

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29620
Docket No. CL-29708
93-3-91-3-75

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications
(International Union
(The Atchison, Topeka and Santa Fe
(Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-10541) that:

- (a) Carrier violated the provisions of the current Clerks' Agreement at San Diego, California, on December 23, 1989, when it failed and/or refused to pay proper compensation for overtime work and,
- (b) Claimant J. M. Suarez shall now be compensated (3) three hours and (15) minutes pay at the straight time rate of Transportation Service Specialist Position No. 6214 for December 23, 1989, in addition to any other compensation Claimant may have received for this day."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is the regularly assigned occupant of Relief Transportation Service Specialist, Position No. 9480. This assignment works days from 8:00 A.M. until 5:00 P.M., Saturdays

and Sundays relieving Position 6214; afternoons from 3:30 P.M. until 11:30 P.M., Mondays relieving Position 6210; and, nights from 11:30 P.M. until 7:30 A.M., Tuesdays and Wednesdays relieving Position 6213. Rest days of the relief assignment are Thursdays and Fridays. On Friday, December 22, 1989, Claimant's second assigned rest day, he was called to work an open vacancy on the afternoon job (Position 6210). He next worked his regular day shift on Saturday (Position 6214) and when that assignment was completed at 5:00 P.M., he was continued on duty to fill the remainder of the afternoon vacancy on Position 6210.

Claimant was paid 8 hours at time and one-half rates for working Position No. 6210 on Friday afternoon, December 22, 1989 (his rest day). He was paid 6 hours and 30 minutes at time and one-half and 1 hour and 30 minutes at straight time for working Position No. 6214 (his own job) on Saturday, December 23, 1989, and 6 hours and 30 minutes at time and one-half for working part of the hours of Position No. 6210 on Saturday afternoon, December 23, 1989.

On January 30, 1990, Claimant was notified that he had been improperly paid for the time worked on Position No. 6210 on Saturday afternoon, December 23, 1989. Carrier contended that work should have been paid at straight time rates instead of time and one-half rates, because it was within the start of the new day which commenced 24 hours after the day which started at 3:30 P.M. on Friday. Carrier made a time roll adjustment which eventually resulted in this Claim being filed for 3 hours and 15 minutes straight time pay, representing the difference between straight time and time and one-half rates for working part of Position No. 6210 on the afternoon of December 23.

The Organization maintains that Claimant is entitled to be paid at the time and one-half rate for work performed on the afternoon job on December 23, because the specific language of Rule 32-H (2) requires that an employee who works his own assignment and part of another before or after his assignment and continuous therewith, is entitled to be paid at time and one-half rates for all time in excess of eight hours on the continuous two assignments. Carrier maintains that it has a specific written understanding as to when a new day starts, which is at the end of a 24 hour period commencing with the starting time of a previous assignment. Moreover, a new day cannot commence until an existing day is completed, Carrier insists. In this matter, Carrier notes, Claimant started a day at 3:30 P.M. on Friday, December 22, 1989. He could not start a new day until 3:30 P.M. on Saturday, December 23, 1989. In these circumstances Carrier claims it is only required to pay for work commencing on this "new day" at straight time rates, not time and one-half. Thus Claimant was paid time and

one-half on his own job until the previous day ended at 3:30 P.M. and was paid straight time for the next eight hours, which ended when he completed work on Position No. 6210 at 11:30 P.M.

Resolution of this matter turns on various sections of Rule 32 of the parties Agreement. Rule 32 frequently references the term "day" within various subsections of its text. That term, as it was used in 32-A, was defined in Third Division Award 21661 involving these parties. In the claim covered in that Award, the Claimant involved worked a short vacancy on second shift on Sunday afternoon, her rest day, and resumed her regular assignment on first shift on Monday morning. Claimant was first paid time and one-half for working her own job on Monday, on the basis of Rule 32-A, which calls for the time and one-half rate for all time worked in excess of eight hours on a given day. Later the time and one-half allowance was adjusted to the straight time rate. In resolving the ensuing dispute, the Board noted that:

"This Board defines the word "day" as used in Rule 32-A as a twenty-four period computed from the starting time of a previous assignment (see Awards 17213, 14927 and Awards cited therein). Thus, the day started at 3:30 P.M. on Sunday and ended at 3:30 P.M. on Monday, at which time claimant had put in seven hours in excess of eight for which she is entitled to overtime, i.e., an additional three and one-half hours' pay."

Subsequently, the parties met and on December 7, 1977, an "agreed-to understanding" of Award 21661's articulation of the definition of the word "day" was adopted. That understanding provided:

"A day is a 24-hour period beginning with the starting time of an assignment and such day must be 24 hours in length before a new day commences, except as stipulated in the NOTE following Rule 32-A as concerns regular relief assignments."

This definition of "day," now in place on this Carrier, by reason of the agreed-to understanding, creates a situation where an employee who starts a shift on his second rest day within sixteen hours of the start of his regular shift at the beginning of his regular workweek, would be entitled to be paid at the time and one-half rate for working his own job, within the scheduled hours of that assignment which would fall within the "day" (24-hour period commencing with the previous assignment) by reason of the language in 32-A. The first sentence of Rule 32-A provides:

"Except as otherwise provided in Rule 32-I, time in excess of eight hours, exclusive of the meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

When read with the parties adopted definition of "day" now means that all time in excess of eight hours on, any day is considered overtime and paid for on an actual minute basis at the time and one-half rate because the parties have agreed that a "day" begins with the starting time of a previous assignment and a new day cannot begin until 24-hours later. The phrase "time in excess of eight hours," as used in 32-A, is not conditional upon what rate was paid during the eight hours. Rule 32-A merely states that if the time is in excess of eight hours it will be considered overtime and paid at the rate of time and one-half. Moreover, it is not necessary that the time in excess of eight hours be continuous with one's own assignment, a factor necessary elsewhere in Rule 32, in some other time and one-half situations.

What happens, though, when on the second day (the day that starts 24-hours after the previous assignment which triggered the start of the first day) an employee works all or part of his own assignment and all or part of an additional assignment continuous with his own assignment, the situation under review here. Carrier maintains that at the conclusion of 24 hours from the start of the first day, the employee starts a new day and the time worked at the beginning of that new day is to be paid at straight time rates. The Organization maintains that this eventuality is specifically covered by Rule 32-H and the employee is entitled to time and one-half for time in excess of eight hours on his own assignment, regardless of what rate he was paid for his own assignment.

Rule 32-H provides:

"Employees Doubling

32-H (1) Except when through the exercised of bidding and/or displacement rights an employee works two complete assignments on any day, the second assignment will be considered overtime and paid at the overtime rate; if the rates of pay on the involved positions are not the same, overtime will be computed on the basis of the higher rate.

(2) Any employee who works all of his own assignment and part of another, either before or after his own assignment and continuous therewith, shall be paid at the rate of his own assignment with time and one-half for time in excess of eight hours.

(3) An employee who works a complete assignment other than his own, and in addition a part of his own assignment either before or after and continuous therewith, shall be paid the rate of his own assignment or that of the other assignment, which ever is the higher, with time and one-half in excess of eight hours."

Rule 32-H is quite specific. It covers three situations. Paragraph (1) accomplishes, initially, the same result as Rule 32-A in situations where an employee works two complete assignments "on any day." (The parties have defined "day" to mean a twenty-four hour period commencing from the start of a previous assignment.) The two assignments, mentioned in Paragraph (1), must be completed within the "day," however, they need not be continuous, a requirement of Paragraphs (2) and (3). The second assignment, by specific language in 32-H (1), is considered overtime and paid for at time and one-half rates. Paragraph (1) also establishes a preservation of rate situation, the time and one-half rate is to be computed on the basis of the higher rate if the rates of the two jobs differ. Paragraph (1), though, does not require that the two complete assignments be continuous with one another, a factor required by the language in Paragraphs (2) and (3).

Paragraphs (2) and (3), differ significantly from Paragraph (1) (as well as 32-A). First, it is noted that neither mentions "day" at all, any place within their text. The term "day," while pivotal in application in both 32-A and 32-H (1), is not even included within the text of 32-H (2) and (3). The omission of the term "day" from 32-H (2) and (3) must be considered meaningful, and the Rules cannot be read to have included "day" when the parties did not do so. Rules 32-H (2) and (3) do not rely on "day" as the measure (or parameter) for defining what work is considered overtime, the situation with 32-A and 32-H (1). What 32-A and 32-H (1) do is take two work situations, which may occur on a particular day, consider them as overtime and indicate that they are to be paid for at time and one-half rates. What 32-H (2) and (3) does is take two work situations which may occur in connection with an employee's own assignments (but without calling one overtime as is done in 32-A and 32-H (1)) provide that in the circumstances described time worked in excess of 8 hours is to be paid at time and one-half rates.

Rules 32-H (2) and (3) do not use "day," nor do they describe the work situations dealt with as being "considered overtime." Instead, 32-H (2) and (3) provide for payment at time and one-half rates for working another assignment before or after an employee's own assignment and continuous therewith. In one case (32-H (2)) the employee works all of his own assignment and part of another.

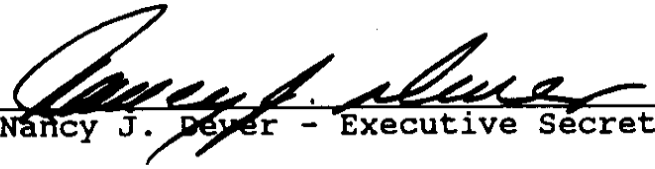
In the other (32-H (3)) the employee works all of the other assignment and part of his own. In both, the work of the two assignments must be continuous with one another. There is no requirement in either 32-H (2) or 32-H (3) that the assignments fit within a "day," as that term has been defined by the parties. "Day" is not mentioned in either paragraph. The only requirement for time and one-half is that the elements be continuous assignments be in excess of 8 hours. Continuous assignment in excess of 8 hours is the entitlement to time and one-half, not that it be considered overtime and not that it be measured within a "day."

Claimant was paid correctly initially. The Agreement was applied incorrectly when time and one-half for work Position 6210 on Saturday December 23, 1990, was altered to straight time. The Claim will be sustained.

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 8th day of April 1993.