CORRECTED

Award No. 18464

Docket No. CL-18721

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert M. O'Brien, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6744) that:

(1) The Carrier violated the Agreement between the parties when it arbitrarily required counterman I. B. Clark to suspend work on his regular position and relieve Truck Driver B. B. Embry while the latter was on vacation, September 30, 1968 through October 11, 1968, and further; by requiring employes C. F. Nichols and P. P. Bosley to suspend work for four (4) hours each on their regular assignments to fill the position of I. B. Clark, all for the purpose of absorbing the overtime necessary to properly fill the position by the use of employes on a rest day basis i.e., Mr. B. Mau, Mr. John Nusbaum and Mr. R. V. Melton.

(2) That the Carrier now be required to compensate counterman I. B. Clark for eight hours at straight time rate of his position, and employes C. F. Nichols and P. P. Bosley for four (4) hours each at straight time rate of their positions for the dates of September 30, October 1, 2, 3, 4, 7, 8, 9, 10 and 11, 1968 in addition to amounts already paid and;

(3) That the Carrier be required to compensate (a) B. Mau for September 30, October 1, 7 and 8, 1968; (b) Mr. John Nusbaum for October 2, 3, 9 and 10, 1968, (c) Mr. R. V. Melton for October 4 and 11, 1968, all for eight (8) hours at time and one-half rate of pay of their regular positions.

(4) Interest in the amount of 6% compounded annually from the date of alleged violation until claimants are properly compensated.

EMPLOYES' STATEMENT OF FACTS: Mr. B. B. Embry, regularly assigned as a Truck Driver, 27th Street Store, Purchasing and Stores Department, with assigned hours of 8:00 A. M. to 4:30 P. M. with assigned rest days of Saturday and Sunday was on vacation September 30, October 1, 2, 3, 4, 7, 8, 9, 10 and 11. 1968.

Upon his (Embry) going on vacation, Mr. I. B. Clark was ordered by the Purchasing Agent " * * * to drive the Store Department truck while Mr. B. B. Embry the regular assigned truck Driver was on vacation." Clark worked as he was instructed during the period September 30 through October 11, 1968.

Mr. Barber, Purchasing Agent, then required Mr. C. F. Nichols, Propane Plant Operator and Mr. P. Bosley, Foreman, to work 4 hours on their own position and 4 hours each on the Clark position while he (Clark) was filling the vacation relief of Embry. Claimants Bosley, Nichols and Clark all holding seniority in the Purchasing and Stores Department were on assignments with similar hours, shift and days of rest as the vacationing employe Embry.

The Employes filed claim under date of November 26, 1968 as evidenced by Employes Exhibit No. 1. Under date of January 16, 1969, Mr. G. J. Barber denied the claim. (Employes' Exhibit No. 2.)

The case was appealed to the Manager of Personnel, Mr. U. B. Llewellyn, the highest officer of the Carrier on March 6, 1969, (Employes' Exhibit No. 3). A decision was rendered by the Manager of Personnel on April 15, 1969 confirming the previous denial (Employes' Exhibit No. 4). Subsequent to the final decision, conference was held on May 21, 1969 and the final conference in which the claim was discussed was held on October 31, 1969.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: The Stores Department is open five days a week, from 8:00 A. M. to 5:00 P. M. All employes are assigned the same hours with Saturday and Sunday relief days.

Truck Driver–Counterman, B. B. Embry, took his vacation from September 30 through October 11, 1968. During his absence a regular Storehouse Counterman I. B. Clark, spent one to two hours each day making deliveries with the truck after which he returned to the Storehouse and continued with his regular counterman duties. For each day that he made deliveries with the truck, Mr. Clark was paid the higher Truck Driver's rate. During this period, Clarks' position of counterman was blanked and all counter work was performed by regular countermen Nichols and Bosley, as well as by Clark when he completed the delivery work.

OPINION OF BOARD: The essential facts in this dispute are uncontroverted. Mr. B. B. Embry, who was regularly assigned as a Truck Driver, Purchasing and Stores Department, was on vacation September 30 through October 11, 1968 inclusive. During this period, Mr. I. B. Clark was ordered to drive Embry's truck, while Claimants Nichols, Propane Plant Operator, and Bosley, Foreman, were required to work four hours on their own positions and four hours each on Clark's position daily while Clark was filling the vacation relief of Embry.

Petitioners charge that Claimants were required to suspend work on their regular positions to relieve the vacationing employe and Clark in violation of Rule 40 of the controlling Agreement between the parties. Petitioners further contend that since the Carrier elected to fill the vacation vacancy with a regular assigned employe, Appendix D of the Agreement required the vacancy to be filled by Claimants Mau, Nusbaum, and Melton, senior employes available for work.

Petitioners further charge that Carrier improperly sought to avoid the hiring of vacation relief workers in violation of Article 6 and 10 (b) of the Vacation Agreement by requiring an employe to absorb the work load of the Vacationing employe in addition to his regular assignment during the same period of time. The pertinent provisions of the Vacation Agreement are as follows:

> "6. The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employes remaining on the job, or burden the employe after his return from vacation, the carrier shall not be required to provide such relief worker.
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> 10. (a). An employe designated to fill an assignment of another employe on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater; provided that if the assignment is filled by a regularly assigned vacation relief employe, such employe shall receive the rate of the relief position. If an employe receiving graded rates, based upon length of service and experience, is designated to fill an assignment of another employe in the same occupational classification receiving such graded rates who is on vacation, the rate of the relieving employe will be paid.
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> (b) Where work of vacationing employes is distributed among two or more employes, such employes will be paid their own respective rates. However, not more than the equivalent of twenty-five per cent of the work load of a given vacationing employe can be distributed among fellow employes without the hiring of a relief worker unless a larger distribution of the work load is agreed to by the proper local union committee or official.
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> 12. (b). As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employe is be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

Carrier's position is that Rule 40 has no application to the case at bar since there was no suspension of work nor was there any overtime to be absorbed. Nor does Article 6 require Carrier to call a relief worker in this instance as there was no vacancy to be filled. Claimants did not suspend all work on their positions but continued to perform their regular duties. Furthermore, it has been a long standing practice on this Carrier for employes absorb the work of vacationing employes. And even if relief were needed, Claimants Mau, Nusbaum, and Melton were unqualified to perform the work in question.

The basic issue to be determined is whether the Carrier violated the Agreement by rearranging the employes to fill the vacancy created by the vacationing employe.

It cannot be questioned that the purpose of Rule 40 is to prevent the Carrier from requiring an employe to suspend work on his regularly assigned

position in order to work another position when its actions in so doing results in the employe so assigned absorbing overtime which belongs to his own or another employe's position. See Awards 2695, 5105, 5108.

It is obvious from the record that Clark, Bosley and Nichols did not elect to voluntarily exercise seniority to the Vacation Relief assignment of Embry. Mr. Barber, Carrier's Purchasing Agent required Clark, regularly assigned Counterman, to drive the Store Department truck while Embry, the regularly assigned truck driver, was on vacation, and, he required Nichols and Bosley to work four hours each day on Clark's job as Counterman. Nor can it be said from an examination of the record that any other regularly assigned employe in the department exercised seniority to fill Embry's position, thus obviating the necessity for overtime. Consequently it would have been necessary to work some regular employe overtime or on rest days to accomplish Embry's work.

We are convinced, that under the foregoing circumstances, the Carrier should have left all employes on their regular assignments and filled the vacation position by calling such employes on their rest or relief days, even at the expense of overtime, and that the effect of its action in suspending the work of Clark, Bosley and Nichols' positions during their regular hours was to prevent the payment of overtime to employes available on their rest or relief days. It follows that Clark absorbed overtime while working Embry's vacation position and thus Carrier violated Rule 40 in requiring him to do so. This Board has so held in pervious awards involving the identical parties. Awards 4646, 5108.

Having found a violation of the Agreement by the Carrier, we need not decide other contentions proffered by Petitioners. All we need do is decide the proper remedy for said violation.

We think that Clark is entitled to be compensated for eight hours at his regular rate for the period he relieved Truck Driver Embry while he was on vacation on account of being denied the right to work his regular assignment on those days. We further think Claimants Nichols and Bosley should be compensated for four hours each at straight time rate of their positions for each day they were required to perform Clark's Counterwork on account of being denied the right to work their regular assignments on those days. Awards 2346, 2695.

However, we feel constrained to deny claim (3), as to hold otherwise would inflict a double penalty upon the Carrier — straight time for the time actually worked and punitive rates for the employes available to work the overtime. Awards 2346, 2695.

Nor do we think that interest should be allowed Claimants on this award. The award in this case is not a debt owed Claimants but a penalty against the Carrier for breaching the Agreement. Consequently interest at 6% is disallowed. Awards 16632, 6962.

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 by the Carrier.

AWARD

Claims (1) and (2) sustained. Claims (3) and (4) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1971.

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