Award No. 5319
Docket No. 5059
2-B&M-MA-'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. 18, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

BOSTON AND MAINE CORPORATION

DISPUTE: CLAIM OF EMPLOYES:

(1) That under the current agreement Machinist Denis McGillicuddy was improperly compensated for work performed on February 22, 1965, the Rest Day of the claimant and also a legal holiday, Washington's Birthday.

(2) That accordingly the Carrier compensate the claimant for an additional eight (8) hours' pay at time and one-half rate for time worked on Monday, February 22, 1965.

EMPLOYES' STATEMENT OF FACTS: Denis McGillicuddy, hereinafter called the claimant, is employed as a Machinist by the Boston and Maine Railroad, hereinafter called the carrier. At the time of the occurrence of this dispute, the Claimant was assigned to the 7:00 A. M. to 3:00 P. M. shift, Tuesday through Saturday with Sunday and Monday as rest days.

The Claimant performed eight hours' work on Monday, February 22, 1965, which was his assigned rest day, also a legal holiday (Washington's Birthday). The carrier paid the Claimant for eight hours at time and one-half rate for working his rest day (see Exhibit A), but refused to pay him eight hours' pay at time and one-half rate for working the Holiday.

This dispute was properly handled with all Carrier officers authorized to handle such disputes.

The Agreement effective April 1, 1937, as subsequently amended and reprinted January 1, 1963, is controlling.

POSITION OF EMPLOYES: The Claimant was paid 8 hours at time and one-half rate for working 8 hours on his rest day (February 22, 1965) as provided for in Rule 1, Section (1) (page 6 of the Agreement) captioned "Service on Rest Days," reading as follows:

BY MR. SCHOENE:

Q. Now, with respect to any holidays worked, you pay them time and a half for work on that holiday now, don't you Mr. Perry, whether it is his relief day or not?

A. You are talking about the clerks?

Q. Yes.

A. Yes.

* * * * *

Q. As I understand it, such rules exist only in the shop craft agreements?

A. Oh, I think in various clerks' agreements. There are different sorts of arrangements, as I described, whereby overtime would be given in some instances to the man who was covering the job and in other instances to the senior man, or in cases where there are extra boards to extra men.

It all depends on what either the agreement or the practice may be on the individual line.'

In arriving at the intention of the parties, where the language of a contract is susceptible of more than one construction it should be construed in the light of the circumstances surrounding them at the time it is made so as to judge the meaning of the words and the correct application of the language of the contract."

In view of the foregoing and the Petitioner's acceptance and recognized historical application of the Agreement, the instant claim is without merit and should be denied.

All data and arguments herein contained have been presented to the Organization in conference and/or correspondence.

Oral hearing is not desired unless requested by Petitioner.

(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 were given due notice of hearing thereon.

This claim is in all essentials the same as those in Awards 5317 and 5318, although it is between different parties and under a different current Agreement, and the holiday involved is Washington's Birthday rather than Christmas or Labor Day.

The first paragraph of Rule 1 is essentially the same as Rule 2 in those cases and provides that eight hours shall constitute a day's work and that except as otherwise provided all employes shall be paid on the hourly basis.

The second paragraph of subsection (1) of Rule 1, which is applicable to this claim, provides as follows:

> "Service rendered by an employe on his rest day, or rest days, filling an assignment which is required to be worked or paid eight (8) hours each day will be paid for at overtime rate with a minimum of eight (8) hours, unless released at his own request."

Thus it provides that "**Service rendered** by an employe on his rest **day**, * * * will be paid for **at overtime rate**," and in that respect its purpose is to make the overtime rate applicable to **work** performed, although it also provides a minimum of eight hours to be paid for at that rate.

Rule 130 prescribes the pro rata, or minimum, rates of pay for the various crafts and classes of employes.

Rule 3(c) provides that **service** rendered on legal holidays "shall be paid for **at the rate** of time and one-half," in which it is practically synonymous with the fourth paragraph of Rule 4 in the two awards mentioned above. Like that rule, these Rules 1(l) and 3(c) are not **pay** provisions, but pay **rate** provisions. They merely apply the time and one-half rate to the **work** for which employes are entitled to pay under the first paragraph of Rule 1.

Rules 1(j), 1(k), 3(a), 4(a), 4f(1), 4f(2), 4f(3), 4(g), 6(a), 6(b), 7(a), 7(b), 7(c), 7(d), 7(e), 7(h), 9(a), 9(e), 10(a), 11(a), 11(b), 11(c), 11(d), 11(e), 11(g) and others, likewise prescribe the rates at which work is to be paid for under various circumstances, some at straight rate, some at time and one-half rate, and some at double rate. In that respect Rules 1(l) and 3(c) are no different from Rule 4 in the awards mentioned above; they are not **pay** rules, but pay **rate** rules applicable to **work** performed, and if more than one of them apply to **work** done on any one day, they do not authorize double or multiple days' pay, but still merely specify the **rate** at which **work** is to be paid for.

The Carrier says in its submission:

> "Since the inception of the Agreement between the parties, only one penalty payment has been allowed when an employe performed service on a rest day coinciding with a holiday. For example, in 1964 on the July 4th holiday at the Boston Terminal Enginehouse, thirty-three shop craft employes worked, twelve of whom were machinists represented by the Petitioner. Saturday, July 4, was a scheduled rest day in each instance. Although the holiday coincided with their rest day, the employes were allowed but eight hours at the overtime rate. No claim was made or progressed for a double penalty payment.

The intent of the parties to the contract is certainly expressed when the Petitioner has accepted and recognized that the Agreement does not provide for a double penalty."

In reply the Employes say:

"The Carrier would have you believe that because no previous claims have been initiated on this property that this proves that their interpretation of these rules has been accepted by the officers of System Federation No. 18. This claim in Docket No. 5059 may never have been initiated by the Local Chairman had we not during the month of January 1965 initiated an educational program for our Local Chairman wherein we advised them as to proper grievance procedure and the interpretation of their agreement rules as agreed to by the officers of System Federation No. 18."

Thus admittedly this is the first such claim made, or even suggested by the Organization's officers, until the preceding month.

What has been said in the first award mentioned above is applicable here, and the claim must be denied.

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 hapepns 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 v. 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 combina-

tions 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 dierence 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 knoweldge 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
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Keenan Printing Co., Chicago, Ill. Printed in U.S.A.