

AMTRAK POLICE LABOR COMMITTEE
SPECIAL BOARD OF ADJUSTMENT

In the Matter of the Arbitration Between

AMTRAK (NATIONAL RAILROAD PASSENGER CORPORATION)

and

AMTRAK POLICE LABOR COMMITTEE, FOP LOCAL 189

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the hours of holiday pay an officer receives on contractually enumerated holidays should not count towards the forty hours of time worked for purposes of overtime eligibility when the holiday hours fall on a scheduled rest day off. The instant grievance is hereby denied.

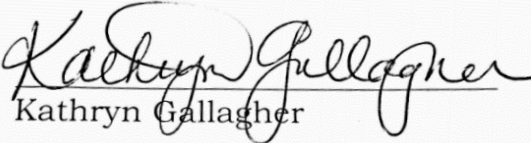
November 9, 2020



Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 9th day of November, 2020 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.



Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2021

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A hearing was held in the above-entitled matter on August 19, 2020 by video conference, before Daniel F. Brent, duly designated by parties as Arbitrator. Both parties attended this hearing, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. A verbatim transcript was made of the proceedings, and both parties submitted post-hearing briefs. The record was declared closed on October 2, 2020.

APPEARANCES

For the Employer

Angela L. Heverling, Esq.

Matthew Holtz, Director of Labor Relations

Eric Dartt, Senior Manager of Labor Relations

Lorraine Lech, Manager Labor Relations (Retired)

For the Union:

Joshua L. Weiner, Esq. of Coughlin Duffy, Esqs.

William Gonzalez, President, FOP Local 189

ISSUE SUMMITTED

Should the hours of holiday pay an officer receives on contractually recognized holidays count towards the forty hours of time worked for purposes of overtime eligibility when they fall on a scheduled rest day off?

If so, what shall be the remedy?

NATURE OF THE CASE

The instant grievance was submitted by the Amtrak Police Labor Committee, FOP Local 189 (hereafter, the Union) contending that the Employer National Railroad Passenger Corporation (hereafter, the Employer or Amtrak) improperly failed to credit aggrieved bargaining unit Police Officers with overtime premium wages for contractual holidays that fell on the Officers' regular rest day off (RDO). According to the Union, the interpretation of the parties' collective bargaining agreement expressed by Arbitrator Scott Buchheit in an award issued in 2013 addressing similar circumstances involving contractual holidays that fell on employees' vacation days was equally applicable to, and dispositive of, the instant grievance. Arbitrator Buchheit held that because vacation days were otherwise days that an employee would have been scheduled to work, the contractual mandate that holidays count towards the computation of the forty-hour threshold for overtime applied to holidays that coincided with a Police Officer's vacation days.

The Employer denied the grievance and asserted that because regular days off were not days that an employee would otherwise have worked, RDO's could not count toward reaching the forty-hour workweek threshold for overtime. To hold otherwise, the Employer asserted, would result in paying for RDO's at time and a half, when RDO's are not listed among the categories of

days, including holidays, that count toward reaching the forty-hour per week overtime threshold.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was brought to arbitration.

RELEVANT CONTRACT PROVISIONS

RULE 7- OVERTIME

- A. 1. Except as otherwise provided, all authorized time worked in excess of forty (40) hours per week, exclusive of roll call time which is always unpaid, shall be considered overtime and paid for on the actual minute basis at time and one-half rate, or the employee, at his option, may elect to accept compensatory time off on the basis of one hour's overtime equaling one and one-half hours' time off.

For the purpose of applying this rule, roll call time is a part of every shift and increases the workday by (15 minutes) without additional compensation and does not count toward overtime eligibility.

2. The following shall be considered as time worked for computing forty (40) hours worked, vacation, holiday, paid personal leave days, jury duty, military leave pay, paid bereavement leave, court time and paid training, court time and time exchanged in Accordance with Rule 12.

RULE 13- HOLIDAYS AND PERSONAL LEAVE

- A. Subject to the qualifying requirements contained in Section B hereof and to the conditions hereinafter provided, each employee shall receive one (1) day's pay at the pro rata rate for each of the following enumerated holidays:

New Year's Day	Labor Day
Washington's Birthday	Veterans Day
*Good Friday	Thanksgiving Day

Memorial Day
Fourth of July

*Christmas Eve
Christmas Day

* "Personal Holiday" will be substituted for the Good Friday and Christmas Eve holidays, to be observed in accordance with the provisions of Section F of this Rule.

NOTE: Effective January 1, 1983, each employee covered by this Agreement will receive an additional "personal holiday" in lieu of the day after Thanksgiving Day subject to the qualifying requirements of Rule 13 (Holidays and Personal Leave) of the current Agreement. Such day will be selected by the employee, consistent with the requirements of service, upon 48 hours' advance notice to the Corporation. The "personal holiday" request must be made before October 12 of each year. Failing to do so, such "personal holiday" will be assigned by management.

- B. A regularly assigned employee shall qualify for the holiday pay provided in Section A hereof if the employee works his/her full workdays immediately preceding and following such holiday, unless excused by their supervisor from working the full tour. If the holiday falls on the last day of a regularly assigned employee's work week, the first workday following his rest days shall be considered the workday immediately following. If the holiday falls on the first workday of his work week the last workday of the preceding work week shall be considered the workday immediately preceding the holiday. An employee who fails to work a holiday when scheduled to work forfeits holiday pay for that holiday.

NOTE: Compensation paid under sick leave rules will not be considered as compensation for purposes of this Rule.

- C. Work performed on the holidays enumerated in Section A shall be paid for at the rate of time and one-half.
- D. Under no circumstances will an employee be allowed, in addition to his holiday pay, more than one time and one-half payment for service performed by him on a holiday which is also a workday, a rest day and/or a vacation day.

DISCUSSION AND ANALYSIS

The Union cited the explicit inclusion of holidays, which are specified in Rule 13, in Rule 7 as unequivocally including all holiday pay in computing whether a bargaining unit Police Officer has worked more than forty hours in a workweek. It bolstered its position by invoking the ruling of Arbitrator Scott Buchheit in an award sustaining the Union's grievance that holidays paid on a vacation day counted toward the computation of overtime eligibility. This argument is initially attractive, but further analysis mandates a different conclusion.

As police departments and other public safety agencies provide their protective services 24 hours a day/365 days a year, some complement of the police force is on duty on every contractual holiday bargained by the parties. Consequently, many police agencies, including the Amtrak Police, pay the holidays provided by the contract whether or not an individual officer's tour rotation schedules the officer to work the contractual holiday. According to the testimony adduced during the arbitration hearing, an officer who wants to be off duty on a holiday which his tour rotation would otherwise require the officer to work, must either negotiate a swap with a fellow officer or request vacation time off in order to receive holiday pay and not report to work as scheduled.

Thus, holiday pay usually flows independently of whether or not an officer works the holiday by virtue of the tour rotation.

In the prior grievance addressing the issue of whether holiday pay could count toward meeting the forty-hour overtime threshold in combination with a paid vacation day, Arbitrator Buchheit held that vacation constituted a day on which the officer would otherwise be scheduled to work, but for utilizing an earned benefit in order to be excused from the obligation to work the officer's scheduled tour or shift in accordance with the ongoing schedule. Thus, if a contractual holiday fell on a day an officer was on approved vacation, the holiday time and the vacation time could both be applied toward the overtime threshold by operation of Rule 7 if the officer worked some scheduled tour time during that workweek.

Rule 7 lists other occasions on which an officer would be excused from reporting for duty as scheduled, such as bereavement leave, paid personal leave days, jury duty, and military leave that also count in computing overtime eligibility. These categories of days do not directly benefit the Employer, but are either granted by the collective bargaining agreement as paid days or mandated by applicable law. A second category of days counted toward overtime involve duties performed on behalf of or for the benefit of the

Employer. These include court time and paid training, which constitute official duty performed away from the officer's usual post.

The Employer denied the grievance regarding the Grievants' attempt to apply the same principle to regular days off (RDO), asserting that RDO's were not listed in the collective bargaining agreement and were not days at which a bargaining unit employee would otherwise be at work. This distinction is material and persuasive, as was the Employer's argument that RDO's occur every workweek or pay period to afford employees rest and respite from their duties. The Employer paid the aggrieved employees for all the contractual holidays, including the Labor Day holiday that precipitated the instant grievance, as straight time. To adopt the Union's interpretation that holidays falling on RDO's should count toward the forty-hour overtime threshold would create a time-and-a-half premium obligation for any workweek with a holiday predicated solely on days on which an employee was not scheduled to work as a recurring component of the tour schedule. This result requires treating RDO's as scheduled work days, which by definition, they are not.

The Union's position would effectively add language to the contract for which the parties had not bargained. It is a fundamental and universally accepted tenet of arbitration that an arbitrator may not add to, subtract from, amend, alter or improve the language of the negotiated agreement. To sustain

the instant grievance would, as the Employer argued, convert contract holidays falling on two of seven days per week to overtime days for employees who were not deprived of the use of the holiday as personal leisure time, did not have to swap or use accrued vacation, and received the straight time holiday pay negotiated by the parties.

Rule 13 lists the ten contractual holidays and provides that an employee who works on an RDO will receive time and a half, as will employees who work on any of the contractual holidays. This provision further demonstrates that the parties addressed the status of RDO's in negotiating their agreement. Rule 13 C provides that "Each employee shall receive one (1) day's pay at the pro rata rate for each of the following enumerated holidays:" Rule 13 B requires that a police officer work "his/her full workdays immediately preceding and following such holiday, unless excused by their supervisor from working the full tour."

Rest days off are, by definition, not work days. Every employee is regularly scheduled to remain off duty on two RDO's. Therefore, when a holiday falls on the employee's RDO, not only is the holiday paid at straight time, as no work is performed pursuant to Rule 13, but the holiday pay does not convert the RDO to hours worked toward the overtime threshold pursuant to Rule 7. Absent explicit contract language in Rule 7, Rule 13, or elsewhere in

the collective bargaining agreement, treating holiday pay on an RDO as potentially triggering overtime pay for hours 41 through 48 within the same workweek, there is no valid basis within the contract or by application of the Buchheit award to require that the Employer count holidays falling on RDO's toward the meeting overtime eligibility threshold.

In addition, the Employer aptly cited Arbitrator William Holley's quoting Arbitrator Dennis Nolan regarding the impact of past practice, particularly in the absence of clear and explicit contract language:

Arbitrators agree that a party asserting a past practice bears the burden of establishing the existence of that practice. This burden can be met by showing that the parties regarded some action as the normal, proper, and exclusive response to a particular situation. Several factors can be examined to determine whether such an understanding exists. The most important of these is mutuality, which can be either express or implied, as by a continued failure to object to a course of conduct that is open and repeated.

The Employer has been paying straight-time holiday pay for holidays falling on officers' RDO's for many years without a grievance by the Union. This absence does not reflect any negligence or omission by the Union, but must be interpreted as evidence that the parties mutually understood the distinction between counting days, such as court duty, jury duty, and vacation, on which employees would otherwise be working on behalf of the employer or enjoying paid time off as an earned benefit versus days on which an employee

was not scheduled to work. Moreover, the provisions have not been changed in two successive rounds of contract negotiations since 2007.

The evidentiary record did not provide by a preponderance of the evidence that the Union met its burden to establish persuasively that, despite the absence of any mention of RDO's in Rule 7 (A)(2), the parties mutually agreed to the outcome the Union pursues in the instant case. There is no compelling evidence to support the Union's interpretation of the pertinent contract language to permit RDO's to count toward making holidays payable at the one time and one-half overtime premium rate. Therefore, based on the evidence submitted, the hours of holiday pay an officer receives on contractually recognized holidays should not count toward the forty hours of time worked for purposes of overtime eligibility when the holiday hours fall on a scheduled rest day off. The instant grievance is hereby denied.

November 9, 2020

Daniel F. Brent, Arbitrator