Award No. 4308
Docket No. 4050
2-GM&O-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Ben Harwood when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 29, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

GULF, MOBILE AND OHIO RAILROAD COMPANY (Southern Region)

DISPUTE: CLAIM OF EMPLOYES:

1. That Car Inspector Roy Price was improperly compensated under the terms of the current agreement for July 4, 1960, while on vacation.

2. That accordingly, the Carrier be ordered to additionally compensate said Car Inspector in the amount of eight hours at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: The Gulf, Mobile and Ohio Railroad Company, hereinafter referred to as the carrier, maintains train yard forces at Meridian, Mississippi twenty-four hours per day, seven days per week. One car inspector is assigned to the first shift each day. Two car inspectors are assigned to the second shift each day. And two car inspectors are assigned to the third shift each day. These car inspectors always have, and continue to work holidays that fall on a work day of their individual work week.

Since the advent of the National Agreement dated August 21, 1954, all shop craft employes of this carrier, holding an assignment that is filled on holidays, were paid eight hours at the straight time rate plus eight hours at the time and one-half rate while on vacation when such holiday fell on a work day of their assignment. Effective May 30, 1960, the carrier arbitrarily withheld the eight hours time and one-half rate, and continues to do so.

Car Inspector Roy Price, hereinafter referred to as the claimant, is assigned to the third shift at Meridian, Mississippi, work days Thursday through Monday. He was on vacation the first half of July, including July 4, 1960. While on vacation, his job was filled every day by the vacation relief inspector. July 4th, falling on a regular work day of this assignment, the vacation relief worker worked same and was paid eight hours straight time

Electric work among qualified electricians, except that at points where electricians are regularly assigned to running repair work, holiday service will be prorated only among such men,

Train yard work among train yard men."

The claim is progressed under the interpretation dated March 10, 1942 of Article 7(a) of the Vacation Agreement, which provides as follows:

"Article 7(a)

"An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment."

"This contemplates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such assignment, **this not to include casual or unassigned overtime** or amounts received from others than the employing carrier." (Emphasis ours.)

As will be shown by the facts in this case and the agreement applicable to overtime work on holidays, such work is casual and unassigned. The claimant is not entitled to holiday pay for Independence Day, July 4th, because service performed on that day by other car inspectors at Meridian was unassigned overtime. Employes are not entitled to unassigned overtime payments for holiday work while on vacation.

There is nothing in the agreement between the parties in this dispute that supports the employes' claim, and it should be denied.

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.

At Meridian, Mississippi, claimant Car Inspector was assigned the third shift to work Thursday through Monday. He took his vacation the first half of July, including the holiday July 4, 1960. While on vacation, his job was filled every day by the vacation relief inspector, including said holiday, for which said relief worker was paid eight hours straight time, plus eight hours at the time and one-half rate. Claimant, however, received only eight hours straight time for this holiday which occurred while he was on vacation.

Claimant contends that, under the rules of the applicable agreement and the past practice for many years, he would have worked his regular assignment on July 4, 1960, had he not been on vacation, and that he would have received for said eight hours the straight time rate, plus eight hours at the time and one-half rate.

Carrier alleges that holiday work is overtime and unassigned, that carman at Meridian, Miss., were not assigned to work on July 4, 1960, and that a bulletin to that effect was posted there June 28, 1960; and further, carrier avers that a car inspector "was called" to work the shift in question on July 4, 1960. Some of the evidence offered by carrier has to do with the year 1961 and is clearly incompetent. On the other hand, the evidence adduced by claimant was direct and unequivocal—a statement by ten witnesses that the relief inspector "filled this job every day it was assigned to work, including July 4th, 1960 (Independence Day). **He was not called out on July 4th to fill this job. He reported to the job the same as usual on other work days of the assignment."** (Emphasis ours.)

We believe the situation here presented is essentially the same as that considered by this Board in Award 3766. There it was said:

> "Claimant was on vacation when the holiday occurred, and his regular assignment customarily worked on holidays. Therefore, the work on that holiday cannot be considered casual or unassigned overtime.
>
> "It is assigned overtime for which Claimant is entitled to be paid under Article 7 (a) of the Vacation Agreement and the agreed interpretation of June 10, 1942. See Awards 2566 and 3104."

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1963.

DISSENT OF CARRIER MEMBERS TO AWARD 4308

In this dispute we have a conflict of facts. The Employes in their submission contended that "Since the advent of the National Agreement dated August 21, 1954, all shop craft employes of this carrier, holding an assignment that is filled on holidays, were paid eight hours at the straight time rate plus eight hours at the time and one-half rate while on vacation when such holiday fell on a work day of their assignment." The Employes did not offer any documentary evidence in exhibit form with their submission to support their assertions.

The Carrier in its submission contended that "Carmen at Meridian, Miss., are not assigned to work on holidays, as holiday work is overtime and unassigned." In support of this statement, Carrier offers in its submission copy of the cut-off Bulletin showing that employes will not work on the holiday unless notified individually.

The Employes changed their argument in their rebuttal statement, and for the first time introduced (improperly before the Division, violating pro-

visions of Circular No. 1) Exhibits A, B, and C, knowing that Carrier could not rebut such evidence since surrebuttal is not permissible. The Employes have improperly tried to meet their burden of proof with these exhibits, which purport to show that vacation relief inspector Wright was not called out to work July 4, but that he worked July 4 as he would have worked any other day within the work assignment. It is significant to note that the Employes did not offer any affidavit or statement from Wright, but rather from ten other employes who claimed to know that employe Wright was not called. The presentation of this evidence in the Employes' rebuttal statement is a deliberate breach of the provisions of Circular No. 1. We read in Circular No. 1 under the caption "Form of Submission," subsection "Position of Employes":

> "Under this caption the employes must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employes' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."

Furthermore, we read in Circular No. 1 under caption "Hearings":

> "The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."

This deliberate act of the Employes was forcefully brought to the attention of the Division and the Referee by the Carrier representative and by the Carrier Members of the Division. In its deliberations the Division apparently overlooked the objections raised and failed to act on the merits of the Carrier's objections and improperly used the information found in these exhibits to justify sustaining the Employes' position.

In denial Award 4245 of this Division (and without dissent), we have a dispute analogous to the instant dispute, wherein the Division found that when the Employes attempted to bring into the record for the first time in their rebuttal submission exhibits calculated to show past practice, their action was in violation of Circular No. 1 and precluded the Division from considering such evidence. Contra to the findings of the majority in this dispute, the information found in the improperly submitted exhibits of the Employes does not show evidence sufficient to sustain their position. The exhibits are simply the consensus of opinion of the employes as they try to recall from memory what they believed happened. It is interesting to note that not a single specific instance is recalled to support their opinions.

It is regrettable that the Division gave no weight to the facts as presented by the Carrier. Another dispute involving the same issue and the same parties was denied by the Division six months earlier, in Award 4182. In order to arrive at the erroneous decision in the instant dispute, it was also necessary to disregard the oral statement made before the Division by the Employes' representative when he acknowledge that this Board had denied prior claims involving the same issue, but that this particular dispute was different from the other disputes because of the 1945 Memo of Understanding submitted as Exhibit "C" in their rebuttal. Although this argument was never discussed on the property nor offered in the Employes' submission, it has been ruled many times (see our Award 4283) that such letters of Agreement were merged into the National Agreement of August 21, 1954; therefore, there is no validity to such argument of the Employes.

The Employes practically admitted that without the support of the 1945 Memo of Understanding the dispute would not be before the Board. In order to arrive at a sustaining award, it was necessary for this Board to ignore the Carrier's arguments and Carrier's objections to the Employes' violation of Circular No. 1 in the presentation of the exhibits in their rebuttal statement.

The Carrier will soon have two (diametrically opposite) orders from this Division involving the same issue and the same Organization. One order advises that Carrier's action was proper; the other order will advise the Carrier its action was improper and to pay claimant.

Awards such as this do little else than add to the bewilderment of both parties.

For these reasons, we dissent.

/s/ P. R. Humphreys

/s/ H. K. Hagerman

/s/ F. P. Butler

/s/ W. B. Jones

/s/ C. H. Manoogian