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Award No. 5121
Docket No. 4319
2-CMStP&P-FT-'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. 76, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Federated Trades)

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1 – That the Chicago, Milwaukee, St. Paul and Pacific Railroad violated the August 19, 1960 Agreement when it failed to allow Holiday Pay for July 4, 1961 to the attached hereto list of employes identified as Exhibit A at Milwaukee and Tomah, Wisconsin Shops, hereinafter referred to as Claimants.

2 – That the Carrier be ordered to compensate each of the claimants one day's pay at the applicable rate for July 4, 1961.

EMPLOYES' STATEMENT OF FACTS: The Chicago, Milwaukee, St. Paul and Pacific Railroad, hereinafter referred to as the carrier, maintains shops at Milwaukee, Wisconsin and Tomah, Wisconsin, where the claimants are regularly employed and assigned on positions in accordance with their respective class and standing on the seniority roster.

The carrier laid the claimants off at the close of their shift on Friday, June 23, 1961. The claimants were restored to service on July 31, 1961.

July 4th is a holiday for which the claimants were entitled to receive eight (8) hours holiday pay. The carrier failed to make the payment and subsequently refused to allow the claim when it was appealed on November 6, 1961 to Mr. S. W. Amour, Assistant to Vice President, Chicago, Milwaukee, St. Paul and Pacific Railroad, and denied by him on December 27, 1961.

The agreement effective September 1, 1949, as subsequently amended, with specific reference to the August 19, 1960 Agreement is controlling.

POSITION OF EMPLOYES: It is respectfully submitted that the July 4th, 1961 holiday is a day for which the claimants are entitled to receive eight hours' pay under the clear and unambiguous provisions of the rules governing holiday pay, reading as follows:

the fact that each of the claimants covered by the electrical workers agreement and the firemen and oilers agreement were available for service on July 3rd and July 5, 1961 they met the available for service requirement of Article III of the August 19, 1960 agreement (item 4 on page 9 hereof) plus the fact that each of said furloughed employes otherwise qualified for holiday pay on July 4, 1961, i.e., met the conditions of items 1, 2 and 3 on page 9 hereof, they were allowed such holiday pay and, consequently, are not included among the claimants of the claim now before your board.

There is absolutely no basis for the instant claim and the carrier respectfully requests that the claim 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.

This July 4, 1961 holiday pay dispute involves the following objections raised by Carrier:

(a) Carrier, in its submission to this Board, at page 4 thereof lists the names of 7 claimants, whom, Carrier alleges, received holiday pay for the July 4, 1961 holiday and Carrier alleged that the claim filed on their behalf should therefore be dismissed.

(b) Also, Carrier lists the names of 6 claimants on said page 4 of its submission to this Board and alleges that the July 4, 1961 holiday was considered one of their vacation days, and that said listed claimants' claim should be dismissed.

(c) Further, Carrier alleges that claimants Schaffer and Jankowski are not proper claimants because, through retirement, they were no longer employes as of the date of said July 4th holiday.

(d) Claimant Buda terminated his employe relationship prior to the holiday in question through voluntary retirement and his claim should be dismissed by authority of Article V of August 21, 1954 Agreement as well as Article III of August 19, 1960 Agreement.

(e) Claimants Schweitzer and Ostermann were not employes as of the 4th of July holiday or since that time and their claims should be dismissed under authorization of Article V of '54 Agreement.

(f) Carrier, on page 10 of its submission to this Board lists the names of 14 claimants whom, Carrier alleges, failed to meet the specific requirement of 2nd paragraph of Section 1, Article III of

the '60 Agreement, in that they did not have "compensation for service" paid them by Carrier credited to 11 or more of the 30 calendar days preceding the holiday.

(g) Carrier further alleges that none of the remaining claimants, inclusive of the 14 claimants referred to in paragraph (f) of this opinion, were "available for service" on either the workday preceding the workday or following said July 4, 1961 holiday because of Rule 27(e) of the Shop Crafts Agreement: "Employes restored to service will not be laid off again without the five (5) days' advance notice provided in this rule.", which Carrier contends prevents claimants from being recalled to service on a day to day basis in connection with temporary vacancies or relief work, but can be recalled to service regarding temporary vacancies or relief work of not less than 5 days.

The Organization, in its rebuttal, vigorously denies the allegations of Carrier and asserts Carrier failed to produce any evidence (1) that seven (7) of the claimants received holiday pay; (2) that six (6) claimants were on vacation, that two (2) claimants retired prior to the holiday; (3) that Clamant J. W. Buda voluntarily resigned prior to the date the instant claim was filed; (4) that Claimants Schweitzer and Ostermann were not employed by Carrier as of the date of the holiday and since then, the Organization pointing out in regard to Claimants Schweitzer and Ostermann that they returned to a different position at the direction of Carrier when called to return to service.

This Division has on numerous occasions held that the burden is on the party making contentions or charges to prove same by competent evidence, and failure to do so prohibits this Division from considering such contentions or charges in regard to the determination of a claim. Mere allegations are not sufficient to prove that an agreement has been violated.

Therefore, inasmuch as Carrier has failed to prove, with competent evidence, their allegations, namely, that (1) seven of the Claimants received holiday pay; (2) that six claimants were on vacation; (3) that two claimants retired prior to the holiday; that Claimants Schweitzer and Ostermann were not employed by Carrier as of the date of the holiday and since then, must be rejected.

In regard to Claimant J. W. Buda not meeting the requirement of Article V of the '54 Agreement because he voluntarily resigned prior to the date his claim was presented on his behalf, Carrier has failed to adduce any evidence in support of said contention, and mere allegations not being sufficient to prove a violation of an agreement, this contention must therefore, be rejected.

The Organization, in response to Carrier's allegation that 14 named claimants did not meet the specific requirements of 2nd paragraph of Section 1, Article III of the '60 Agreement in that they did not have 11 or more compensated days credited to them within the 30 calendar day period preceding the holiday in question, argues that inasmuch as these 14 claimants were "regularly assigned" employes at the time of furlough and therefore the provisions of said Section 1, Article III of '60 Agreement do not apply to them.

With this argument of the Organization, we do not agree. This Board in Third Division Awards 14515, 14625, 14635 and 15015, has held that furloughed employes, whose lay-off period extends beyond the holiday, are considered as "other than regularly assigned" employes. Therefore, said 14 named claimants listed on page 10 of Carrier's submission, having failed to meet the "11 or more compensated days" requirement of said Section 1, Article III of the '60 Agreement, their claim must be denied.

The Carrier's objection to the other claimants not being "available for service" because of Rule 27(e); which Carrier alleges proves that claimants were not "available" because they did not have to respond to a call for service for temporary vacancies or relief work of not less than 5 days' duration, is without foundation and rejected because this Board has held that the test for determining "availability" is not whether or not an employe is not required to respond to a call for service, but whether or not Carrier called an employe, such as claimants herein, for service and they did or did not respond to such a call for service.

Inasmuch as there is no contention that claimants were called for service by Carrier and inasmuch as they did not lay off of their own accord, said claimants were "available for service" within the intent and meaning of Section 3(ii) and the "Note" therein of Article III of '60 Agreement, and having met all the other necessary requirements of Article III of '60 Agreement, this claim as to all other claimants must be sustained.

AWARD

(1) Claim for the 14 claimants listed on page 10 of Carrier's submission denied.

(2) Claim sustained as to all other claimants.

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.

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