Award No. 8277
Docket No. CL-7697

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, 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 Division Committee of the Brotherhood that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 4-A-1 (b), (c), (d) and (e), by refusing to pay Nicholas Russi, Extra Tallyman at Philadelphia Transfer, Philadelphia, Pa., Philadelphia Terminal Division, at the punitive rate for services performed March 9 and April 12, 1952.

(b) Extra Tallyman, Nicholas Russi, the Claimant, should be compensated for the difference between the pro-rata rate, which he was paid, and the punitive rate, which he should have been paid, on March 9 and April 12, 1952. (Docket E-921)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position 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, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also 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.

The Claimant is assigned to the Group 1 Tallymen's Extra Board at Philadelphia Transfer, Philadelphia, Pa., and has seniority dates on the Seniority Rosters for the Philadelphia Terminal Division in Groups 1 and 2. His Group 2 seniority date is September 12, 1939, and his Group 1 seniority dates from September 26, 1942.

OPINION OF BOARD: The question to be resolved here is shall paid vacation time be counted as time worked for the purpose of computing overtime?

Claimant Russi, in 1952, was entitled to ten workdays' vacation, which he took at two different periods.

The first period began Monday, March 3 and lasted for five days. Carrier called him to work on Sunday March 9, the seventh day of that week.

The second part of his vacation began on Monday, April 7 and Carrier called him to work on Saturday, April 12, the sixth day of that week.

It is the claim of the Organization that under the Agreement, particularly paragraphs (b), (c), (d) and (e) of Rule 4-A-1, Claimant Russi should have been paid at one and one-half times the basic straight time rate of pay for this work performed on the seventh and sixth days of his respective work weeks.

Carrier takes the position that he was properly compensated at the pro rata rate in conformity with the provisions of Rule 4-A-6 (d).

Organization contends that the "Carrier takes the unusual position on this issue, as in a docket involving employe Schraer, the Carrier took the position that it rightfully paid Schraer punitive rates for service performed on a Sunday after Schraer was on vacation for five days. The Carrier contends in the Schraer case that he was a regular employe and Sunday was one of his designated rest or relief days. Mr. Russi was worked on his designated rest or relief day."

Claimant Russi is assigned to the Group 1 Tallymen's Extra Board at Philadelphia Transfer and has seniority dates on the Seniority Rosters for the Philadelphia Terminal Division in Groups 1 and 2.

The Agreement Rule immediately confronting us here is 4-A-1 (b):

> "(b) (Effective September 1, 1949) Time worked in excess of 40 straight time hours in any work week shall be paid for at one and one-half times the basic straight time rate of pay, except * * * (the parties are in agreement that the exceptions hereafter listed have no application here.)"

We likewise have (c) of Rule 4-A-1:

> "(c) (Effective September 1, 1949) Employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate of pay for work on the sixth and seventh days of their work weeks, except * * * (and again the parties agree the exceptions which follow are not applicable here.)"

It should be noted that paragraph (b) refers to "time worked" in excess of 40 straight time hours and paragraph (c) refers to "employes worked" more than 5 days.

It is Carrier's position that "vacation time is not in fact time worked, that the Claimant had not worked in excess of forty hours or more than five days in either work week involved, and that the Claimant was not entitled to the payment of time and one-half for the service performed on the dates in question."

Carrier further states that "to establish his right to the punitive rate of pay provided in Rule 4-A-1 (b) and (c) the Claimant, an extra employe, would have to show either that he had worked in excess of forty straight time hours or more than five days in the work weeks involved."

Counter argument in behalf of Organization observes that Rule 4-A-1 (b) "relates only to the time worked **in excess of 40 straight time hours** (which admittedly Russi received pay for) and is not predicated on whether Russi did or did not actually work during those 40 straight time hours. Those 40 straight time hours were part of Russi's work week of seven consecutive days starting Monday, he being an extra or unassigned employe under Rule 5-E-1 (i). Under certain provisions of the Vacation Agreement of December 17, 1941 the Carrier could have actually worked Russi during those 40 straight time hours. The fact that the Carrier did not so work him, does not cancel out that part of Rule 4-A-1 (b) whereby the Carrier is required to pay for 'Time worked in excess of 40 straight time hours' at one and one-half times the basic rate." (Emphasis theirs).

We must agree with additional argument in behalf of Organization that the Interpretation of Referee Wayne Morse on Article 1 of the Vacation Agreement, relied on by Carrier, "deals only with respect to the matter of compensated service" in determining the eligibility of employes for vacation. It has no application here because Mr. Morse was interpreting "compensated service."

Organization also relies on Rule 4-A-1 (e), particularly the last sentence:

> "(e) (Effective September 1, 1949) Compensation for time which employes are off duty with pay for personal reasons will be used to offset overtime, * * *. Other time off duty with pay will be considered the same as time worked in computing overtime."

In rebuttal to Organization's reliance on the above Rule, Carrier notes that "if the second sentence is read in connection with the first, as it must be to understand its purpose, it is apparent that it means only that time off duy with pay for other than personal reasons will not be used to offset overtime. In other words if an employe to whom the second sentence applies becomes entitled to overtime, his time off will not be used to offset it. Before the second sentence has any application the employe concerned must have made overtime. The determination of whether he is entitled to overtime, however, does not depend on the second sentence, but on the other separate provisions of the Agreement, in this case Rule 4-A-1 (b) and (c). The only purpose for the phraseology that other time off duty is to be 'considered as time worked' is to ensure that no time off duty other than for personal reasons would be used in computing the offset against overtime permitted by the first sentence. Of course time actually worked would not be used to offset overtime, and the parties chose their language merely to ensure the same results in the case of time off not covered by the first sentence. * * *

"The reference in the present Rule to 'time off duty with pay for personal reasons' can have no application to hourly rated employes who would receive no such pay. The vacations and sick leave with pay to which reference was made in early applications of the rule (exemplified in Exhibit 'A') were available only to monthly rated employes. The Carrier submits that the rule thus has no proper relation to the present case which involves only the question of whether an hourly-rated extra employe is entitled to overtime under the provisions of paragraphs (b) and (c) of Rule 4-A-1."

Rule 4 covers, as the Agreement indicates, "Time Allowances." We must and will agree with Carrier's observations generally that under Rule 4,

> (a) establishes a day's work as "8 consecutive hours on duty," exclusive of the meal period; that time worked in excess of 8 hours in any 24 hour period will be overtime and paid for at punitive rates;
>
> (b) provides punitive rate for "time worked" in excess of 40 hours in any work week, with an exception not here applicable;

(c) provides punitive rate for work on the 6th and 7th days of their work weeks for "employes worked" more than 5 days in a work week, and

(d) prohibits pyramiding of overtime, etc. The parties agreed in argument this paragraph is not applicable here.

However, the first sentence of paragraph (e) provides that "Compensation for time which employes are off duty with pay for personal reasons **will be used** to offset overtime, including calls, in that pay period." (Emphasis added.)

To that extent, it modifies (a), (b) and (c).

The second sentence of (e) says that

"Other time off duty with pay will be considered **the same as time worked in computing overtime.**" (Emphasis added).

It must certainly be read, as Carrier claims, in connection with the first sentence. And to the extent indicated, it, together with the first sentence, modifies (a), (b) and (c).

It must be noted that the second sentence does not say that other time off duty with pay "will not be used to offset overtime." It states clearly that such time

"will be considered the same as time worked in computing overtime," viz., under (a), (b) and (c).

Thus we are faced with the question: Shall paid vacation time be considered as "time off duty with pay," within the meaning of the second sentence of Rule 4-A-1 (e)?

Admittedly no section of the Agreement states explicitly that paid vacation time shall be so considered. Certainly, however, the parties, in framing that second sentence had some "time off duty with pay" in mind.

Carrier states "the determination of whether he is entitled to overtime, however, does not depend on the second sentence, but on other separate provisions of the agreement, in this case Rule 4-A-1 (b) and (c)."

With this we cannot agree. Rule 4-A-1, (b) and (c) are modified to the extent of the language of paragraph (e).

Carrier also states the only purpose of the second sentence of (e) "is to ensure that no time off duty other than for personal reasons would be used in computing the offset against overtime permitted by the first sentence."

Carrier submits that the second sentence of (e) cannot be construed as Organization contends "in view of its purpose and history."

Carrier says that in 1921 clerical employes were covered by a schedule known as "Regulations for the Government of Clerical Forces under the jurisdiction of General and Division Superintendents, effective July 9, 1921," and proceeds to establish the history of the principle of offset against overtime, as then recognized.

It submits as an exhibit a case of Clerk F. E. Barber, and asserts the decision "shows very clearly that the offset rule had nothing to do with determining when an employe was entitled to overtime, but only came into effect after, by his work performed on Sundays, Holidays, rest days or on call he had become entitled thereto under other provisions of the regulations."

With respect to Carrier's Exhibit, above referred to, the decision in the case cited was made by Carrier's General Manager, as was then customary.

The record of that case, as contained in Carrier's exhibit A, noted that the position of Carrier's General Superintendent was that "Regulation 4-A-1 when drafted and accepted by the representatives of the clerical forces * * * was understood by all to mean exactly what it said; in other words, any time off duty with pay was an offset against overtime and calls, this off duty time with pay including vacations and sick leave."

"Under date of August 23, 1921," the General Superintendent asserted, "decision was rendered by the General Manager:

> 'It has now been decided that time allowed off duty with pay on account of vacation, is not to be considered as an offset in the allowance of overtime under this regulation.' * * *"

It might well be reasoned that had paragraph (e) been in existence in 1921, the effect of the General Manager's 1921 decision would have taken paid vacation out of the coverage of the first sentence and placed it under the coverage of the second sentence of paragraph (e) as it is now before us.

In this record, the Carrier submits that the history of Rule 4-A-1 (e) here

> "shows that it was never intended to apply to hourly rated employes. Its position in the agreement of 1921 * * * was in a paragraph dealing only with monthly rated employes. Hourly rated provisions were covered by other overtime provisions not having any offset features. The reference in the present Rule to 'time off duty with pay for personal reasons' can have no application to hourly rated employes who would receive no such pay."

Organization asserts, however, that "When the National Vacation Agreement of December 17, 1941 was effective in 1942, that the language of Rule 4-A-1-(e) as now in effect was continued in the Rules Agreement. The Rule is not restricted by the way an employe is paid: monthly, daily or hourly." With this we concur.

We could here sustain Carrier's position if Agreement Rule No. 4 ended with paragraph (c); or if the second sentence of paragraph (e) read "other time off duty with pay **will not be used to offset overtime.**" (Emphasis added).

Such is not the case. The sentence clearly states that

> "other time off duty with pay will be considered the same as time worked in computing overtime."

Therefore, in Claimant Russi's case the period March 3 through 7, 1952 being his paid vacation time, and having performed service for Carrier on Sunday, March 9, 1952, the period March 3 through March 7 must be considered as time worked (Rule 4-A-1 (e)) in computing the overtime he thus earned (Rule 4-A-1 (b)) on Sunday March 9; and, the period April 7 through 11, 1952 being his paid vacation time, and having performed service for Carrier on April 12, the period April 7 through 11 must be considered as time worked (Rule 4-A-1 (e)) in computing the overtime he thus earned on April 12 (Rule 4-A-1 (b)).

The claim will be sustained.

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) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1958.