

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Milton Friedman, Referee

PARTIES TO DISPUTE:

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

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the
Brotherhood (GL-6133) that:

(1) The Carrier violated the effective Agreement and the Vacation Agreement of December 17, 1941, when they failed to allow Claimants vacation compensation based on the straight time and overtime worked on their respective assignments.

(2) Claimants shall now be paid the difference between what they did receive as vacation allowance in the year 1965, and compensation for overtime worked on their position as shown below, had the overtime been included in the vacation allowance.

Name	Date	Hours
R. Nordlund	Last half	()
	September 1965	(90½)
	First half	()
	October 1965	()
A. Brasgala	July 22, 1965	8
	July 25, 1965	8
	July 29, 1965	8
	August 1, 1965	8
	August 5, 1965	8
J. Peterson	August 5, 1965	8
	August 6, 1965	10
	August 7, 1965	13
	August 9, 1965	11
	August 10, 1965	19½
	August 11, 1965	14

Name	Date	Hours
J. Peterson (Cont.)	August 13, 1965	9½
	August 14, 1965	8½
	August 15, 1965	8
	August 16, 1965	3½
	September 8, 1965	4
	September 9, 1965	5½
	September 10, 1965	9½
	September 11, 1965	9½
	September 12, 1965	8
G. Miller	June 21, 1965	9½
	June 22, 1965	14
	June 23, 1965	12½
	June 24, 1965	11
	June 25, 1965	12
	June 26, 1965	11
	June 27, 1965	6
	June 28, 1965	8
	June 29, 1965	8
	June 30, 1965	12
	July 1, 1965	16
	July 2, 1965	8
	July 3, 1965	8
	September 2, 1965	8½
	September 3, 1965	8
	September 4, 1965	8
	September 5, 1965	12
	September 6, 1965	16
D. Nichols	July 7, 1965	8
	July 8, 1965	7
	July 9, 1965	9
	July 10, 1965	8
	July 11, 1965	8
	July 12, 1965	17½
	July 13, 1965	18
	July 14, 1965	9½
	July 15, 1965	8
	July 17, 1965	8
N. Thomas	July 18, 1965	4½
	July 19, 1965	9
	July 20, 1965	2
	July 21, 1965	5½
	July 22, 1965	8
	July 23, 1965	2

Name	Date	Hours
N. Thomas (Cont.)	July 24, 1965	16
	July 25, 1965	8
	July 26, 1965	3
	July 27, 1965	1
	July 28, 1965	7
	July 29, 1965	3
	July 30, 1965	8

EMPLOYEES' STATEMENT OF FACTS: The Carrier is an iron ore hauling railroad with the iron ore being hauled by rail from the mines to Carrier's Iron Ore Docks during the Lake Shipping Season. The Lake Shipping Season is determined by the freeze-up and generally extends from April through November.

The Carrier maintains an iron ore weighing facility at Proctor, Minnesota, where the rail transported ore is weighed prior to loading in lake vessels. It is at this facility that Claimants were employed during the 1965 Iron Ore Shipping Season.

While on their annual vacations, Claimants were compensated at the daily rate of their assignment for 8 hours for each day of their vacation. In the absence of Claimants, while on their vacations, their positions were filled by vacation relief employees. The vacation relief employees worked overtime, as shown in the Statement of Claim, on the days and dates on which the vacationing employees were absent from their assignments. Overtime had been worked from the beginning of the Iron Ore Shipping Season by Claimants at the Proctor Ore Scale, prior to their vacation periods; overtime was worked during the Claimants' vacation periods, by the relief employees, and overtime was worked following the vacation periods by Claimants.

In the month of July, 1965 an excess of 1,000 hours of overtime was paid to the Ore Scale employees. The Ore Scale is operated 24 hours per day, 7 days per week, during the Iron Ore Shipping Season. In the Iron Ore Shipping Seasons prior to 1965, there were 2 employees per shift performing service at the Proctor Ore Scale. Commencing with the 1965 Iron Ore Shipping Season the Carrier introduced an Automatic Car Identification System and integrated its operation into the functions of the Ore Scale. The Carrier then, in 1965, believed the introduction of the automated system would allow a reduction of 1 employee per shift at the Ore Scale. Commencing with the 1965 Iron Ore Shipping Season, 1 employee was assigned on each shift. The reduction from 2 employees per shift to 1 employee per shift resulted in the performance of overtime by the remaining employees on the shift.

The Organization became aware of the extent of overtime being worked at the Ore Scale early in the 1965 Iron Ore Shipping Season and on numerous occasions requested the Carrier to establish additional 40 hour week assignments at that point.

It was the request of the Organization that the overtime be discontinued by furloughed employees of this Craft and Class being reemployed on regular assignments at the Ore Scale. On each occasion the request of the

When the weighmaster sees a waybill number change, he keys in the new number and the above process is repeated.

Needless to say, since this was the first installation of its kind, difficulties were encountered in making the system operational. The major difficulties were of a technical nature: the stepping or sequencing switch in the unit, which has many relays, would stick, track switches malfunctioned, and finger motors burned out. At times the reading unit failed to read car numbers and weights. The electric adding machine, which is tied in to the system, failed to function properly. This necessitated the redesign of electrical components of the equipment.

Because of these and other malfunctions of the system equipment, which were beyond the control of this Carrier, it was necessary to weigh, calculate, and recheck car numbers manually, necessitating that overtime be worked in order to maintain service to its customers.

To complicate matters further, the claimants took their vacations during the ore season. Naturally, the relief employees were not as familiar with the operation as were the regular incumbents, the claimants in this case. These factors made it necessary for the Carrier to work the remaining weighmasters on rest days and overtime.

The records show that the overtime was not scheduled, as it varied throughout the period of claim from one hour to a maximum of 18 hours per day. The employees were only requested each day to work overtime when it was necessary for the Carrier to meet service requirements.

All assigned employees at the Proctor scales have a regular assignment of hours, and in no case are there any regular hours of overtime included in such assignment. (Copy of bulletin attached and marked as Carrier's Exhibit G.)

The correspondence involved in the handling of the claims in this case on this property are attached and marked as Carrier's Exhibits A through F.

(Exhibits not reproduced.)

OPINION OF BOARD: 1. Claimants had been working a substantial amount of overtime prior to their vacations. Their vacation replacements continued to work a large amount of overtime. Had Claimants not been on vacation they would have been the beneficiaries of the work and the pay. The chief issue is whether or not the overtime was part of daily compensation to be included in calculating vacation pay, pursuant to Article 7 (a) of the Vacation Agreement of December, 1941 and its Interpretation of June 10, 1942:

"Article 7(a) - An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment.

Interpretation - This contemplates that an employee having a regular assignment will not be 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."

The Employees contend that Claimants were worse off during their vacations as the result of Carrier's failure to compensate them for the overtime hours that were worked. However, the language in the above-quoted interpretation indicates that "casual or unassigned overtime" is not to be a standard in deciding if an employee is "worse off," no matter how considerable its amount.

The term "casual and unassigned overtime" has been defined before, and lucidly, in Awards which have frequently been followed by this Board. Award No. 4498 (Carter) noted that casual overtime "means overtime the duration of which depends upon contingency or chance, such as service requirements or unforeseen events. Whether such overtime assumes a degree of regularity is not a controlling factor." Referee Carter observed that casual overtime could occur daily in varying amounts (which is precisely the circumstance in the case before us), whereas "regular overtime . . . means overtime authorized for a fixed duration each day of a regular assignment, bulletined or otherwise."

Award No. 4510 (Robertson), issued a few days after No. 4498, held that excluded from vacation calculation was overtime "not of a reasonably foreseeable and recurrent character and of a reasonably determinable duration on the days worked." In the case before us the overtime requirements, while vast, due partly to a new installation and to the exigencies of the busy season, were indeterminate, disparate, and of unanticipated duration.

The Robertson Award distinguished between casual and non-casual overtime, giving two illustrations. One was overtime ordered daily in a fixed amount, and the other was overtime to be performed when necessary and in an indeterminate amount, depending upon the needs of the operation. That the latter may involve far more hours would not alter its casual nature, and its proper exclusion, therefore, from vacation calculation. (Also see Awards 16307 and 14400.) Not overtime as such, but regular, recurring overtime of a fixed amount thus becomes part of daily vacation compensation whose loss would leave a vacationing employee "worse off."

The Employees cited sustaining Award 9240 (Stone), which stated that the overtime work in that case was assigned overtime. It "was not performed on daily or specific instruction, but under continuing authority." That overtime was clearly non-casual, since it regularly consisted of one hour per day, each day, for a year. This pattern is completely different from the irregular hours worked by Claimants' replacements, which ranged from an hour a day to 12 and more hours. In fact, such irregularity of overtime work is similar to a second claim denied in the Stone Award. The vacation replacement in that case worked varying number of overtime hours each day, "which was neither regular nor assigned but subject to call as required, hence may not be included for vacation pay." Thus the mere fact that overtime was worked daily did not satisfy the definition of overtime which should be included in vacation pay, contrasted with overtime in fixed, consistent and regular amounts each day.

2. Claimant Peterson regularly worked on one of his two rest days, as did his vacation relief on August 10. He seeks compensation for those hours.

However, employees on a five-day week are eligible only for five days per week of vacation and not for a sixth day even if a rest day has regularly been worked and continues to be worked during the vacation. Article 7(a) of the Vacation Agreement refers to "daily compensation," and an employee cannot claim sixth-day hours as part of daily vacation compensation.

3. The Employees contend that compensation for work performed on Labor Day is due Claimant Miller. There are Awards of this Division which have simply held that where a vacation relief employee works on a holiday, which the regular employee would have worked had he not been on vacation, compensation is due for the hours worked. (Awards 15910, 15722.)

Some sustaining Awards (11827, 14857) have hinged their decisions on the fact that the holiday had been regularly worked as part of a 7-day position. (There is no indication in the Record that Claimant Miller's is a 7-day position.) For example, Award 11827 cites the interpretation of the Carrier's Conference Committee in reply to a question concerning an employee in a 7-day position "regularly assigned to work the holidays which fall in his work week." The answer was:

"Under these circumstances, the holiday would be considered a vacation day and paid for as such. In addition, the employee would be paid what he would have earned had he been required to work the holiday."

Referee Stark, in Award 11827, then sustains the claim based on three qualifications which are: "if (1) the position regularly works on the day on which the holiday falls; (2) the position has always been filled on the holiday; (3) the position was filled on the particular holiday for which the claim is made." He added that it was unnecessary "to bulletin the holiday assignment in order to take it out of the category of casual and unassigned overtime." Thus holiday work is not casual overtime when the holiday is regularly worked as part of a 7-day position.

Since Claimant Miller does not demonstrate that the Labor Day holiday meets the first two qualifications, the work performed on that day by his vacation relief represents casual and unassigned overtime, which is excluded from vacation compensation. Unless the Board were to hold that pay for any holiday work performed during a vacation is to be added to vacation pay, the claim must be denied. Nothing in the Agreement purports to require such automatic payment for holiday work to a vacationing employee.

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 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

That the Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1968.