Award No. 5120
Docket No. 4318
2-PRR-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 152, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

THE PENNSYLVANIA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier unjustly deprived Machinist M. J. Lengyel of his holiday pay for February 22, 1961.

2. That the Carrier be ordered to compensate Machinist M. J. Lengyel eight (8) hours Grade "E" rate of pay for February 22, 1961.

EMPLOYES' STATEMENT OF FACTS: Machinist M. J. Lengyel, hereinafter referred to as the claimant, is employed by the Pennsylvania Railroad Company, hereinafter referred to as the carrier, in the Samuel Rea Shops, a part of the Altoona Works of the heavy repair shops.

Claimant hired with the carrier on January 23, 1942, and has been shown on the common laborer, assigned laborer, machinist helper and machinist rosters ever since. There were several times when he was furloughed due to reduction in forces; however, he always answered a call when his turn came to be returned to active service.

Immediately prior to February 20, 1961, claimant owned a machinist job on second trick, Monday through Friday, with Saturday and Sunday rest days, from which job he was displaced by a senior employe.

On February 21, 1960, claimant was employed in the Wheel Shop of the Samuel Rea Shop, Pennsylvania Railroad Company, Hollidaysburg, Pa.

On February 24, 1960, Claimant was assigned by the carrier to work in the machine shop of the Samuel Rea Shop, Pennsylvania Railroad Company, Hollidaysburg, Pa.

Claimant Lengyel was denied holiday pay for February 22, 1961.

CONCLUSION: The carrier has established that the claimant is not entitled to holiday pay for February 22, 1961.

Therefore, the carrier respectfully submits that your honorable board should deny the claim of the employes in this matter.

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 holiday pay dispute concerning Washington's Birthday, February 22, 1961, involves the issue of whether claimant is entitled to holiday pay for said holiday within the intent and meaning of Section 3 (ii) and the "Note" therein of Article III of the August 19, 1960 Agreement.

Claimant herein was displaced by a senior machinist in the exercise of seniority on February 21, 1961.

Carrier's position is that in accord with Rule 3-D-4, claimant was not obligated to hold himself available for call and was not required to respond to a call and therefore, inasmuch as claimant could not be automatically considered available for service during the five-day period, inasmuch as said claimant could within five days exercise his seniority after being displaced because of Rule 3-D-4 (b), and therefore he was not "available for service" as required by Section 3 (ii) and the "Note" therein of Article III of the '60 Agreement.

As this Board has previously pointed out, the test to determine "availability" within the intent and meaning of Section 3 (ii) and the "Note" therein of Article III of '60 Agreement is not that an employe is not required to respond to a call, but whether or not Carrier called the employe for service and said employe did or did not respond to said call for service.

Inasmuch as there is no dispute that Carrier did not call claimant for service, and not having laid off of his own accord, this Board is of the opinion that claimant herein was "available for service" on the workday immediately following the holiday in question, and having met all the other requirements of Article III of '60 Agreement, this claim will be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March, 1967.

DISSENT OF CARRIER MEMBERS TO AWARDS NOS. 5061–5090 INCLUSIVE, AND AWARDS NOS. 5120, 5123 AND 5134

In its Award No. 5061 the Board finds, based on an affirmative contention by the employes, that claimants were "available for service" within the intent and meaning of the second paragraph, Section 3, Article III, of the August 19, 1960 Agreement and, therefore, their claims must be sustained.

The decision in this case has been followed in 29 companion cases (Awards Nos. 5062 through 5090).

The "Note" to Section 3, Article III, HOLIDAYS, of the August 19, 1960 Agreement reads as follows:

> "NOTE: 'Available' as used in subsection (ii) above is interpreted by the parties to mean that an employe is available unless he lays off of his own accord or does not respond to a call, **pursuant to the rules of the applicable agreement, for service.**" (Emphasis ours.)

The respondent carriers in these awards adopted Article IV of the August 21, 1954 Agreement, paragraph 2 of which reads as follows:

> "2. Furloughed employes desiring to be considered available to perform such extra and relief work will notify the proper officer of the Carrier in writing, with copy to the local chairman, that they will be available and desire to be used for such work. A furloughed employe may withdraw his written notice of willingness to perform such work at any time before being called for such service by giving written notice to that effect to the proper Carrier officer, with copy to the local chairman. If such employe should again desire to be considered available for such service notice to that effect — as outlined hereinabove — must again be given in writing. Furloughed employes who would not at all times be available for such service will not be considered available for extra and relief work under the provisions of this rule. Furloughed employes so used will not be subject to rules of the applicable collective agreements which require advance notice before reduction of force."

then follows Note 1 which is applicable to the employes herein involved reading:

> "NOTE 1: In the application of this rule to employes who are represented by the organizations affiliated with the Railway Employees Department A. F. of L., it shall not apply to extra work."

and the above rule and note were admittedly in full force and effect at all times involved in these cases.

It is significant that there was recognition on the part of many employes covered by the rules agreements of the crafts in the Federated Trades that the provisions of Article IV of the August 21, 1954 Agreement have full application on the properties involved in the present cases. A review of these cases will show conclusively that various employes filed individual notices of

availability for relief service under the rule and having met the qualifications of Article III of the National Agreement of August 19, 1960 they qualified for and did receive holiday pay. They recognized that the provisions of the agreement must be met and that under Article IV they must indicate in writing their desire for relief work in order to be considered available for relief work. For example:

1 – In Docket No. 4261 (Reading Co.–Carmen) Award No. 5075, 191 furloughed employes filed notice of availability and were paid; others who had not signed up were not paid, including claimants.

2 – In Docket No. 4136 (Clinchfield–Electrical Workers) Award No. 5069, 114 registered availability and were paid; the two claim ants did not and were asked specifically if they desired to sign up for relief work — they both said "NO".

3 – In other dockets various numbers of employes signed up and were paid and in some instances only one organization filed claims even though all of the organizations were in the same position.

The net result of these palpably erroneous awards is that a furloughed employe who, for his own personal reasons, refused to make himself available for relief work on the days surrounding a holiday and thereby made it impossible for carrier to issue a call for service "pursuant to the rules of the applicable agreement" is nevertheless to be considered available for service on those days. **In other words, the Referee's interpretation of availability in applying Section 3 includes employes who deliberately have made themselves unavailable.**

Employes refusing to make themselves available for relief work pursuant to the applicable rule would be relieved of any obligation under the controlling agreement to protect service on the days surrounding a holiday, and the entire burden of protecting service on those dates would fall on the employes who made themselves available, yet the unavailable would also qualify for holiday pay.

In yet another case, Docket No. 4055 (Tennessee Cent.–Machinists) Award No. 5062, the Referee awarded holiday pay to employes who were notified to return to **regular** service on their former positions one month after the holiday. In other words, these employes — who made no attempt or effort to make themselves available for relief work pursuant to the rules of the applicable agreement upon their furlough — could be notified to return to work as many as three months after a holiday and still obtain holiday pay according to the ludicrous conclusions of the Board.

In Second Division Award No. 3529, Grand Trunk Western Railroad Company v. Carmen, Referee Mortimer Stone participating, involving Article IV of the August 21, 1954 Agreement, the majority stated:

> "The work involved here was relief work on regular positions during absence of regular occupants and claimant was a furloughed employe. Under Article IV carrier had the right to use him provided he had signified in the manner provided in paragraph two thereof his desire to be so used. Claimant had failed to signify such desire

so Carrier was unable to secure him under the meaning of Rule 118 and a carman helper might be used. Carman Helper Bruce having notified Carrier of desire to be used as required by Article IV was properly used."

Also, in Second Division Award No. 4479, Norfolk & Western Railway Co. v. Sheet Metal Workers, Referee Jacob Seidenberg participating, which involved Article IV of the August 21, 1954 Agreement, the majority stated:

> "The Division is constrained to hold that there were no furloughed employes 'available' at point 'B' other than the one employe there who signed up for relief work and was so used by the Carrier. **The other furloughed employes who did not indicate their interest and desire to work in accordance with the provisions of Article IV were not furloughed employes 'available' for relief work.**"

> "In summary, the record indicates that in the past furloughed employes from one seniority point have been used for temporary work at a point or points where they enjoyed no seniority; that the canon of construction applied in construing Article IV against Rule 30 does not limit the aforementioned Article only to the territory where the furloughed worker seeking relief work enjoyed seniority; **and that a furloughed worker is not an 'available' worker for relief work until he has indicated his desire therefor by complying with the appropriate provisions of the relevant agreements.**" * * * (Emphasis ours.)

Still another rule that militates against the Referee's interpretation of Section 3, Article III, August 19, 1960 Agreement and the Note is that an exception in an agreement is to be strictly construed, and clearly confined to the subject matter thereof. The general plan of the holiday pay agreement is that compensated service should be performed on the two workdays surrounding the holiday. The provisions for payment in event an employe is available for such service but is not called are in the nature of an exception to the general rule, and they should be strictly construed, thereby limiting the exception to those situations clearly provided for. Only the clearest possible language demanding the interpretation for which the Referee contends could ever justify the adoption of such an interpretation. The language of Section 3, Article III, August 19, 1960 Agreement and the Note precludes such an interpretation, instead of requiring it.

Finally, and in the same vein, where any other interpretation is permissible an agreement should never be given an interpretation that permits one to do indirectly that which he is expressly prohibited from doing directly. The interpretation of "available" in the Note to Section 3, Article III, August 19, 1960 Agreement expressly forbids considering one available if he "lays off of his own accord." The Referee's interpretation would permit an employe to lay off of his own accord on the workdays surrounding a holiday by the indirect means of refusing to make himself available for a call under the applicable rules. As we have noted, a furloughed employe who fails to make himself available for a call under the provisions of Article IV, Section 2 of the Agreement of August 21, 1954, thereby renders it impossible for the carriers to give him a call that is "issued pursuant to the rules of the applicable agreement." He thus voluntarily holds himself out of service, lays off; yet the Referee would have us consider him available under the provisions

of Section 3, Article III, August 19, 1960 Agreement. Every applicable principle of contract construction precludes the interpretation for which the Referee contends.

From a review of the record in these cases even the most uninitiated in the field of labor contracts could not arrive at the conclusions reached by the Referee. It is obvious that the Referee completely misconstrued the record before him and evidently was unable to analyze the statements and citations entered by the carriers — otherwise how could such injudicious conclusions be reached.

For the reasons stated hereinabove we dissent. This dissent also applies to Awards Nos. 5120 and 5123.

Docket No. 4333 (Award No. 5077) encompassed an additional condition not found in the other dockets covered by this dissent. In this docket the Referee found that an employe on vacation must be given additional pay for a holiday that fell within his vacation period. This is a complete departure from many prior awards (given to the Referee at the time of discussion) of this Division which have held as in Award No. 3477 that —

> "The foregoing agreement rules are clear, specific and unambiguous as applied to the facts of this case. The plain language of these rules indicates that the carrier was not required to grant Claimant Davis more compensation for Christmas Day, 1957 than the eight hours straight time pay which he received for that day. Said rules expressly provide that a holiday falling on a work day of the employes' regularly assigned work week while he is on vacation shall be considered as a work day for which the employe shall be paid in the amount of eight hours at straight time rate. No other agreement rule can be found which required any additional pay under the subject factual circumstances."

Also see Second Division Awards Nos. 2212, 2277, 2291, 2302, 2339, 2345, 2346, 2347, 2348, 2349, 2571, 2663, 2696, 2800, 3284, 3518, 3557, 3565, 3866 and 4283.

On this particular issue the employes presented no evidence which would overturn the prior holdings and give the Referee cause for such an erroneous holding as found in Docket No. 4333, Award No. 5077.

Since no reason is offered for setting aside our prior awards and since no agreement rule can be found which required any additional pay under the subject factual circumstances, we are compelled to believe that the Referee did not give a judicious review of the evidence presented to him in this case.

As to Award No. 5134: It has always been the established and accepted understanding and practice on this property, prior to the claim in this case, to consider that a mutually agreeable postponement of a scheduled conference date by either the employes or the carrier to a mutually satisfactory future date automatically extended the 60-day period for rendering a decision under the time limit on claims rules by the length of the agreed-upon postponement.

It has never previously been considered necessary by practice or understanding by either the employes or the carrier to formally agree in writing that the 60-day period for rendering a decision under the time limit on claims rules was extended by the length of the agreed-upon postponement when a postponement was mutually agreed-upon.

Carrier cited numerous cases to show that the postponement of scheduled conferences has always extended the time for rendering a decision under the provisions of time limit on claims rule and no special agreement granting a specific extension of time was required.

It seems obvious that to mutually agree to a future date for conference would automatically extend the 60-day period otherwise what would be the use of having a conference — it would be a useless gesture. In this particular case at one point the general chairman requested a postponement to another mutually satisfactory date and under these circumstances surely the carrier could only believe that the time was mutually extended.

It is the policy of the carrier that it is only after a conference is held to discuss a claim or grievance that a conference record is prepared containing the decision rendered at the conference and copy subsequently mailed to the general chairman.

The Referee states the citations offered by the carrier differ from the factual situation in this claim — they do not. For example, Award No. 3685 of this Division supports the position of the carrier. In that award Referee Johnson states:

> "If the time limit had been insisted upon the matter would have been closed and out of the Superintendent's hands, and he would have had no authority to consider or decide it; **consequently, there would have been no occasion to ask about, agree to or participate in a conference with him. The circumstances therefore evidence or constitute an agreement to extend the time limit, which had already run. No contention is made that under the Rule the agreement for extension must be made in any certain way, or before the 60 day period for decision has elapsed.**" (Emphasis ours.)

For the reasons stated hereinabove we dissent.

H. F. M. Braidwood
F. P. Butler
H. K. Hagerman
P. R. Humphreys
C. L. Melberg

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