

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24921
Docket Number CL-24130

I.M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9429)
that:

(1) The Carrier violated the terms of the Agreement between the Parties when it required Operator Clerk P. E. O'Leary, to suspend work on his regular assignment at North Excello, Middletown, Ohio, on Wednesday, March 26, 1980, and

(2) As a result of such impropriety, Carrier shall now be required to compensate Claimant P. E. O'Leary for eight (8) hours at the pro rata rate of his position at North Excello, Middletown, Ohio, for March 26, 1980, which represents time lost.

OPINION OF BOARD: Claimant had a regular second shift assignment, Wednesday, through Sunday with rest days of Monday and Tuesday. On Tuesday, March 25, 1980, a vacancy occurred on a Third Trick Operator Clerk assignment and Claimant was called to work that position, even though Claimant was not registered as desiring to fill short vacancies. He was paid at the time-and-one-half rate for filling the Third Trick vacancy. By virtue of the Hours of Service Law Claimant was precluded from working his regular Second Trick assignment on Wednesday March 26, 1980, which was the first day of his regular work week. The claim herein was based on his loss of work on his first day of the work week.

The applicable rules are as follows:

"RULE 5

Employees will not be required to suspend work during regular hours to absorb overtime.

RULE 14

Guarantee.

Nothing within this Agreement shall be construed to permit the reduction of days for employees covered by this Agreement below five (5) days per week, except that this number may be reduced in a week in which holidays occur, within the five (5) days constituting the work week, by the number of such holidays.

RULE 24

Short Vacancies Not Requiring Bulletin

(a) Vacancies of less than thirty (30) calendar days' duration, positions of vacationing employees regardless of duration and positions under bulletin pending assignment, will be filled in the following manner and sequence:

"(1) First--by the senior regularly assigned employee who has filed written request with designated officer, with copy to Local Chairman, (not less than twenty-four (24) hours prior to the starting time of desired position(s)) (vacancies), subject to the following:

(a-1) In moving from his regular assignment to a temporary vacancy, from one temporary vacancy to another, or back to his regular assignment, no employee may start a second tour of duty on the same calendar day, nor may an employee move on assigned rest days.

NOTE: (a) The parties agree that an employee may be held off or removed from his assigned position to work a vacancy under emergency conditions when such vacancy cannot be filled in any other manner. The involved employee is entitled to his regular rate, or the rate of the vacancy, whichever is higher, with a minimum of eight (8) hours, and penalty rate for all hours worked outside of his regularly assigned hours.

(b) An employee held off or removed from his regular position and required to fill a vacancy other than as outlined in the first sentence of paragraph (a) of this note is entitled to a minimum of eight (8) hours' pay at pro rata rate for each position."

Petitioner argues that Claimant was used on a rest day on which he had no regular assignment and therefore could not be "held off or removed from his assigned position" as contended by Carrier. Hence, the Organization states that Rule 24 has no applicability to this dispute. On the contrary, it is urged that Claimant lost the first day's work of his regular work week because Carrier used him on his earned rest day. Further, according to the Organization, even if he had been registered to work short vacancies, he would have been precluded from this assignment since it was his rest day and hence improper under Rule 24(a-1). Petitioner maintains in addition that the compensation Claimant received (time-and-one-half) for the work performed on his rest day was the same as he would have received for any rest day work and cannot be used to offset the loss he sustained in not being permitted to work the first regular day of his next work week, as provided in Rule 14. The Organization concludes that Claimant clearly lost a day's pay due to Carrier's assignment and was obviously required to suspend work during his regular assignment due to the involuntary assignment by Carrier on his rest day.

Carrier argues that Rules 5 and 14 are not applicable to this dispute. Claimant was paid for five day's work, one at the overtime rate and was not sent home or denied any pay. Carrier insists that the real issue herein is the applicability of either NOTE (a) or (b) of Rule 24 which were effective December 15, 1969. Thus, the problem of whether or not there was an emergency, as referred to in Rule 24 (notes(a) and (b)) is critical to the proper resolution of this matter. Carrier refers to Awards 22186 and 22271 of this Board as indicative of the guidelines established in the application of the Notes to Rule 24. Carrier states that since no other employees were available to fill the assignment on March 25th an emergency did exist and Claimant was properly compensated under the provisions of NOTE (a) of Rule 24. Further it is asserted that neither NOTE (a) nor NOTE (b) support the payment of an overtime day as well as a pro-rata day as is claimed in this dispute.

The Board notes that while Awards 22186 and 22271 properly set forth guidelines for the implementation of Rule 24 NOTES (a) and (b) those Awards are not controlling herein since in this matter rest days are involved and they were not considered in the above Awards; thus this situation is clearly distinguishable from the prior awards. There is no question but that Carrier is correct in that there was an emergency in this situation since there was no effective refutation by Petitioner. However, in the Board's view, the use of Claimant on his rest day because of that emergency deprived him of earnings in the succeeding work week (Award 14392). As this Board said in Award 6781:

"It was a consequence of the relief duties performed at the Carrier's request and benefit that Claimant ran afoul of the Hours of Service Law. The result was the loss of one day's work in his succeeding work week, and as we construe the Rule in this Case, the day should be compensated for."

It is our view that in this situation also the provisions of Rule 14 are controlling since Claimant was not "held off or removed from his assigned position" as contemplated by NOTE (a) of Rule 24.

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

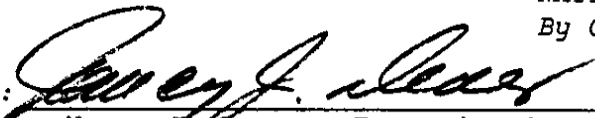
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1984.