Award No. 5318
Docket No. 5057
2-NYNH&H-FO-'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. 17, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Firemen & Oilers)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. It is the claim of the employes that the carrier violated the provisions of Rule No. 4 of the current agreement when they arbitrarily denied Mr. Carroll W. Dearborne compensation at the rate of time and one-half for working Labor Day, September 7, 1964, which is considered a holiday as per Rule No. 4.

2. Therefore, Mr. Carroll W. Dearborne, employed at the New Haven Motor Storage, must be compensated for eight hours' pay at the rate of time and one-half for working Labor Day, September 7, 1964.

EMPLOYES' STATEMENT OF FACTS: Classified Laborer C. W. Dearborne, hereinafter referred to as the Claimant, is regularly employed by the New York, New Haven and Hartford Railroad Company, hereinafter referred to as the Carrier, at its New Haven Motor Storage facility and regularly assigned as an engine preparer with a work week having Monday as a regularly assigned rest day.

Claimant was called and requested by Carrier to work on Monday, September 7, 1964, which was his rest day and a legal holiday, Labor Day. He was paid eight (8) hours at time and one half rate for service performed on his rest day, but claims he is entitled to an additional eight (8) hours' pay at time and one half rate for service performed on a holiday.

The above stated facts are verified by copy of letter dated May 4, 1965 addressed to the Vice General Chairman, G. J. Francisco by Director of Labor Relations and Personnel, J. J. Duffy attached hereto as Exhibit A.

These exhibits are representative only and do not constitute a complete record of all such payments. No claims were made for additional penalty payments for this service, as has been done in the instant case.

While the Employes have not so stated, we believe that they have been prompted to enter such claim because of sustaining Awards in similar circumstances involving another organization and different rules, and probably are acting under the theory that they have nothing to lose.

But a later Award of Third Division, Award No. 14240 (Referee B. E. Perelson), points out the distinction between the rules of the agreement involved in those sustaining awards and rendered a denial award in the case at hand.

We subscribe to that principle and impress upon your honorable Board that the agreement rules with the Firemen and Oilers on this Property likewise differ from the rules upon which the decision in Award 10541 was predicated.

For all of the reasons herein stated we respectfully request that the claim be denied.

All of the facts and evidence herein have been affirmatively presented to or are known by the Employes.

Carrier does not request an oral hearing. However, in the event the Employes request hearing, Carrier desires the opportunity to be heard as well.

(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 waived right of appearance at hearing thereon.

This case is a companion claim to Award No. 5317, involving the same parties, rules and facts, except that the holiday in question was Labor Day instead of Christmas.

What has been said in that award is fully applicable here, including the fact that these two claims are the first of their kind to be presented here since the rule in question became effective on September 1, 1949, indicating a long-standing interpretation consistent with these Awards.

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 happens 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 whch 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.

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 require-

ments; 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 combinations 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 difference 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 knowledge 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
E. J. McDermott
C. E. Bagwell
O. L. Wertz
D. S. Anderson

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