Award No. 13696
Docket No. TE-12920

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, New Haven and Hartford Railroad, that:

1. Carrier violated and continues to violate the provisions of the Telegraphers' Agreement when, commencing April 4, 1960, and continuing to date, it fails and refuses to compensate Mr. C. P. Mulligan, Agent, Middletown, Connecticut, for service in connection with train movements in excess of eight hours per day and outside his regular assigned hours.

2. Carrier shall compensate Mr. Mulligan by payment of sixty-one hours and forty-five minutes at the time and one-half rate of his position for such service performed between April 4, 1960, and June 30, 1960, both dates inclusive, as set forth in detail in Statement of Facts, and shall compensate him additionally at the time and one-half rate for such service commencing July 1, 1960 and continuing until this claim shall finally be disposed of.

3. Carrier shall further compensate Mr. Mulligan by payment of one hour at the straight time rate of his position account not afforded his assigned meal period June 9, 1960.

4. Carrier further violated the Telegraphers' Agreement, when between the dates of April 23, 1960, and July 1, 1960, it required and permitted train service employes, outside the coverage of the Agreement, to perform the duties of block operator and to handle train orders at Middletown, Conn.

5. Carrier shall additionally compensate Mr. C. P. Mulligan by payment of twenty "calls" for forty hours at time and one-half rate in accordance with Article 7 account not called to perform service outside of his regular assigned hours at Middletown.

assigned operators should have been called out to report trains clear of the block during hours when operators had not previously been assigned. Your Board rejected the contention of the employes — a similar ruling is here required.

The work in question is not work which accrues exclusively to the Telegraphers either by rule, custom, or practice, and the claim should be denied.

Aside from the position that there was no necessity to use claimant on the dates in question, we submit that the request for "call" payments is improper in any event. Had the claimant been used, such time worked would not be paid in addition to his monthly rate, but only when in excess of 208⅓ hours.

Carrier respectfully submits:

(1) the claim for daily overtime in those months where claimant did not work in excess of 208⅓ hours should be denied.

(2) the claim for payment in lieu of lunch hour should be denied.

(3) the claim of alleged blocking service violations is unsupported by the Agreement and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioner makes three claims against Carrier, each of which will be discussed separately.

The first involves the right of a monthly rated agent to be paid at overtime rates for work performed outside of assigned hours and in excess of eight hours per day. The record indicates that Claimant worked 61¾ hours during the months of April, May and June, 1960, before or after his scheduled hours, on Monday through Fridays. The basic question involved is whether Article 6 (a) and (b) of the applicable Agreement apply to monthly rated employes. Their employment is governed by Article 33, which reads as follows:

"ARTICLE 33. MONTHLY RATED POSITIONS

(a) The monthly rates shown in wage scale (prefixed by asterisk) comprehend 208⅓ hours per month. Such employes shall be assigned one regular rest day per week, Sunday if possible. Such employes may be used on the sixth day of the work week to the extent needed without additional compensation. If not worked on the sixth day, or if worked less than a full day on such sixth day there shall be no reduction in compensation.

Time worked (other than on assigned rest day) in excess of 208⅓ hours in any calendar month will be paid for at time and one-half. Time worked on the assigned rest day shall be paid for under the appropriate provision of Article 6-A.

The overtime rate will be determined by multiplying the monthly rate by 12, dividing by 2500 and multiplying the result by one and one-half.

The monthly rates payable to such employes effective September 1, 1949 shall be the rates in effect August 31, 1949 reduced by 56 cents per week or $2.43 per month.

Future wage adjustments, so long as such rates remain in effect on such basis, shall be made on the basis of the hours comprehended in the rate in effect on and after September 1, 1949.

(b) Such positions will not be subject to the provisions of Article 4-B (Holiday) nor to that portion of Article 8 relating to specific assignment of meal periods."

Petitioner points out that Articles 4-B and 8 are the only Articles mentioned as being excepted from the application of Article 33. Under the rule of construction that where specific exceptions are made it will be presumed that there are no other exceptions, Petitioner argues that Article 6 (a) and (b) apply. They read as follows:

"ARTICLE 6. BASIC DAY — OVERTIME

(a) Eight (8) consecutive hours, exclusive of the meal period specified in Article 8, will constitute a day's work.

(b) Except as otherwise provided, time worked in excess of eight (8) hours on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate."

We find, however, that this rule of construction is not applicable here, for to hold that Article 6 (a) and (b) apply would create an ambiguity instead of resolving one. Article 6 (b) provides for daily overtime, "Except as otherwise provided. . . ." Article 33 provides otherwise when it states, "Time worked (other than on assigned rest day) in excess of 208⅓ hours in any calendar month will be paid for at time and one-half."

Article 6 (b) by its own language defers to any other provision with which it conflicts. Reading both Articles together, it is clear that the parties intended overtime payment only when the monthly total of time worked exceeded 208⅓ hours. The sole exception was work on an assigned rest day. If we use the same rule of construction urged by the Petitioner, work on an assigned rest day being the only specified exception, there are no other exceptions. It follows that daily overtime must be ruled out as another exception to computing overtime.

The record indicates that Petitioner at first agreed by implication that a monthly rated employe is not entitled to daily overtime. It originally relied on the argument that Carrier had unilaterally combined a monthly and an hourly rated position and therefore "can no longer rely on Rule 33 to absolve it from payment of overtime." (Record 13, 14.) In effect, it was saying that although a monthly rated employe is not entitled to daily overtime, he should receive it when he also performs the duties of an hourly rated employe who is admittedly required to be paid daily overtime. This argument is specious since the right to daily overtime depends not upon the work done or upon who previously did the work, but upon whether the claimant qualifies under the Agreement.

This claim arose when Carrier issued instructions that only time actually worked on Saturdays should be computed in the total hours worked each month.

Petitioner charges that these instructions were a violation of the letter and spirit of the applicable agreement and of the National Agreement of March 19, 1947, which established the 40-hour week. It is not clear from a reading of the National Agreement whether daily overtime or any other overtime applies to monthly rated employes. Whatever ambiguity in this respect may have existed, the parties cleared it up by specific language in Article 33 when they provided for overtime after 208⅓ hours worked.

Petitioner also argues that by applying Saturday's unworked hours against daily overtime, Carrier required Claimant to suspend work to absorb overtime.

The difficulty with this argument is that Petitioner assumes the unworked time on Saturday was suspended. Saturday work was not part of Claimant's regularly assigned work and cannot, therefore, be said to have been suspended. Carrier was given the right to call upon Claimant to work on Saturday if necessary without additional pay. If he is not called he cannot be suspended from work.

Whether the employe is working when called upon by Carrier to stand by on Saturday if needed, is a question not before us and should not, therefore, be decided at this time.

This part of the claim is, therefore, denied.

The second claim is for payment for one hour at the straight time rate because Claimant was not afforded his meal period on June 9, 1960. On that day Claimant worked without taking any time for a meal.

Carrier refused the claim on the ground that Article 8 relating to the specific assignment of meal periods was excepted. Under Article 8 such employes are entitled to a meal period but not at any specifically assigned time. This claim will be sustained.

The third claim is based upon the fact that on specified occasions, conductors of various extras cleared the block from Middletown to operators who control it.

On this property we held in Award 6800 that "where a conductor clears a block at a recognized block station outside the hours of duty of the assigned man (except in an emergency) the assigned operator is entitled to a call." This award is authority for holding that such work is block work.

The standards governing the payment of a call for such block work were defined by Special Board of Adjustment No. 306, Award No. 29. This Award reaffirmed Award 6800, and also held that a call should be awarded if the acts complained of occurred outside the assigned hours of the Agent at the point involved. Award 8133 was distinguished on the ground that in that case, on the dates and during the hours indicated, the work involved had never been performed by telegraphers. In Award 29 it was shown that, up to 14 years earlier, operators were employed around the clock at the signal station.

Award 6800 is still authority on this property, and requires the payment of a call unless it is shown that on the dates and during the hours indicated, the work involved had never been performed by telegraphers as stated in Award 8133. He who claims the exception to the general rule has the burden

of proof. There is no such proof here. Carrier's assertion that there has been no operator on this trick for thirty years does not satisfy the need to show that the work involved had never been done by telegraphers.

Carrier finally argues that Claimant is not entitled to any calls because if Carrier had called him, the work would have been encompassed in the 208⅓ hours claimant must work before being entitled to overtime pay. We think the point is well taken for the reasons we have stated above in discussing the claim for work performed outside of assigned hours.

It is apparent, however, that in the months of May and June, the combination of hours actually worked and calls, computed at the rate of 2 hours each, might exceed 208⅓ hours. To the extent that they do, Claimant is entitled to overtime pay at the rate of time and a half, the exact amount to be determined by a joint check on the property.

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 Carrier violated the Agreement.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1965.