Award No. 15969
Docket No. TE-13896

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, 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 the parties' Agreement by improperly paying Mr. Milton Faubel, Agent, New Rochelle, New York, for August 26 and September 2, 1961, Saturdays, occurring during a vacation period in which Mr. Faubel was denied a vacation to which entitled.

2. Carrier shall be required to compensate Mr. Faubel the difference between the amount received as a result of working his vacation period and that to which entitled under Agreement rules. (Railroad Docket 9136.)

EMPLOYES' STATEMENT OF FACTS: Mr. Milton Faubel was, at the period involved in this claim, the regular occupant of the agent's position at New Rochelle, New York. His position was covered by Article 33 — Monthly Rated Positions, which rule set forth the hours of service for positions such as Mr. Faubel's and reads, to the extent applicable, as follows:

"(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 2,500 and multiplying the result by one and one-half.

The position of Agent — New Rochelle is a monthly rated position (the structure and conditions of which will be discussed in detail in the position of the Carrier). The rate of pay comprehends service six days per week with no deduction in pay if service is not required on the sixth day of the work week, but with no additional payment if such service is required.

Mr. Faubel was called upon to work during his assigned vacation period August 13, 1961, to September 2, 1961.

Mr. Faubel was paid during this period:

(a) Three weeks' vacation pay at the rate of his position.

(b) Time and one-half payment in addition to vacation pay for time worked during the vacation period.

The point at issue in the case involves the measure of payment due the claimant on:

(a) Saturday, August 26, 1961, when Mr. Faubel performed no service.

(b) Saturday, September 2, 1961, when Mr. Faubel performed only four hours' service.

There are attached as Carrier Exhibits the following letters:

EXHIBIT A — General Chairman Marr's claim of December 13, 1961, to the undersigned as the highest Carrier officer designated to handle appeals.

EXHIBIT B — Carrier's decision of February 9, 1962, to the appeal filed by General Chairman Marr.

EXHIBIT C — Payroll time report filed by Mr. M. A. Faubel for week ending August 26, 1961.

EXHIBIT D — Payroll time report filed by Mr. M. A. Faubel for week ending September 2, 1961.

Copy of the agreement 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 facts are not in dispute. Claimant was assigned a vacation period commencing Monday, August 14 through Saturday, September 2, 1961; a period of eighteen consecutive work days. Claimant was required to work his assigned vacation.

The question to be resolved is whether Claimant is entitled to an additional payment at time and one-half rate for the entire day of Saturday, August 26, 1961, when he performed no work, or that portion of Saturday, September 2, 1961, when no service was performed as Claimant only worked 4 hours on that date.

The parties agree Claimant was entitled, under Article 33, Monthly Rated Positions, one day, i.e., eight hours' pay at straight time, each Saturday, whether he worked or not. Further, Claimant did work on certain days within the assigned vacation period and for the work performed on those days, he was paid time and one-half in addition to his vacation allowance.

The other applicable rule involved in this dispute is Article 5 and 7 of the Vacation Agreement.

We do not find that the provisions of Article 33 of the Agreement or the provisions of Articles 5 and 7 of the Vacation Agreement are in conflict or overlap to be inconsistent, uncertain, or ambiguous in Carrier's application of them in the instant case.

Article 5 of the Vacation Agreement governs the question of additional payment at time and one-half rate to employes required to work within the assigned vacation period, which is the precise issue before the Board. Article 5 expressly sets forth the contention for additional time and one-half rate:

* * * * *

". . . then such employe **shall be paid** in lieu of the vacation **the allowance hereinafter provided.**

Such employe **shall be paid** the time and one-half rate **for work performed during his vacation period** in addition to his regular vacation pay." (Emphasis ours.)

The record is not clear whether or not Claimant received straight time pay for the two Saturdays in question, therefore, if it be found from a check of the Carrier's records that Claimant received no compensation for straight time, as guaranteed by Article 33, he should be so compensated for eight hours on August 26 and four hours on September 2, 1961 on a straight time basis only, but he is not entitled to an additional payment of time and one-half rate on these days. Article 5 expressly limits itself to time and one-half payment **for work performed.**

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 not violated.

AWARD

Claim denied as to additional time and one-half payment as set forth 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 November 1967.

DISSENT TO AWARD 15969, DOCKET TE-13896

Although I agree with the finding of the majority that the claimant should be paid his regular salary for the one day and a half during his vacation period on which no work was required — in accordance with Article 33 of the Agreement — I must disagree with the finding that this payment should not be at the time and one-half rate — in accordance with Article 5 of the Vacation Agreement as amended.

Claimant's monthly rate contemplates service on the sixth day of his work week. And the agreement specifically provides that if no service is required, or if less than a full day's service is required there shall be no reduction in compensation.

The Vacation Agreement casts the "vacation period" of monthly rated employes in terms of "weeks," and provides that for work performed during a "vacation period" the rate of compensation shall be time and one-half.

In placing the emphasis on the phrase "work performed" rather than on the term "vacation period" the majority has permitted a coercive provision to have the opposite effect of vitiating the plain intent of Article 33 (schedule agreement) and Article 5 (vacation agreement), when read together.

In other words, what happened here is the same as if a Carrier were permitted to pick out one hour of an hourly rated employe's "vacation period" during which no actual work was performed and pay him only the straight time rate for that particular hour.

Article 5 of the Vacation Agreement has no such meaning; this award is in error, and I dissent.

J. W. Whitehouse
Labor Member

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