Award Number 17630
Docket Number SG-17711

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David H. Brown, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY — COAST LINES

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka and Santa Fe Railway Company that:

On behalf of Special TCS Maintainer L. W. Ballantyne for the overtime worked regularly by Relief Signal Maintainers L. W. Hageman and B. L. Leonard taking care of signal work in connection with the steel relay on L. W. Ballantyne's assigned territory during period he was on vacation (May 23 to June 10, 1966). (Carrier's File: 132-72-32)

EMPLOYES' STATEMENT OF FACTS: This dispute involves the question of how a vacationing employe should be paid, if during his vacation the relief man is assigned to work overtime.

Due to a rail relay program by Maintenance of Way forces, beginning May 20, 1966, and continuing through June 17, 1966, on the territory regularly assigned to Signal Maintainer L. W. Ballantyne, it was necessary to protect signal circuits and signal equipment.

Each day this work involved taking a temporary signal out of service before the relay work started and putting it back in service after the day's work was done. Signal Maintainer Ballantyne was instructed to do this and other overtime work necessary to protect signal circuits and equipment. And except for the time he was on vacation, from May 23 to June 10, he did perform such overtime work.

Vacation relief was furnished, and Vacation Relief Signal Maintainers L. A. Hageman and B. L. Leonard were instructed to, and did in fact, perform the overtime work on Mr. Ballantyne's territory necessitated by the rail relay program.

As a result, upon returning from vacation, Signal Maintainer Ballantyne submitted time slips for overtime which had been worked while he was on vacation. Notice was given by the Signal Supervisor, however, that such overtime had been deducted from the time rolls; whereupon, formal claim was initiated by Local Chairman C. R. Flower on July 2, 1966, to Superintendent C. E. Rollins.

The claim comprehends the payment to Mr. Ballantyne of seventy-six and three-fourths (76-3/4) hours' overtime, which was earned by the Vacation Relief Signal Maintainers in connection with the rail relay program from

Article 7 (a):

"An employe having a regular assignment will be paid while on vacation the daily compensation paid by the Carrier for such assignment."

Interpretation dated June 10, 1942:

"This contemplates that an employe having a regular assignment will not be any 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 claim was submitted to the Superintendent and progressed to Assistant to Vice President Ramsey, who is the Carrier's highest officer of appeal, as is evidenced by copies of correspondence attached hereto and identified as Carrier's Exhibits "A" to "J", inclusive.

(Exhibits Not Reproduced)

OPINION OF BOARD: From May 20, 1966, through June 17, 1966, Carrier had a track extra gang engaged in re-laying rail on the territory to which Claimant, Signal Maintainer Ballantyne, was assigned. During such period it was necessary that signals be taken out of service each day before the extra gang commenced its work and to restore the signals to service after the gang finished its day's work.

Claimant handled the signal work occasioned by the track re-lay project on May 20 and 21, working a total of 10 hours 50 minutes overtime. He then went on vacation, and during his absence his relief worked 76 hours and 30 minutes on 13 separate days—an average of 5 hours and 54 minutes overtime per day. On Claimant's return, the overtime continued and he worked 20 hours more overtime until the re-aly project was completed. Claimant averaged 4 hours and 24 minutes overtime per day during the period consisting of the two days before his vacation and the five days after his vacation.

Claimant seeks to be paid for the 76 1/2 hours overtime done by his relief while he was on vacation, basing his claim on Section 7(a) of the National Vacation Agreement reading "An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment."

Obviously, under a bare reading of Section 7(a) Claimant is entitled to all overtime earned by the man protecting his assignment. Carrier contends, however, that Ballantyne's right to overtime is negated by the provisions of the June 10, 1942 Interpretation of Article 7(a) which reads:

"This contemplates that an employee having a regular assignment will not be any 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. . . . ." (Emphasis added).

Again, it is obvious that Claimant's right is unimpaired until we reach the emphasized portion of the interpretation. The question percolates down to whether or not the disputed overtime was "casual" or "unassigned."

This case has great similarity to that represented by our sustaining Award 14640. That was also a Signalmen's case where the claimant did the work necessary to protect a gang engaged in the re-laying of track. In 14640 the signalmen, claimant and his relief, worked one hour each day; in the instant case the work ordinarily required one hour each morning before 8 o'clock and a varying amount of time each evening. The work, however, was essentially the same.

Does overtime which is foreseen (as was the overtime herein—obviously the signals would have to be adjusted before and after the re-lay work, the latter work having been duly scheduled and executed)—does overtime which is foreseen and anticipated become casual when its duration is inconstant?

This Board has defined "casual" as meaning "happening without design, and without being expected; coming by chance." Awards 5750 (Wenke) and 14640 (Brown). It cannot be seriously argued that the disputed overtime herein involved came about without design, or was unexpected or came by chance. As sure as night follows day, the occupant of Claimant's position was going to have to go out after hours, after the extra gang finished a day's work of laying new rail, and restore the service. As sure as day follows night, the occupant of Ballantyne's position would have to go out the next morning, early in order that the B&B gang not be delayed, and arrange the circuits so as to protect the work. The casualness of an event is in on way dependent upon its duration.

This Board, speaking through a distinguished Referee, said in Award 4498, "We think casual overtime, as the term is used in Article 7(a) (sic) means overtime the duration of which depends upon contingency or chance, such as service requirements or unforeseen events." Again, the disputed overtime herein was not dependent upon contingency, for while the exact amount could not be predicted, there would definitely be overtime to work. We believe there are subsequent cases that have read "service requirements" out of context. Literally speaking, all overtime depends on "service requirements". Referee Carter's language needs to be read in the light of the case he was deciding.

In Award 4498, Claimant Gordon was a Claim Clerk at Fruitvale Freight Station on the Western Pacific Line. The overtime work consisted of sealing and checking carload shipments. We deem it particularly significant that the Carrier had no control over the overtime, it was rather dependent upon the volume of business received from shippers. And while there was overtime on nearly every day, the record reflects several days on which the volume of business was handled during regular hours. Thus, we apprehend that Judge Carter had in mind **variable customer service requirements** and not extra work occasioned by internal work programs over which Carrier has control.

It should be kept in mind that the provisions of Article 7(a) are absolute: "An employe. . . . **will be paid the daily compensation paid** . . . . . for such assignment." (Emphasis ours) The Interpretation came some six months later, and for the first time we learn of "casual or unassigned overtime." Standing beside such language is the language "This contemplates that an employee . . . . will not be any 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, ..." We believe this language directs that this Board strictly interpret the circumscribing language relative to casual or unassigned overtime. There are some recent awards that tend toward holding

that all overtime not authorized by assignment bulletin is "unassigned" overtime and thus not compensable. There are some recent awards that tend toward holding that only such overtime as occurs regularly and is of constant duration is compensable—that all other overtime is "casual" within the Interpretation. Such awards, if followed, will render the Interpretation of 1942 an illegitimate offspring of Article 7(a).

Finally, overtime which accrues to a position because Carrier has regularly scheduled a project to which such overtime is necessarily incident is neither casual nor unassigned overtime.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1969.

DISSENT OF CARRIER MEMBERS' TO AWARD 17630, DOCKET SG-17711 (REFEREE BROWN)

In this award the Referee refuses to give effect to a significant word in the agreement and fatally distorts the facts of record.

He opens his discussion of the Vacation Agreement with the erroneous statement that "Obviously, under a bare reading of Section 7(a) Claimant is entitled to all overtime earned by the man protecting his assignment." The truth is, Section 7 (a) provides in the clearest terms that only the daily compensation paid for the "regular" assignment shall be given to the vacationing employe. Implicit in this restriction to compensation paid for the "regular" assignment is the understanding that the vacationing employe will not be paid for any overtime that is not part of the "regular" assignment.

Throughout the Opinion the Referee has refused to recognize and give reasonable effect to the word "regular" which appears in Section 7 (a). In the next to last paragraph he states:

> "It should be kept in mind that the provisions of Article 7(a) are absolute: 'An employe. . . . **will be paid the daily compensation paid** . . . . . for such assignment.' (Emphasis ours) The Interpretation

came some six months later, and for the first time we learn of 'casual or unassigned overtime.' . . ."

The portion of the rule deleted by the Referee defines "such assignment" as the "regular" assignment. The Referee ignores the word "regular" and gives it no effect.

This language in the Vacation Agreement came from a referee's decision. The parties to the Agreement themselves readily recognized that the expression "regular assignment" in Section 7 (a) was so ambiguous in its context as to require clarification and they quickly agreed that any overtime which is either "casual" or "unassigned" cannot be regarded as part of a "regular" assignment. Thus, this Referee's bald assertion that Section 7 (a), unadorned by any interpretation, makes perfectly clear provision for payment of all overtime earned is belied by both the express restriction in Section 7 (a) to compensation paid for the "regular" assignment and by the action of the parties in quickly adopting an interpretation that is designed to clarify which overtime can properly be regarded as part of the "regular" assignment.

In numerous awards, some of which have been drafted by referees with long experience, this Board has recognized that the words "unassigned" and "casual" as used in the parties' own interpretation of Section 7 (a) should be given the liberal interpretation apparently intended by the parties, rather than the strict and wholly indefensible interpretation which this Referee suggests should apply. See Awards 4498 (Carter), 4510 (Robertson), 5001 (Begley), 6731 (Parker), 9240 (Stone), 14400 (Lynch), 16307 (Ives), and 16684 (Friedman).

In this award the Referee has exhibited the same complete disregard for the true facts as he has exhibited for the contents of the agreement and the prior decisions of capable referees. In laying a factual foundation for his sustaining award he attempts to make the facts look like those in his sustaining award 14640. He states:

". . . As sure as day follows night, the occupant of Ballantyne's position would have to go out the next morning, early in order that the B&B gang not be delayed, and arrange the circuits so as to protect the work. . ."

According to Carrier's Statement of Facts, which stands uncontroverted by any competent evidence, there were only four days during the entire three week period the Claimant was on vacation when the occupant of Claimant's position had to go out the next morning, early. Even the Employes' own unsupported version of the facts indicates that there were only eight days during this entire three week period then the occupant of the position had to go out early in the morning, before his regular starting time.

Numerous awards in which many capable referees have participated are summarily brushed aside by this Referee as "an illegitimate offspring of

Article 7(a)." We respectfully submit that in his abortive attempt to rewrite the agreement and upset the interpretation thereof adopted by both the parties and this Board, this Referee is the one who has sired an "illegitimate offspring".

/s/ G. L. NAYLOR
G. L. Naylor

/s/ R. E. BLACK
R. E. Black

W. B. JONES
W. B. Jones

/s/ P. C. CARTER
P. C. Carter

/s/ G. C. WHITE
G. C. White

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