Award No. 5317
Docket No. 5048
2-NYNH&H-FO-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. It is the claim of the employes that the carrier violated the provisions of the fourth paragraph of Rule No. 4 when they failed to compensate, at the rate of time and one-half, employes working December 25, 1964, which is considered a legal holiday.

2. That the following employes be compensated at the rate of time and one-half for working December 25, 1964: B. J. Jablowski, A. J. Michaels, A. Dieppa, J. P. Mutino and N. F. Columbo.

EMPLOYES' STATEMENT OF FACTS: Power Plant Employes B. J. Jablowski, A. J. Michaels, A. Dieppa, J. P. Mutino and N. F. Columbo, hereinafter referred to as the claimants, are regularly employed by the New York, New Haven and Hartford Railroad Company, hereinafter referred to as the Carrier, at its Cos Cob Power Plant, Cos Cob, Connecticut. Claimants are regularly assigned to various shifts with work weeks having Friday as a regularly assigned rest day.

Claimants were called and requested by Carrier to work on Friday, December 25, 1964 which was their rest day and a legal holiday. They were paid eight hours at time and one-half rate for service performed on their rest day, but claim they are entitled to an additional eight hours' pay at time and one-half rate for service performed on a holiday.

The above stated facts are verified by copy of letter dated April 28, 1965 addressed to the Vice General Chairman, G. F. Francisco by Director of Labor Relations and Personnel J. J. Duffy, attached hereto as Exhibit A.

This dispute has been handled with all officers of Carrier designated to handle such disputes, including Carrier's highest designated officer, all of whom have declined to make satisfactory adjustment.

For all of the reasons herein stated we respectfully request that the claim be denied.

All of the facts and evidence herein have been affirmatively presented to or are known by the Employes.

Carrier does not request an oral hearing. However, in the event the Employes request hearing, Carrier desires the opportunity to be heard as well.

(Exhibits not reproduced.)

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.

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

Each of the Claimants performed one day's work on December 25, 1964, which was a rest day of their regular assignment as well as a legal holiday. Each received a day's pay at time and one-half, but seeks another day's pay for the same day's work under these paragraphs of Rule 4 of the current agreement:

> "**Work performed** by employes on the following legal holidays, namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or proclamation shall be considered the holiday) shall be paid for **at the rate** of time and one-half.
>
> **Service rendered** by regular employes on their assigned rest days shall be paid for **at** time and one half * * *." (Emphasis ours.)

The employes rely upon a series of Third Division Awards beginning with Award No. 10541, which found as follows:

> "It is coincidental that the rest day and holiday occurred on the same day, but there are no exceptions to these articles, **the payment** for such work is provided in the Agreement.
>
> The Claimants herein were seeking **compensation pursuant to the terms of two specific articles,** relative to two specific employment situations." (Emphasis ours.)

Similarly, in Award No. 11899 the Third Division said:

> "Carrier has bound itself by the Agreement **to pay compensation** under two separate rules of the Agreement."

In the present case, at least, that interpretation is clearly erroneous. The Carrier has not bound itself to pay compensation under two separate rules or provisions; if it had, it would have bound itself to pay compensation under three separate provisions; for Rule 2 binds it to pay the compensation for a day's work. What the Carrier has bound itself to under each of these provisions of Rule 4 is that the **rate** to be paid for the **work** is the time and one-half rate; and the work to be paid for is one day's work whether the day on which it is performed happens to be a holiday, a rest day, or both.

The Carrier relies upon Awards 9577, 14240 and 15749 of the Third Division, 5237 of the Second Division and Award No. 23 of Special Board of Adjustment No. 564, all of which held to the contrary under similar **circumstances.**

The series of Third Division awards following Award No. 10541 in the main indicated considerable doubt about its correctness but followed it upon the rule of stare decisis.

The same argument is made here, but is equally applicable to the denial awards. In view of the opposing authorities we cannot blindly follow either, but must examine the rules and the circumstances to determine which line of authority should be followed under the rules and facts of this case.

Third Division Award No. 10541 and the other awards which followed it, including Award 11899, sustained claims upon the theory that a rule similar to Rule 4 was a compensation or **pay** rule, authorizing a day's pay for each occasion mentioned, so that if two of them coincided it authorized **two days'** pay; but the rule does not say that employes shall receive an hour's or a day's pay; it merely says that the **rate** to be paid is the time and one half rate. In other words it is not a **pay** rule at all, but a pay **rate** rule.

The compensation or pay rule of the agreement is Rule 2. It provides as follows:

> "Eight (8) hours shall constitute a day's work. **All employes** coming under the provisions of this Agreement, except as otherwise provided in this schedule of rules, or as may hereafter be legally established between the carrier and the employes, **shall be paid** on the hourly basis." (Emphasis ours.)

Since it does not state what the hourly basis of pay is, we must refer to Rule 52 to find the basic rates of pay per hour for the various crafts and classes of employes.

Certain circumstances and conditions have been agreed upon by the parties under which service performed shall be paid for on a time and one-half basis, instead of the basic rate. It is therefore necessary to look to rules governing each situation to ascertain whether the employe's pay for his work under Rule 2 is to be at his basic rate or at the time and one-half rate.

Rules 4, 4-X, 7, 8, 8-A, 9, 16 and 35 all state whether, under various circumstances or conditions of service mentioned, the basic rate or the time and one-half rate shall apply. Rule 4 is no different in purport from the rest of them. They merely specify whether the basic (pro rata) rate or the time and one-half (punitive) rate shall apply in the special instances mentioned.

In short, Rule 2 is the pay or compensation rule, and the others, including Rule 4, are merely pay rate rules. As noted above, Rule 4 says only that work performed on legal holidays shall be paid for at the rate of time and one-half, and that service rendered on assigned rest days shall be paid for at time and one half, which clearly mean the same. It merely specifies that in either event the applicable rate is the time and one-half rate, rather than the basic rate. Neither the holiday provision nor the rest day provision of Rule 4 provides, like Rule 2, that eight hours shall constitute a day's work or employes shall be paid on the hourly basis; they merely set the rate for such pay under the circumstances named.

The work in question was performed on December 25th, which happened to be Claimant's rest day, as well as Christmas. Thus there were two reasons why the time and one half rate applied to work performed on December 25th. That work was paid for at the rate of time and one half, and both provisions of Rule 4 were therefore complied with. What the Employes are now claiming in effect is a rule provision stating that if the work is performed on a day which is both a holiday and a rest day, it shall be paid for at triple rate, or is to be paid for twice at the punitive rate, either of which could easily have been specified in the rule if the parties had so intended; but since this Board finds no such provision in Rule 4 it cannot so hold.

Even if Rule 4 were a pay rule and had provided that for work performed on either a rest day or a holiday, the employes should receive pay for an hour and a half or a day and a half for an hour's or a day's work, the claim could still not be sustained for two days' pay for one day's work performed on a day which happened to both a rest day and a holiday; for in either event the pay is for the work performed rather than for the day; and since only one day's work has been performed, only one day's work is to be paid for. Again, if the parties had agreed upon triple pay, or two days' punitive pay under those circumstances, they could easily have done so; but they did not.

There is no warrant for this Board to read into both provisions of Rule 4, or into either, authorization for a day's pay. If Rule 4 were a pay rule in addition to Rule 2, and each provision authorized a day's pay at time and one-half, so that they would be cumulative to each other, they would also logically be cumulative to Rule 2, so as to authorize four days' pay instead of three. However, that claim has apparently never been made.

In fact, this claim and that in Award No. 5318 are the first such claims brought here since Rule 4 became effective on September 1, 1949; the Carrier contends that no such prior claim was ever made on the property, and that there has been no difference of opinion between the parties concerning the meaning of the rules here involved until the present claims.

The Employes deny the Carrier's assertion that there has been no difference of opinion between the parties in the matter. They say in their rebuttal:

> "While it may be true that only one payment at time and one-half has been made over the years for service performed on a rest day on which a legal holiday also occurred and that no claims have been made for anything more until the instant claim, as discussed herein above, this cannot serve to prove that the Agreement between the parties does not provide for the payment claimed in this dispute."

Thus they admit that these are the first such claims to be asserted since the rule was adopted. While it is true that this does not prove the Carrier's contention concerning the meaning of the rule, it does prove that for a period of fifteen years both parties had the same understanding of its meaning; which, if Rule 4 can now be considered ambiguous in meaning must necessarily be determinative of the issue. Certainly the Employes have not for fifteen years intentionally foregone what they considered a contractual right to two days' pay at time and one half under the conditions involved.

In its Award No. 2436 the Third Division said:

> "The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made."

And in Award No. 12367 it said:

> ". . . where language in a contract is ambiguous, the intention of the parties can best be ascertained by the past practice of the parties and this becomes conclusive when such past practice has continued for a long time and has not been objected to by the Petitioner . . ."

In conclusion, we would emphasize that neither provision of Rule 4 authorizes a day's pay; that authorization is provided by Rule 2. There is no provision in Rule 4, either that the Employes shall receive a day's pay for work on the holiday, or that he shall receive it for work on his rest day; each provision merely states the rate at which he shall be paid, without cumulation or duplication in the event a holiday and rest day coincide. Furthermore, the rate applies to work performed on either such day, and not to the days themselves. The work was performed on December 25th, which in this instance was a rest day as well as a holiday. Thus there were two reasons why the time and one-half rate applied to the work, but no reason why it should be paid for twice. There is only one day's work to be paid for, whatever the rate, and whether there are two or a dozen reasons why that particular rate applies to the work. One payment for the work satisfies all provisions, and the rule has been complied with. The Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October, 1967.

LABOR MEMBERS' DISSENT TO AWARDS 5317 – 5318 – 5319

The majority is in fundamental and harmful error in Awards 5317, 5318 and 5319. In laying down their foundation for their final decision, they state among other things:

> "The employes rely upon a series of Third Division Awards beginning with Award No. 10541, which found as follows:
>
> > 'It is coincidental that the rest day and holiday occurred on the same day, but there are no exceptions to these articles, **the payment** for such work is provided in the Agreement.
> >
> > The Claimants herein were seeking **compensation pursuant to the terms of two specific articles**, relative to two specific employment situations.' (Emphasis ours.)
>
> Similarly, in Award No. 11899 the Third Division said:
>
> > 'Carrier has bound itself by the Agreement **to pay compensation** under two separate rules of the Agreement.'
>
> In the present case, at least, that interpretation is clearly erroneous. The Carrier has not bound itself to pay compensation under two separate rules or provisions; if it had, it would have bound itself to pay compensation under three separate provisions; Rule 2 binds it to pay the compensation for a day's work. What the Carrier has bound itself to, under each of these provisions of Rule 4, is that the rate to be paid for the work is the time and one-half rate; and the work to be paid for is one day's work whether the day on which it is performed happens to be a holiday, a rest day, or both."

The statement, "The Carrier has not bound itself to pay compensation under two separate rules," is an unsupported conclusion on the part of the majority and to say the least, is a theoretical error. However, when coupled with the following additional mistakes, it becomes harmful and prejudicial to the claimants' entire case.

The Shop Craft rules have a long historical background which gives weight and meaning to their application, even in the present amended agreement state. It is not in the same posture or premise that it must be governed by common law principles which control private contracts between two private parties. Therefore, to resort to highly technical or irrational legal gymnastics is improper here.

This point is supported by the U. S. Supreme Court Decision TCEU vs. Union Pacific Railroad, 12/5/66, when Mr. Justice Black delivered the opinion of the court and stated among other things:

> "* * * This contention rests on the premise that collective bargaining agreements are to be governed by the same common-law principles which control private contracts between two private parties. On this basis it is quite naturally assumed that a dispute over work assignments is a dispute between an employer and only one union.

Thus, it is argued that each collective bargaining agreement is a thing apart from all others and each dispute over work assignments must be decided on the language of a single such agreement considered in isolation from all others.

We reject this line of reasoning. A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts."

We have shown here the evident lack of consideration or perhaps knowledge of the background of these rules on the part of the referee and Carrier members when they state in pertinent part:

"Rule 2 binds it to pay compensation for a day's work."

This is a standard rule appearing in all shop craft agreements differing only in some instances in number for identification. When this rule stands alone, it only binds the Carrier and Employe to what its unambiguous language factually says — that is, the establishment of hours of service and rest days. This historical rule was amended in 1949, in order to establish the 40 hour work week. Prior to that time, even as far back as the old national agreement in 1919, it set out the 8 hour day.

Rule 2, speaking for itself, states:

"RULE 2.

Eight (8) hours shall constitute a day's work. All employes coming under the provisions of this Agreement, except as otherwise provided in this schedule of rules, or as may hereafter be legally established between the carrier and employes, shall be paid on the hourly basis.

Except as to weeks in which holidays as specified in Rule 4 occur, regular employes will not be reduced below five days per week."

"RULE 2-A.

ESTABLISHMENT OF SHORTER WORK WEEK

NOTE: The expressions 'positions' and 'work' used in this Rule 2-A refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employes.

(a) General.

The Carrier will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this Rule 2-A a work week of forty hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the carrier's operational requirements;

so far as practicable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this agreement which follow:

(b) Five-Day Positions.

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

(c) Six-Day Positions.

Where the nature of the work is such that employes will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday.

(d) Seven-Day Positions.

On positions which are filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

(e) Regular Relief Assignments.

All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned.

Assignments for regular relief positions may on different days include different starting times, duties and work locations for employes of the same class in the same seniority district, provided they take the starting time, duties, and work locations of the employe or employes whom they are relieving.

(f) Deviation from Monday-Friday Week.

If in positions or work extending over a period of five days per week, an operational problem arises which the carrier contends cannot be met under the provisions of Rule 2-A, paragraph (b) above, and requires that some of such employes work Tuesday to Saturday instead of Monday to Friday, and the employes contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the rules agreement.

(g) Non-consecutive Rest Days.

The typical work week is to be one with two consecutive days off, and it is the carrier's obligation to grant this. Therefore, when an operating problem is met which may affect the consecutiveness of the rest days of positions or assignments covered by paragraphs (c), (d) and (e), the following procedure shall be used.

(1) All possible regular relief positions shall be established pursuant to Rule 2-A, paragraph (e).

(2) Possible use of rest days other than Saturday and Sunday, by agreement or in accordance with other provisions of this Agreement.

(3) Efforts will be made by the parties to agree on the accumulation of the rest time and the granting of longer consecutive rest periods.

(4) Other suitable or practicable plans which may be suggested by either of the parties shall be considered and efforts made to come to an agreement thereon.

(5) If the foregoing does solve the problem, then some of the relief men may be given non-consecutive rest days.

(6) If after all the foregoing has been done there still remains service which can only be performed by requiring employes to work in excess of five days per week, the number of regular assignments necessary to avoid this may be made with two non-consecutive days off.

(7) The least desirable solution of the problem would be to work some regular employes on the sixth or seventh days at overtime rates and thus withhold work from additional relief men.

(8) If the parties are in disagreement over the necessity of splitting the rest days on any such assignments, the carrier may nevertheless put the assignments into effect subject to the right of employes to process the dispute as a grievance or claim under the rules agreements, and in such proceedings the burden will be on the carrier to prove that its operational requirements would be impaired if it did not split the rest days in question and that this could be avoided only by working certain employes in excess of five days per week.

(h) Rest Days of Furloughed Employes.

Furloughed employes recalled to take the place of regular employes will have as their days off the regular days off of that assignment.

(i) Beginning of Work Week.

The term 'work week' for regularly assigned employes shall mean a week beginning on the first day on which the assignment is bulletined to work."

Clearly, this is an hours of service rule, not a pay rule or a rate of pay rule. To attempt to implicate this rule into the specific overtime rules or holiday rules is wrong.

The Third Division Awards previously cited and relied upon by the employes clearly laid down the proper principles and application of the rules applicable in this instant dispute. Such precedents should have held here.

The majority further cites from the Employes' record in part:

"The Employes deny the Carrier's assertion that there has been no difference of opinion between the parties in the matter. They say in their rebuttal:

> 'While it may be true that only one payment at time and one half has been made over the years for service performed on a rest day on which a legal holiday also occurred, and that no claims have been made for anything more until the instant claim, as discussed here and above, this cannot serve to prove that the Agreement between the parties does not provide for the payment claimed in this dispute.'

Thus, they admitted that these are the first such claims to be asserted since the rule was adopted. While it is true that this does not prove the Carrier's contention concerning the meaning of the rule, it does prove that for a period of 15 years, both parties had the same understanding of its meaning; which, if Rule 4 can now be considered ambiguous in meaning must necessarily be determinative of the issue. Certainly, the Employes have not for 15 years intentionally foregone what they consider a contractual right to two days' pay at time and one-half under the conditions involved."

The foregoing citation from the Employes' record, and the Referee and Carrier Members' conclusion of this situation, to say the least, is unreasonable double-talk. For example, there is no bar in the entire agreement, four square, which would prevent the Employes from filing a grievance at any time that they so choose to do so. To misconstrue and to give such false weight and meaning to the Employes' statement, merely reflects a prejudiced and eager attitude to defeat the claimants' original dispute.

A further glaring reflection, as to a calculated misunderstanding of Rule 4 itself, is when the majority with full knowledge of Rule 4 and all its subsequent amendments, attempts to lead the public to believe that Rule 4 has been in existence for 15 years in its original Agreement state. This is not so. The majority certainly lacked prudent judicial restraint in this statement.

Rule 4, 15 years ago, merely provided for seven legal holidays. In the event an individual worked on these legal holidays, he would be paid time and one-half pro rata rate. However, if a holiday fell on his work week and he did not work, he was just out that day's pay. This rule was amended in 1954 on the theory of a keep-whole-take-home pay basis. It was again amended in 1960 and further amended in December 1964 and February 1965, inclusive.

Based on this fact alone, it is unreasonable to conclude or even expect the public to believe that both parties had the same understanding or application of Rule 4 for a 15 year period. Even if they had, it is irrelevant to this instant claim. The majority has created its own conclusion without supporting facts or substantive evidence to establish or fortify this conclusion.

Further, Article V, of the August 21, 1954 (Grievance Procedure Rule) Agreement, specifically stipulates the time limits for filing grievances on particular episodes or alleged violations, and further states that a continuing

violation may be filed at any time. It merely provides the maximum retroactivity allowed. Keeping these foregoing facts in mind, which we contend are certainly the best evidence before this Division insofar as the amended rules are concerned in the specific dispute and the grievance procedure rules, this Division has certainly gone beyond its authority of attempting to rule on what individuals may or may not have thought on the property. Such pure assumptions and interpretations of thought are never considered to be evidence, valid or of substance, under contract law or any place else, other than in an intersanctum or Extra Sensory Perception seances. The Railway Labor Act nor this Agreement does not provide for this type of participation and judgment.

Further, this Division with and without a Referee recognized the facts in Awards No. 5218, 5259 through 5296 and 5326, with quote as follows (only holiday changes in Award findings):

> "Claimant was required to work 8 hours on **Memorial Day, which was not only a holiday, but also his Birthday.** He received 8 hours' pay for the holiday, as well as a like amount for his birthday and 8 hours' pay at time and one-half for working that day."
> (Emphasis ours.)

This shows that payment for a day worked, holiday pay and birthday pay could be all inclusive in one day's pay, and that each of the payments was made under a separate rule providing specifically for that pay.

In face of these sound principles, the Referee and Carrier Members' conclusions to these three awards are a complete reversal of our own determinations. It is a discarding of sound, uniform principles, in favor of ambiguity and absurd conclusions, completely lacking in substance, projecting merely obvious, deliberate error.

We dissent.

R. E. Stenzinger
E. J. McDermott
C. E. Bagwell
O. L. Wertz
D. S. Anderson

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