



Award No. 1632

Docket No. 1570

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Phillip G. Sheridan when award was rendered.

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM: Claim and request of the Railroad Yardmasters of America that —

Yardmaster E. D. Lawrence be paid for one day's pay at the rate of time and one-half for not being called on December 8, 1959, to cover vacancy at Holban Yard.

EMPLOYES' STATEMENT OF FACTS: On December 8, 1959, a vacancy as yardmaster existed at Holban Yard, on a position with assigned hours 3:59 P. M., to 11:59 P. M.

Extra Yardmaster W. J. Quinn, who, on this same date, worked as a Yard Conductor from 7:59 A. M., to 3:59 P. M., on an assignment at Jamaica, Long Island, New York, was used to fill the vacancy of yardmaster at Holban Yard, having been notified at 12:30 P. M., December 8th, while working as Yard Conductor at Jamaica, to protect the assignment at Holban Yard, which entailed 30 minutes travel time from Jamaica.

Claimant was available to work the vacancy and had previously filed the required notice with the proper officer of the Carrier as provided by the Agreement dated March 23, 1959.

Yardmaster E. D. Lawrence was regularly assigned as yardmaster on the position at Holban Yard, with hours 11:59 P. M., to 7:59 A. M.

POSITION OF THE EMPLOYES: The record of the handling of this dispute and the position of the employes is evidenced by the following:

"THE LONG ISLAND RAIL ROAD

The Nation's Busiest Passenger Railroad

Jamaica, N. Y.
January 6, 1960

Mr. E. D. Lawrence, Local Chairman
Railroad Yardmasters of America
Holban Yard

Dear Sir:

Your penalty claim dated December 23, 1959, addressed to Mr. J. F. Fox, Assistant Freight Train Master, for one day's pay at the rate of time and one-half for not being called on December 8, 1959 to cover vacancy at Holban Yard, 3:59 P. M. to 11:59 P. M., is denied.

Paragraph No. 1 of Agreement of March 23, 1959 provides that where a pro-rata man is available, he can be used instead of a regular man at the punitive rate.

As W. J. Quinn was available, he was used in accordance with this Agreement.

Very truly yours,

/s/ W. F. Clemens
Freight Train Master."

"THE LONG ISLAND RAIL ROAD COMPANY

Jamaica, N. Y., February 11, 1960

Mr. J. L. Pleines, General Chairman
Railroad Yardmasters of America
26 Butternut Lane
Levittown, New York

Dear Sir:

The following claim was discussed at our meeting on February 8, 1960:

Claim for Yardmaster E. D. Lawrence for one day's pay at the rate of time and one-half for not being called on December 8, 1959, to cover vacancy at Holban Yard.

On December 8, 1959, a vacancy of Yardmaster at Holban Yard, 3:59 P. M. to 11:59 P. M. existed due to regular Yardmaster R. J. Lyman reporting off sick. This vacancy was filled by Extra Yardmaster W. J. Quinn who, on this same date, covered Yard Conductor assignment at Jamaica from 7:59 A. M. to 3:59 P. M.

In view of the foregoing circumstances, I agree with your position that Quinn was not available to cover the Yardmaster vacancy at Holban Yard, which involves thirty minutes time from Jamaica.

Accordingly, I am willing to dispose of this claim by allowing Yardmaster E. D. Lawrence, who should have been used for the assignment in accordance with the provisions of the March 23, 1959 Agreement, eight hours at the pro rata rate of pay. The payment at the punitive rate of pay is not warranted as decisions of the various Divisions of the National Railroad Adjustment Board have set forth the principle that the right to work is not equivalent of work performed so far as overtime is concerned, and under such circumstances they have ruled that the pro rata rate of pay only applies.

If you concur in the foregoing, please endorse this letter in the space provided for your signature and return one copy for our file. Yourself and the claimant will be advised the payroll period this adjustment will be made.

Very truly yours,

/s/ T. F. Kustes
Manager of Personnel

ACCEPTED:

J. L. Pleines, General Chairman"

"Long Island Railroad LOCAL LODGE NO. 91
RAILROAD YARDMASTERS OF AMERICA

26 Butternut Lane
Levittown L.I. N.Y.
February 20, 1960

Mr. T. F. Kustes, Manager of Personnel
Long Island Rail Road
Jamaica Station
Jamaica 35, New York

Dear Sir:

COPY

Jamaica, N. Y., February 11, 1960

Mr. J. L. Pleines, General Chairman
Railroad Yardmasters of America
26 Butternut Lane
Levittown L.I. New York

Dear Sir:

The following claim was discussed at our meeting on February 8, 1960:

Claim for Yardmaster E. D. Lawrence for one day's pay at the rate of time and one-half for not being called on December 8, 1959, to cover vacancy at Holban Yard.

On December 8, 1959, a vacancy of Yardmaster at Holban Yard, 3:59 P. M. to 11:59 P. M. existed due to regular Yardmaster R. J. Lyman reporting off sick. This vacancy was filled by extra Yardmaster W. J. Quinn who, on this same date, covered Yard Conductor assignment at Jamaica from 7:59 A. M. to 3:59 P. M.

In view of the foregoing circumstances, I agreed with your position that Quinn was not available to cover the Yardmaster vacancy at Holban which involves thirty minutes travel time from Jamaica.

Accordingly, I am willing to dispose of this claim by allowing Yardmaster E. D. Lawrence, who should have been used for the

assignment in accordance with the provisions of the March 23, 1959 Agreement, eight hours at the pro rata rate of pay. The payment at the punitive rate of pay is not warranted as decisions of the various Divisions of the National Railroad Adjustment Board have set forth the principle that the right to work is not equivalent of work performed so far as overtime is concerned, and under such circumstances they have ruled that the pro rata rate of pay only applies.

If you concur in the foregoing, please endorse this letter in the space provided for your signature and return one copy for our file. Yourself and the claimant will be advised the payroll period this adjustment will be made.

Very truly yours

/s/ T. F. Kustes
Manager of Personnel

ACCEPTED:

J. L. Pleines, General Chairman

Please note that the underscored as referred herein is of a different nature, as explained in our discussion of February 8, 1960. I therefore decline to sign letter of acceptance.

I am referring case to Grand Lodge for further handling.

Very truly yours,

/s/ J. L. Pleines
General Chairman"

"THE LONG ISLAND RAIL ROAD COMPANY

Jamaica, N. Y.
Feb. 23, 1960

Mr. J. L. Pleines, General Chairman
Railroad Yardmasters of America
26 Butternut Lane
Levittown, L.I.

Referring to previous correspondence concerning the following subject, please be advised that claimant(s) will be allowed the amount(s) shown opposite his name, on payrolls for the B period of Feb. 1960 in settlement of this claim: Claim for Yardmaster E. D. Lawrence for one day's pay at the rate of time and one half for not being called on December 8, 1959, to cover vacancy at Holban Yard.

T. F. Kustes
Manager of Personnel

CC: E. D. Lawrence, Yardmaster, \$28.64"

RAILROAD YARDMASTERS OF AMERICA
(AFL-CIO)

"Long Island Railroad Local Lodge No. 91

26 Butternut Lane
Levittown, N. Y.
April 19, 1960

Mr. T. F. Kustes, Manager of Personnel
Long Island Rail Road
Jamaica Station
Jamaica 35, New York

Dear Sir:

Would like to have you review our discussion of February 8th, 1960, of claim of Yardmaster E. D. Lawrence for a days pay at the rate of time and one-half.

To quote part of your letter of this date, "The payment at punitive rate of pay is not warranted as decisions of the various Divisions of the National Railroad Adjustment Board have set forth the principle that the right to work is not the equivalent of worked performed so far as overtime is concerned, and under such circumstances they have ruled that the pro rata rate of pay only applies.

I have not accepted any such thinking as proper and correct: I call your attention to the Volumes of the Fourth Division Awards, as Awards 870 and 871 and 1043.

While the case covered by award 1043 was presented by another organization I can not deny that the RYA had something to do with it.

If you care to discuss the case further I would only be to glad to do so.

Very truly yours

/s/ J. L. Pleines
General Chairman"

We are attaching hereto for ready reference, reproduced as Exhibit "A", copy of Agreement executed on March 23, 1959, which applies in the instant case.

Carrier admits that Claimant was entitled to the work; that Extra Yardmaster Quinn was not available to cover the assignment, and offered to allow Yardmaster Lawrence eight (8) hours pay at the pro rata rate. This offer was refused by the Employes on the premise that Yardmaster Lawrence was entitled to the punitive rate, but the Carrier refused to allow the time and one-half rate. Thus, the only point to be resolved is whether the Claimant is to be allowed one day's pay at the straight time or the overtime rate of pay.

It is the contention of the Employes that the Claimant is entitled to the amount he would have received if permitted to work the assignment, and that he should now be made whole for the loss suffered as a result of the violative action of the Carrier, in failing to comply with the Agreement.

Previous Awards of the Fourth, as well as other Divisions of the National Railroad Adjustment Board, have ordered payment at the time and one-half rate. See Fourth Division Awards 594, 766, 870, 871, 1043 and 1158.

All data used in support of this claim has been presented to the management and made a part of the particular question in dispute. Claim should be sustained.

CARRIER'S STATEMENT OF FACTS: On December 8, 1959, a yardmaster's vacancy existed at Holban Yard on the 3:59 P. M. to 11:59 P. M. tour of duty, due to the regular occupant of that position (R. J. Lyman) reporting off sick. This vacancy was filled by Extra Yardmaster W. J. Quinn who, on the same date, covered a yard conductor assignment at Jamaica Station from 7:59 A. M. to 3:59 P. M.

On December 23, 1959, claim was filed by Yardmaster E. D. Lawrence account not permitted to cover the 3:59 P. M. to 11:59 P. M. vacancy at Holban Yard on December 8, 1959. A copy of this letter is attached hereto and made a part hereof, marked "Carrier's Exhibit A".

This claim was denied by the carrier's Freight Train Master on January 6, 1960. A copy of this letter is attached hereto and made a part hereof, marked "Carrier's Exhibit B".

On February 8, 1960, the claim was discussed by the General Chairman of the Yardmaster's organization and the Manager of Personnel, the highest officer of the carrier designated to handle such matters, following which the Manager of Personnel advised the General Chairman, in writing, that he was willing to dispose of the claim by allowing eight hours at the pro rata rate of pay for December 8, 1959. This payment was inadvertently allowed, prior to receipt of reply from the General Chairman, on the second payroll period of February, 1960. A copy of the Manager of Personnel's proposal is attached hereto and made a part hereof, marked "Carrier's Exhibit C".

On February 20, 1960, the General Chairman advised the Manager of Personnel that his proposal to allow the claim at the pro rata rate of pay was not acceptable. A copy of this letter is attached hereto and made a part hereof marked "Carrier's Exhibit D".

POSITION OF CARRIER: There is in effect on this property an agreement between the parties known as the "Overtime Agreement" dated March 23, 1959. For the Board's ready reference we have set forth below the provisions of this agreement:

"IT IS AGREED:

1. Effective March 23, 1959, when regular Yardmasters or Extra Yardmasters are not assigned, or are unavailable to work at the pro rata rate of pay on the rest days of six and seven day positions or other vacancies, and punitive payment is required in order to fill the positions, the following shall apply:

(a) Relief Days.

- 1) The regular incumbent of the position will have preference to work the position on his rest day.

2) If the regular incumbent does not desire to work, then the senior Yardmaster in the yard who has indicated his desire to work will be used.

(b) Other Vacancies.

1) The senior Yardmaster in the yard who has indicated his desire to work will be used.

2. No regular Yardmaster shall be used on an overtime basis or on his relief day, if such use will prohibit him from working his regular position.

3. In the application of this Agreement, regular Yardmasters who desire to work overtime or on their relief days, shall file their names, addresses and telephone numbers with the proper officer of the Company.

4. This Agreement shall remain in full force and effect until terminated in accordance with the provisions of the Railway Labor Act, as amended.

THE LONG ISLAND RAIL
ROAD COMPANY

RAILROAD YARDMASTERS
OF AMERICA

/s/ T. F. Kustes
Manager of Personnel

/s/ J. L. Pleines
General Chairman

As set forth in the Carrier's Statement of Facts, Yardmaster R. J. Lyman who owns a yardmaster position at Holban Yard, 3:59 P. M. to 11:59 P. M., reported off sick on December 8, 1959. The vacancy was covered by W. J. Quinn, an Extra Yardmaster, who owns a regular assignment as Yard Conductor at Jamaica Station, 7:59 A. M. to 3:59 P. M.

The claimant, E. D. Lawrence, owns a relief yardmaster position and during the work week of December 7, 1959 worked as follows:

December 7	Holban Yard	3:59 P. M. to 11:59 P. M.
December 8	Holban Yard	11:59 P. M. to 7:59 A. M.
December 9	Holban Yard	11:59 P. M. to 7:59 A. M.
December 10		REST DAY
December 11		REST DAY
December 12	Holban Yard	7:59 A. M. to 3:59 P. M.
December 13	Bay Ridge	7:59 A. M. to 3:59 P. M.

The carrier submits that Extra Yardmaster Quinn should not have been considered available to cover the 3:59 P. M. vacancy at Holban Yard on December 8, 1959, under the provisions of the Overtime Agreement. Extra Yardmaster Quinn's regular yard conductor's assignment at Jamaica Station was not completed until 3:59 P. M., and since it takes thirty minutes to travel from Jamaica Station to Holban Yard, he would be unable to cover the aforesaid vacancy. It was on this basis that the carrier proposed to dispose of the claim by allowing the claimant eight hours at the pro rata rate of pay.

In making the foregoing proposal the Carrier relief upon numerous awards of this Division and the Third Division which held that the claim for time and

one-half is inapplicable to work not performed. Ample justification for this decision can be found in the following awards:

Award No. 4244 — Third Division — Referee Carter.

The right to perform work is not the equivalent of work performed insofar as overtime is concerned. Whether the overtime rate be construed as a penalty against the employer or as the rate to be paid an employe who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing that makes the higher rate applicable. One who has been deprived of work is not entitled to recover penalties accruing to the employe who actually performs the work where such penalties arise from the fact of his actually performing it. They are personal to such employe and are not a part of the loss sustained by the employe deprived of the work. The latter's loss is the rate the regularly assigned occupant of the position would have received if he had performed the work in the regular course of his employment.

Also see Third Division Award Nos. 2695-3049-3222-3251-3271-4196, and awards of other referees to the same effect are 2346-2823-3232-3371-3375-3376 3504-3505-3609-3745-3837-3910-3890 and 4037.

And Fourth Division Award No. 1178 — Referee Nahstoll.

The measure of the claimant's right, however, is limited to pro rata pay for the position of yardmaster, in lieu of the overtime rate demanded in his claim.

See Award No. 1099.

Award No. 802 — Fourth Division — Referee Boyd.

The claimant here did not perform the work. If the regularly assigned relief Yardmaster had filled the position in the regular course of his employment he would have been compensated at the pro rata rate. Following the reasoning expressed in the foregoing quotation, the claim is valid at the pro rata rate.

The awards cited above by the carrier lend irrefutable support to the payment of the pro rata rate made by the carrier in lieu of the time and one-half rate claimed. In the instant case the claimant was unjustly dealt with and the carrier corrected the injustice by allowing a day's pay at the pro rata rate — the same payment which the regular incumbent would have received had he been available for service on December 8, 1959.

The penalty payment requested by the organization is not supported by the overtime rules of the applicable agreement and should be denied. The overtime or penalty rules of the agreement provide that for an employe to qualify he must actually perform work for the carrier. The word 'work' is defined in Webster's New International Dictionary of the English Language, Second Edition, unabridged, as

* * * "Exertion of strength or faculties for accomplishment of something; physical or intellectual effort directed to an end, toil or labor."

The claimant in this case did not perform any 'work' on the second trick as yardmaster at Holban Yard on December 8, 1959 and, therefore, is entitled only to the pro rata rate which he has already received from the carrier.

For reasons outlined above, the claim as made herein should be denied.

Oral hearing is not desired.

(Exhibits not reproduced)

OPINION OF BOARD: The facts in this matter are not in dispute. The Carrier, through error, failed to call the claimant to cover a vacancy. Carrier admitted its error and is willing to pay pro rata rate of pay, but refused to pay punitive pay because claimant did not work.

There is nothing in this case which distinguishes it from the majority of awards from the several Divisions of this Board which hold that in order to qualify for punitive pay the work must have been actually performed in excess of eight hours. In the instant case, the claimant has not qualified himself for the punitive rate by doing the work which makes the higher rate applicable. The Carrier provided the proper compensation.

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

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 14th day of May 1962.

DISSENT OF LABOR MEMBERS TO AWARD 1632
(Docket 1570), RYA vs LI

The decision of the majority only serves to compound the injustice perpetrated initially on the property when the Carrier admittedly and negligibly deprived the Claimant of earnings to which he was rightfully entitled. Awards such as this condone the admitted violations of the Carrier and give them license to continue their errant ways.

While it is true that the awards of the various divisions are in conflict on the point of payment for time not worked, many have ordered payment at the time and one-half rate, and almost without exception in circumstances such as here involved.

There is no proper basis for an award which does not make the grievant whole for the loss suffered: "A person injured in any Anglo-American jurisdiction is, so far as possible to do so by a monetary award under the law of damages, to be placed in the position he would have been had the contract been performed." This principle was enunciated in many previous awards and we vigorously dissent.

LABOR MEMBERS

R. H. Wachowiak

J. P. Tahney

W. J. Ryan