Award No. 2358
Docket No. 2104
2-KCT-FT-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 38, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Federated Trades)

KANSAS CITY TERMINAL RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Kansas City Terminal Railway Company improperly denied employment to:

a) Machinists C. T. Petkoff, G. E. Marshall and C. R. Hayes,

b) Electricians George J. Kostas, Henry S. Schick, F. J. Snyder and Electrician Helpers Eugene F. Schratter, H. A. Hahn, Robert Powers and C. M. Marshall

on one of the days involved in their regular assigned work week of 40 hours, consisting of 5 days of 8 hours each, namely Thursday, November 25, 1954.

2. That accordingly the Kansas City Terminal Railway Company be ordered to make these employes whole by additionally compensating each of them in the amount of 8 hours at the time and one-half rate on the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: The Kansas City Terminal Railway Company, hereinafter called the carrier, made the election to create and maintain seven-day positions—a work week of 40 hours consisting of 5 days of 8 hours each with 2 consecutive days off, staggered within each 7 days and thereupon assigned the above named machinists, electricians and electrician helpers, hereinafter referred to as the claimants, to such hours of work, to such days of work and to such off days as stipulated in copy of Memorandum submitted herewith and identified as Exhibit A.

The carrier, nevertheless, unilaterally chose to deprive each of the said employe claimants of their possessed assignment of work hours on Thanksgiving Day, Thursday, November 25, 1954 and such action as this had not previously occurred, which is supported by signed statements dated May 28th,

claims were sustained, and nothing has been presented to justify that decision, the claimants would only be entitled to recover at the straight time rates in accord with the well settled principle of your Board that punitive time will not be paid for time not actually worked. (See Awards 1401, 1387. Also Third Division Award 3504, 4224).

As indicated by carrier's statement of facts, the claimants received a day's pay for Thanksgiving Day under the terms of the August 21, 1954 agreement. In that manner they were paid a full five-days' pay for the work week.

The carrier's granting the claimant's a day of leisure on the holiday is an accepted item of public policy and one that is underwritten by organized labor (See Third Division Award 312).

In the light of all the facts and all the circumstances it is clear that the claim in this dispute is not supported by the agreement and is without merit and should be denied in its entirety.

FINDINGS: The Second 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.

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

The organization contends carrier improperly denied employment to three (3) machinists; three (3) electricians and four (4) electricians' helpers on Thursday (Thanksgiving Day), November 25, 1954, when that holiday fell on one of the workdays of their regularly assigned work week. In view thereof it asks that carrier be required to pay each claimant for eight (8) hours at time and one-half.

Claimants were regularly employed by the carrier in its roundhouse and coach yard at Kansas City. They held positions the duties of which necessarily had to be performed on seven (7) days of each week. Consequently the positions were subject to the provisions of the parties' controlling agreement which provides any two (2) consecutive days may be assigned thereto as rest days although carrier is obligated to favor, insofar as possible, Saturdays and Sundays. See Rule 1 "Note" and (d) of the parties' agreement effective September 1, 1949. Under this authority the claimants' rest days had been so assigned that Thursday was a workday of each claimants' work week. Carrier notified each claimant his services would not be needed on Thursday, November 25, 1954. Each claimant was paid for eight (8) hours at straight time for this day as Article II, Section 1 of the August 21, 1954 Agreement provides they shall be. The bulletins advertising the jobs held by these claimants outlined the days of the work week thereof but did not specifically specify that the occupant thereof would necessarily be required to work on any of the recognized holidays if they fell on the workdays of his work week.

Rules 3 and 4 of the same agreement provide that employes regularly assigned to work on certain holidays, which include Thanksgiving, will be allowed to work the entire day and will be paid therefor at time and one-half. The question is, is an employe regularly assigned to a work week of forty (40) hours, as provided for by Rule 1(a), regularly assigned to work on the recognized holiday when such holiday falls on a workday of his work week?

This question was recently answered by Award 2325 of this Division by the following language:

> "At that time a holiday was considered an unassigned day, and even though it fell on a workday of an employe's work week, it could be blanked without penalty or worked in accordance with carrier's operational needs. When employes were not used on a holiday, their work week was shortened by eight (8) hours."

See also Awards 1606 and 2212 of this Division and 5668 and 7136 of the Third Division. As stated in Award 2212:

> "A holiday is treated as an unassigned day."

This is further evidenced by the many holdings of this, and the Third Division prior to the agreement of August 21, 1954, to the effect that when, during a vacation, a recognized holiday fell on a regularly assigned workday of the employe taking a vacation it could not be considered as one (1) of his consecutive workdays with pay and thus no part of the vacation granted him.

There is a further reason why the claimants should not now be permitted to maintain the position they herein seek to assert. That the spokesmen for the organizations appearing before Emergency Board No. 106 fully understood the foregoing interpretations of the parties' agreements is evidenced by some of the statements they made to it.

Lester P. Schoene, General Counsel for the employes, stated:

> "We also have some special considerations with respect to the matter of holiday pay. I mentioned earlier, in discussing the proposals, that on the matter of holidays, we have some recognition of holidays in our industry now. We have these seven holidays that are designated as holidays. But, perhaps, recognition is scarcely an appropriate word. The principal effect of a holiday, in the railroad industry now, it has an exception to the guarantee rule. Usually these employes are guaranteed five days of work a week under their agreements. The main recognition given to holidays is that on the weeks in which we have a holiday, they don't have five days of work. In other words, a holiday, in the railroad industry today, is simply a day of unemployment. One of these employes in the railroad industry who celebrates his holiday can celebrate it exactly the same as a fellow who doesn't have a job. His pay is short that week by one day's pay. That is what holidays mean in the railroad industry today.
>
> Now, it is true that those who are required to work on the holiday, do get paid time and a half, and, to that extent, there is further recognition. But, the great bulk of the employes in the non-operating crafts don't work on holidays, so, for them, it is simply a day of unemployment.
>
> Now, I think you will find when we present our evidence, by comparison with other industries that this is the only major important industry in the country of which it can be said today that a holiday is simply a day of unemployment."

G. E. Leighty, Chairman of the Employes' National Conference Committee, stated:

> "I would say that at the present time, because on certain carriers they do have considerable service on a holiday, they have a number of the employes working, but for the group as a whole I doubt that on the basis of the best figures that we have available,

over 25 per cent of them actually work on a holiday. The rest are off on that holiday.

Now, you can realize what it does to an individual on a five-day week when he is dependent on that weekly pay check to have one day's pay deducted from it because he does not work that day, and I want to say to you that we have had a real uproar from the employes whom we represent because they are not paid for those holidays, and they are insistent that they shall be paid for those holidays, and in addition, paid at the penalty rate should they be required to work on such holidays."

And, when asked:

"You have time and a half in the railroad industry now for time worked on holidays, do you not?"

Mr. Leighty replied:

"Yes, for time worked on holidays, but we don't have pay for holidays not worked and I don't believe that over 25% of that group work on holidays, possibly a little more."

And in response to a series of questions, Mr. Leighty responded as follows:

Q. "We are considerably puzzled as to just how that would operate and I want to ask a question about it. At the present time the vacation agreement provides for the payment of a certain number of consecutive working days, does it not, or the allowance of a certain number of consecutive working days of vacation?

A. My recollection is that it provides for—the way it reads now is 6, 9 and 12 days.

Q. 6, 9 and 12 consecutive working days?

A. I think so, yes. The thought in that being six days was the number of days per week at the time that was made.

Q. It is 5 now.

A. It is 5 now, that is right.

Q. Assuming an employe is entitled to a vacation of five consecutive working days under the agreement, would you count that holiday as a working day?

A. Today?

Q. Yes.

A. No, no.

Q. So that how much vacation would he get at the present time?

A. Well, he would get 10 working days.

Q. Even though a holiday fell within the vacation period?

A. Yes, definitely.

Q. So that you would count that as a working day?

A. No, you wouldn't count it as a working day. He would get 10 working days."

In discussing this matter Emergency Board No. 106 said:

"Issue 12 proposes to grant employes time off duty with pay on seven holidays. (Issue 10 in Carriers' analysis.)

At present, for most of the employes concerned, the holidays in question are recognized but no compensation is received. Those employes called on to work on holidays are paid time and a half."

"The Board feels that in relation to practice in other industries it would be appropriate for hourly rated nonoperating railroad employes to receive straight time compensation for any of the seven holidays falling on any of the workdays of their established work week, subject to certain limitations outlined. In reaching this conclusion the Board is strongly influenced by the desirability of making it possible for the employes to maintain their normal take-home pay in weeks during which a holiday occurs. As will be indicated later, the Board proposes continuation of the present arrangements for time and a half for holidays worked. Such time and a half for holidays worked would be in addition to straight time pay for holidays. This will have the effect of take-home pay in excess of normal for those employes who work on holidays, but under the conditions involved is believed by the Board to be justified."

"Summarizing the Board's conclusions concerning Issue 12 under Holidays, whenever one of the seven enumerated holidays falls on a workday of the work week of a regular assigned hourly rated employe, he shall receive the pro rata of his position in order that his usual take-home pay will be maintained."

In view of the foregoing the Emergency Board No. 106 recommended:

"Issue 12.—Because of the reasons set forth in our discussion the Board recommends that the parties agree that:

(a) Whenever one of the seven enumerated holidays falls on a workday of the work week of a regularly assigned hourly rated employe, he shall receive the pro rata rate of his position for that day."

"Issue 7.—Because of the reasons set forth in our discussion, including the interrelation of this issue to other issues, the Board recommends that the vacation period not be increased by allowing additional vacation days where holidays fall in the base vacation period and that when a holiday falls on what would have been a workday of the employe's regularly assigned work week, such holiday shall be considered as a workday of the period for which he is entitled to vacation."

As a result of these recommendations Section 1 of Article II and Section 3 of Article I became a part of the agreement of August 21, 1954. In view of that fact we think claimants are now estopped from asserting a different position than that presented to Emergency Board No. 106 and from which they obtained the benefits which Section 1 of Article II now affords them.

In view of the foregoing we think the claim here made must be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December, 1956.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2358.

1. In the Findings on page 2, the majority assert reading—

> "The bulletins advertising the jobs held by these claimants outline the days of the workweek thereof but did not specifically specify that the occupant thereof would necessarily be required to work on any of the recognized holidays if they fell on the work days of his workweek."

which is either without basis or it represents arbitrary thinking. There is no reason for revising the bulletins and the majority is without the authority to amend the bulletining rules of the parties to include therein the words "specifically specify" because seven of the fifty-two calendar weeks in each calendar year embrace legal holidays and, in bulletining the work weeks, the claimant's hours of work are specified. Each of their five days of work are specified or thusly named—**Tuesdays through Saturdays** and, then too, their two off days in each seven are actually each named.

There is no assuming necessary by either management at the local level or by the employes because the days of work and the off days are definitely and specifically set forth in bulletins by the management of the carrier and if the need was ever so great for revising the bulletining rule, the majority has no authority to do so.

2. Also in the Findings, on page 2, the majority assert reading—

> "The question is, is an employe regularly assigned to a work week of forty (40) hours as provided for by Rule 1(a), regularly assigned to work on the recognized holidays when such holiday falls on a work day of his workweek?

and then they answer the question:

> "This question was recently answered by Award 2325 of this Division by the following language—
>
> > 'At that time a holiday was considered an unassigned day, and even though it fell on a work day of an employe's workweek, it could be blanked without penalty or worked in accordance with the Carrier's operational needs. When employes were not used on a holiday, their workweek was shortened by eight (8) hours.'
>
> See also Awards 1606 and 2212 of this Division and 5668 and 7136 of the Third Division."

There is no phrase or sentence in any rule of the agreements of the parties effective between September 1, 1949 and May 21, 1954, which authorized the treating of a holiday as an **unassigned day** or that such holiday is subject to be **blanked** at the will of the Carrier and such strange and strained thinking is refuted by Rule 1(a) and Rule 4 of the parties' agreement.

The reference made to Second Division Awards 2325, 1606, 2212 and Third Division Awards 5668 and 7136 are not subject to be substituted for the parties' agreement rules and, therefore, the rules of the parties apply rather than those erroneous awards. Indeed, no agreement rule has been made between the parties—Kansas City Terminal Railway Company and System Federation No. 38—nor have the parties adopted any rule which states "a holiday is treated as an unassigned day" and there is no support therefor expressed in Article II of the August 21, 1954 Agreement made by the parties signatory thereto in pursuance of the Amended Railway Labor Act. In fact, the Emergency Board No. 106, on page 43 of its Report, said in part reading—

". . . it is **not** the intention of the Board in making the above recommendation to propose the modification of the present agreement providing time and one-half for work on holidays." (Emphasis supplied).

which ought to serve to remove such erroneous thinking from the minds of all concerned.

3. Further, in the Findings on page 2 of the majority, they assert that—

"This is further evidenced by the many holdings of this, and the Third Division prior to the agreement of August 21, 1954, to the effect that when, during a vacation, a recognized holiday fell on a regularly assigned workday of the employe taking a vacation it could not be considered as one (1) of his consecutive workdays with pay and thus no part of the vacation granted him."

This reference is certainly not germane here. It invokes an issue separate and distinct from the facts in the instant case. These claimants were not vacationing. They were in the service and they were specifically assigned to work designated hours. Each of their five days of work was specifically named and so was each of their two off days in each seven.

There was no rule between the parties from September 21, 1949 to August 21, 1954 which specifically authorized the carrier to arbitrarily deprive an employe of the right to work a single one of his five specified days to work in his staggered work week of Seven-day Positions. The "many holdings of this, and the Third Division" are erroneous and they do not, by any stretch of the imagination, supersede the rules of the agreements made by the parties signatory thereto.

4. In the Findings, on pages 3, 4 and 5, there are discussions recorded therein which occurred at the hearing **before the Emergency Board** No. 106 including discussions of **Issue 12** at pages 40, 41 and 42; **Issue 12** at the bottom of page 54 and **Issue 7** at the bottom of page 53 and at the top of page 54 of the Emergency Board's Report to The President dated May 15, 1954.

It is submitted that in accordance with the Amended Railway Labor Act the majority has no authority to substitute the discussions presented before the Emergency Board No. 106 or the Report thereof dated May 14, 1954 for the agreements (ARTICLE I—VACATIONS and ARTICLE II—HOLIDAYS) subsequently negotiated between the national representatives of the carriers listed in Exhibits A, B and C and the Employes' National Conference Committee of the Fifteen Cooperating Railway Labor Organizations signatory thereto dated and signed at Chicago, Illinois, August 21, 1954; known to be "Agreement and Memorandum dated August 21, 1954."

5. On the last page of the Findings the majority concludes that—

"As a result of these recommendations Section 1 of Article II and Section 3 of Article I became a part of the agreement of August 21, 1954. In view of that fact **we think** claimants are now estopped from asserting a different position than that presented to Emergency Board No. 106 and from which they obtained the benefits which Section I of Article II now affords them.

In view of the foregoing **we think** the claim here made must be denied." (Emphasis supplied).

Insofar as Article I of the August 21, 1954 Agreement is concerned, is is clear that the words ". . . such day shall be considered as a work day of the period for which the employe is entitled to vacation" as used in Section 3 thereof could, of course, be used in support of rather than as a detriment to the claimants but which support thereof is by no means needed in the event

the plain language, as used in Rule 1(a) by the parties, is applied as the rule is written and as same was jointly applied on the property between September 1, 1949 and August 21, 1954. Consequently, the majority must be gravely in doubt as to the wisdom of their award by reason of having elected to base it on the emphasized words in the next above quotation.

In light of the indisputable facts, the indisputable plain and positive language used by the parties' agreement in Rule 1(a), Rule 4 and in Article II, the award of the majority is erroneous.

R. W. Blake
Charles E. Goodlin
T. E. Losey
Edward W. Wiesner
George Wright