

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20025

Docket Number CL-19963

Joseph A. Sickles, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
( (Formerly Transportation-Communication Employees Union)  
(  
(George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and  
( Willard Wirtz, Trustees of the Property of Penn Central  
( Transportation Company, Debtor.

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Penn Central Transportation Company, GL-7213, that:

1. On December 11, 18, 1970, and again on January 19, 20, and 21, 1971, it ordered and required M. S. McCormick to work "HUNTER" Levers at the overtime rate of pay from 2:30 p.m. to 6:30 p.m. and suspended service from 6:30 p.m. to 10:30 p.m. for the purpose of absorbing or avoiding overtime.

2. Because of such violation Carrier shall compensate M. S. McCormick four (4) hours at the overtime rate of pay for Dec. 11 and 18, 1970, and also compensate M. S. McCormick for four (4) hours at the overtime rate of pay for Jan. 19, 20 and 21, 1971. Regulation 4-G-1 applies.

OPINION OF BOARD: Claimant was regularly assigned as a lever operator from 6:30 a.m. to 2:30 p.m. (rest days Saturday and Sunday). A second trick position was also maintained with hours of duty 2:30 p.m. to 10:30 p.m. with the same rest days.

On the dates in question (none of which were rest days), the occupant of the second trick was absent, and Claimant, after completing her regularly assigned tour of duty, was held over on the second trick, but worked only four hours.

The Organization does not question (in this dispute) that Claimant was properly selected to work the second trick, but it insists that she was entitled to work the entire second shift, citing Regulation 4-G-1.

"4-G-1: Absorbing Overtime. Employees shall not be required to suspend work during regular hours, nor shall they be required to suspend work, for the purpose of absorbing overtime."

The Organization also refers to Regulations 4-D-1 and "Supplement

"4-D-1: Hours of Service. Except as otherwise provided in Regulation 4-E-1, the regularly assigned hours, as established from time to time shall constitute a day's work for agent positions.

Except as otherwise provided in Regulation 4-E-1, eight (8) consecutive hours, exclusive of the meal hour, shall constitute a day's work for other than agent positions at offices where only one shift is worked. At offices where more than one shift is worked, eight (8) consecutive hours, with no allowance for meals, shall constitute a day's work for employees other than agents."

"Supplement No. 4: Memorandum of Understanding Overtime.

It is understood that when a vacancy is filled or work is assigned on an overtime basis, in other than an Agent's position, there being no available, qualified extra employees who otherwise would not have forty hours' work in the week, the following will govern in determining the employee to be used except when the vacancy or work is not known four or more hours in advance or if the use of an employee hereunder would result in violation of the Hours of Service Law:

A. Work not a part of any assignment (Regulation 5-F-1(i) and vacancies arising by reason of absence of regular relief employee:

- (1) Incumbent of position who is observing his rest day.
- (2) Other available, qualified employees regularly assigned at the location, in seniority order.
- (3) Qualified extra employee who has forty hours' work in the week.
- (4) Any qualified employee.

B. Vacancies arising by reason of absence of a regular employee on other than rest day:

- (1) Available, qualified employee regularly assigned at the location in seniority order.
- (2) Qualified, extra employee who has forty hours' work in the week.
- (3) Any qualified employee.

C. For the purposes of this Agreement, a regular relief employee whose schedule includes relief work in more than one office shall be considered as regularly assigned at his headquarters office only."

Carrier denies the claim on the basis of Regulation 4-F-1:

"4-F-1: Overtime. (a) Except as otherwise provided in Regulation 4-E-1 and in paragraphs (b) and (c) of this regulation (4-F-1), time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate."

Claimant does not suggest that each incident of overtime must be for eight (8) hours (which would, of course, nullify Regulation 4-F-1), but insists that under the facts of this case, the Carrier must compensate for a full shift.

Carrier asserts that it was not required to fill the second trick, and could have left it "blank", citing Awards 15633 (Ives), 13162 (Zack) and 11307 (Miller). It also suggests that the Organization's failure to respond to Carrier's Rebuttal Brief leaves uncontroverted material factual statements in this regard, citing Award 19849 (Roadley) and others.

The basic issue of "blanking" shifts is not before this Board for adjudication. A position is blanked when no one works it. Award 19668 (O'Brien). See also Award 7255 (Wyckoff).

The Organization's reliance on Regulation 4-G-1 does not appear to be supported by the facts of this case. In order to establish a violation of such a rule, the Claimant must show a suspension of work on a regular assignment coupled with performance of work in another position which otherwise would have been performed on an overtime basis by the incumbent of the later position. See Award 14242 (Perelson) citing Award 13192 (Coburn). See also, Awards 14080 (Dorsey), 15046 (Devine), 16611 (Dorsey), 17206 (Mesigh) and 17720 (McGovern).

Leaving aside the question of the right to "blank" a shift, Claimant suggests that if a regularly assigned incumbent does not report for duty, and Carrier fills that position for any period of time, it must do so for the entire shift. Clearly, it is incumbent upon the Organization to demonstrate that the Agreement requires such a result, and it is not improper to view a combination of Rules in that regard. See Award 14242 (Perelson).

Regulation 4-D-1 states that eight (8) hours constitutes a day's work for the position in question. Regulation 4-G-1 precludes work suspension for purposes of absorbing overtime, and Supplement No. 4 specifies procedures when overtime is assigned by reason of absence of a regular employee on other than a rest day.

Upon this record, the Board is unable to conclude that Regulation 4-G-1, read individually or in conjunction with other sections, establishes a specific requirement for the Carrier to have filled the entire second trick on the days in question.

The Organization has cited, among others, Awards 19668 (O'Brien) and 7255 (Wykoff). In both instances, the determination was based upon a Rule quite similar to Rule 4-D-1. The Rule under consideration in Award 19668 stated:

"Except as otherwise provided in this rule, eight (8) consecutive hours or less, exclusive of the meal period, shall constitute a day's work for which eight (8) hours' pay will be allowed. (underscoring supplied)

In Award 19668, the Claimant had completed her regular assignment and then performed the work of another position (the incumbent having laid off sick) for 4 hours and 15 minutes. The Board concluded that:

"Since Carrier elected to fill the position by utilizing claimant therein, it was bound to pay her 8 hours' pay for the assignment in compliance with Rule 37(a-1)". (cited above)

In Award 7255, the Board noted:

"If the Carrier had worked her less than eight hours and deferred the balance of her work, she would have been entitled to eight hours' pay for a day's work of eight hours, 'or less'."

In this case, the Organization did not base its claim on Regulation 4-D-1, but rather it urged a violation of 4-G-1. On the property, the Claimant, the District Chairman and the General Chairman each insisted that Rule 4-G-1 applied. The Joint Statement of the Parties makes no mention of a violation of Rule 4-D-1.

The final denial on the property (December 27, 1971) states:

"Your position in this matter was that the Carrier violated the provisions of Supplement No. 4, Regulation 5-F-1 and 4-G-1."

It was not until some 7½ months later (August 10, 1972) that the Organization made a specific reference to Regulation 4-D-1. But that was a limited reference and the Organization continued to conclude that Regulation 4-G-1 was violated. The August 10, 1972 letter predated the notification of intention to file an ex parte submission to this Board by only 11 days. While it is understood that anything considered on the property is properly considered by this Board, this Referee has noted in Award 19832:

"Clearly if evidence were submitted within such a short time of filing of the notification of intention so as to reasonably preclude the Carrier from replying, the weight of such evidence might be suspect..."

While we certainly do not ignore or minimize Awards 19668, 7255 and related decisions, the Board is of the view that the issue of a specific violation of Regulation 4-D-1 was not sufficiently joined on the property so as to be properly before us for a specific Ruling. As noted in Award 19976;

"...under the procedural concepts of this Board, a Carrier is entitled to full exposure to an Organization's claim on the property. A sustaining Award, in whole or in part, could be issued only after such a claim was processed,"

Certainly, in this case, the parties should have had opportunity on the property to consider the similarities and differences in the "eight hour" language of 4-D-1, and that in the Awards cited above. For example, does the fact that the words "or less" do not appear in Regulation 4-D-1 enhance or detract from the effect of the language, etc?

In short, neither Regulation 4-G-1 nor Supplement No. 4 was violated. A violation of Regulation 4-D-1 was not raised with specific clarity on the property and accordingly, we make no finding on the merits of that issue.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulson  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1973.