving at Hoboken at 10:15 P. M. Shay claims pay for this day for eight hours straight time rate as a penalty for being suspended from his regular assigned job during his regular assigned hours and overtime at time and one-half rate for the hours from 1:05 A. M. to 8:30 A. M. and 5:00 P. M. to 10:15 P. M.

The Claimant had been paid for eight hours on each day in question and actual expenses under Rule 48.

The Carrier contends that the duties Claimant was required to perform on April 17 and April 24 came within Rule 48 which is as follows

"Employees taken away from their regular assigned duties at the request of the Management, to attend court or to appear as witnesses for the carrier will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place and, in addition, necessary actual expenses while away from headquarters. * * *"

If this last cited Rule is applicable to both days in question, then Claimant has been fully paid and the claim should be denied.

A pre-trial conference held with the Court is considered a part of the trial of a law suit. From the conference comes stipulations as to evidence and other matters. It is to expedite the trial of the case and simplify the issues to be presented.

The Claimant in attending the pre-trial conference held in the Court House before the Court was attending Court within the meaning of Rule 48 of the Agreement.

Rule 48 provides what shall be paid when employees are required to attend Court or to appear as a witness. We cannot add words to this Rule nor take them out by interpretation.

The Claimant received full payment for April 24, 1950 when he was paid his regular pay for his regular assigned position, his transportation, and actual expenses.

Rule 48 of the Agreement is a special rule and modifies the general rules in conflict.

On April 17, 1950 the Claimant was required by the Carrier to leave his position to confer with the Carrier's attorneys. He did not attend Court nor did he appear as a witness for the Carrier. Rule 48 does not cover

conferences with attorneys for the Carrier, therefore, the Claimant is entitled to be paid for all overtime performed after 5:00 P.M. on April 17, 1950. Carrier violated Rule 3-3/4 on this date which provides: "Except as otherwise provided, time in excess of eight (8) hours exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

Claimant contends that the Carrier violated Rules 23, 29, 31, 34, and 5. To this we cannot agree. Rule 5 provides that: "Employees will not be required to suspend work to absorb overtime." In this claim Shay was not required to suspend work to fill a vacancy of another position for which the Carrier would have had to pay overtime if he (Shay) had not filled it, nor was he required to suspend his work on his regular assignment and perform work in another position which work would have required overtime performance. See Award 5331.

The Claimant was paid eight hours for his regular assigned duties on April 17, 1950. He is entitled to no more except the overtime between 5:00 P.M. and 9:55 P.M.

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 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; and

The Carrier violated Rule 3-3/4 on April 17, 1950. In other respects there was no violation of the Agreement.

AWARD

Claim sustained in part, in conformity with this Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 28th day of July, 1952.