

Award No. 5134

Docket No. 4850

2-B&LE-CM-'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. 57, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

BESSEMER AND LAKE ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the controlling agreement Carmen W. K. Black, W. R. Bell, C. O. Stepp and R. I. Long were improperly denied holiday pay for Decoration Day, May 30, 1963.

2. That the carrier violated the provisions of the time limit Rule No. 53 of the controlling agreement.

3. That accordingly the carrier be ordered to compensate the aforementioned employees in the amount of eight (8) hours each at the applicable pro rata rate.

EMPLOYEES' STATEMENT OF FACTS: W. K. Black, W. R. Bell, C. O. Stepp and R. I. Long, hereinafter referred to as the claimants, were regularly employed and assigned as carmen by the Bessemer & Lake Erie Railroad Co., hereinafter referred to as the carrier, in its Car Department at Butler, Pa.

Claimants' regularly assigned work week included Thursday as one of their assigned work days. Claimants were furloughed by the carrier effective at the close of their tour of duty May 26, 1963.

Decoration Day, May 30, 1963, a holiday under the terms of the controlling agreement fell on Thursday, a work day of the claimants' work week, but the Carrier has declined to compensate claimants therefor in accordance with the provisions of rule 8(b) (Effective July 1, 1960).

Each of claimants have a seniority date in excess of 60 calendar days preceding the holiday, May 30, 1963.

Each claimant had compensation for service paid them by the carrier credited to eleven (11) or more of the thirty (30) calendar days immediately preceding the holiday, May 30, 1963.

3. The various conflicting positions of present and former employe representatives in connection with the applicability of rule 14(f) to the merits of this dispute is further evidence of the lack of merit of the claims.

On the basis of the facts outlined herein, the carrier respectfully requests that the Board render a denial award supporting the carrier's denial of the claims in this case.

This dispute has been handled in the usual manner up to and including the chief operating officer of the carrier as prescribed by the Railway Labor Act.

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.

The issues involved in this holiday pay dispute for Decoration Day, May 30, 1963 are as follows: (1) Did the Carrier fail to comply with the provisions of Rule 53 (Time Limit on Claims) by failing to deny the claims within 60 days from the date the claim was filed with Carrier. (2) Were claimants not "available for service" in accord with Rule 8(b) by reason of claimants not complying with the requirements of Rule 14 (f) (Reduction of Forces) and therefore not qualified for the holiday pay. (3) Were the inconsistent positions of claimant in the handling of the claims on the property in regard to the application of Rule 14 (f) an admission that Rule 14 (f) is the "applicable rule of the Agreement."

Concerning the first issue, the pertinent provisions of Rule 53 (a) (1) provide as follows:

"should any such claim or grievance be disallowed, the company shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the company as to other similar claims or grievances."

Carrier argues that it is established and accepted practice between the parties that a mutually agreeable postponement of a scheduled conference date to a mutually agreed future date automatically extends the 60-day time limit period for rendering a decision by Carrier to the length of the agreed upon postponement.

The facts herein are that in the progression of this claim on the property, the Organization appealed the denial of the claim by Carrier's Superintendent of the Car Department to Carrier's Chief Mechanical Officer Rentschler by letter dated December 28, 1963. Conference was held by the Organization with Mr. Rentschler, on February 14, 1964, some 8 days prior to the expiration of the 60-day time limit period, and decision reached by Carrier was that claim was not allowed. Copies of the Record of the Conference of February 14, 1964 were sent to General Chairman Klimtzak by letter dated March 18, 1964.

Carrier has cited Second Division Award 3685 (Johnson) in support of its position that there is no requirement that an agreement for extension must be made in a certain way, or before the 60-day decision has elapsed. A close examination of said Award 3685 shows that after the 60-day time limit period had elapsed, the General Chairman called the proper officer of the Carrier in regard to a conference and one was actually held 7 days later and a decision rendered three days thereafter. The factual situation in the instant claim can be distinguished from that in Award 3685 in that we are not confronted with an extension of the time limit rule after a 60-day time limit period has elapsed.

Carrier in its submission has cited a number of prior cases where postponement of scheduled conferences extended the time for rendering a decision. In Carman's Case 186 the claim was appealed to Carrier on February 18, 1959, and conference held on April 14, 1959, and conference record mailed to the General Chairman on May 1, 1959, after the 60-day time limit period had expired. Evidently the Organization did not raise a procedural objection in said Case 186. However, the fact that the Organization did not object in said case does not prohibit an objection being now raised in the instant claim as to the procedural defect here involved. Further, in the other prior cases, discussions were had between the Carrier and the Organization in regard to the possibility of a conference being held beyond the 60-day time limit period. In this claim, no discussion whatsoever was had between the parties regarding a conference continuation and there is nothing in the record that shows that the Organization gave the Carrier to believe that it could render a decision after the 60-day time limit period had expired. No waiver by the Organization can be implied unless the facts would indicate otherwise.

Carrier has furnished Third Division Award No. 10603 in support of its contention that the Conference extended the 60-day time limit period for rendering a decision and forwarding name to the Organization. However, in said Award No. 10603, the Board reached a decision that although it wasn't clear what transpired at the Conferences, that there was a probability of reaching a settlement of the dispute and that the Organization waived the strict compliance of the 60-day time limit period in Rule 53 (a) (1).

We do not have such a situation in the instant claim as in Award No. 10603. A transcript of record of the Conference of February 14, 1964 is before this Board in the Organization's Exhibit B. It is clear from the record of that Conference that the Carrier had reasonable grounds for believing in all probability that the parties would not reach a settlement of the dispute. Further, the record is void of any evidence showing that the Organization agreed to or even discussed with carrier extension of the time for rendering a decision by Carrier. Therefore, it is the opinion of this Division that the Organization did not waive the strict compliance of the 60-day time limit period in said Rule 53 (a) (1) of the Agreement, and the Carrier having failed

to comply with said Rule 53 (a) (1), and therefore the other issues do not need to be decided.

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 employees, 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 employee 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 employees 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 employee 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 employee should again desire to be considered available for such service notice to that effect — as outlined hereinabove — must again be given in writing. Furloughed employees 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 employees 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 employees herein involved reading:

"NOTE 1: In the application of this rule to employees 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 employees 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 employees 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 employees 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 claimants 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 employees 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 employee 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 employees who deliberately have made themselves unavailable.

Employees 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 employees 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 employees who were notified to return to regular service on their former positions one month after the holiday. In other words, these employees — 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 employee. 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 employees 'available' at point 'B' other than the one employee there who signed up for relief work and was so used by the Carrier. The other furloughed employees who did not indicate their interest and desire to work in accordance with the provisions of Article IV were not furloughed employees 'available' for relief work.

In summary, the record indicates that in the past furloughed employees 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 therefore 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 work days surrounding the holiday. The provisions for payment in event an employee 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 work days 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 Refer 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 that day. Said rules expressly provide that a holiday falling on a work day of the employees' 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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