Award No. 5393
Docket No. 5214
2-NYNH&H-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Electrical Workers)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the current agreement when it denied claim for eight (8) hours' pay at the time and one-half rate of pay each in favor of Electricians L. O. Smith and W. J. Sherman for work performed on a holiday, Friday, January 1, 1965.

2. That the Carrier be ordered to additionally compensate Electricians L. O. Smith and W. J. Sherman each in the amount of eight (8) hours' pay at time and one-half rate for work performed on a holiday, Friday, January 1, 1965.

EMPLOYES' STATEMENT OF FACTS: Electricians L. O. Smith and W. J. Sherman, hereinafter referred to as the claimants, are regularly employed by the New York, New Haven and Hartford Railroad Company, hereinafter referred to as the Carrier, at the Dover Street Engine House, Boston, Massachusetts. Claimant L. O. Smith held a regular assignment on the 4:00 P. M. to 12:00 Midnight shift, with rest days Friday and Saturday. Claimant W. J. Sherman held a regular assignment 12:00 Midnight to 8:00 A. M. shift, with rest days Friday and Saturday.

Friday, January 1, 1965, New Year's day was the claimants' rest day and claimants were directed to perform the duties of their regular assignments on that day. A claim was made in the amount of eight (8) hours at time and one-half rate each, in favor of claimants for working on their rest day as provided under Rule 4 of the Agreement. Claim was also made for eight (8) hours at time and one-half rate for working on their holiday as provided under Rule 3 of the Agreement.

The Carrier paid the claim for work performed by claimants on their rest day and declined the claim for work on their holiday.

The above stated facts are verified by copy of letter dated October 1, 1965 addressed to General Chairman A. J. DeRitis, Jr., by Director of Labor Relations and Personnel J. J. Duffy, attached hereto as Exhibit A.

and holidays * * *", that the holiday provisions were effective only when the holiday falls on a work day of an employe's work week and that rest day service is payable under Rule 4.

Rule 4, Paragraph 4, of our Agreement reads as follows:

> "Employes called or required to report for service and reporting will be allowed a minimum of four (4) hours for two (2) hours and forty (40) minutes or less, and will be required to render only such service as called for or other emergency service which may have developed after they were called and cannot be performed by the regular force in time to avoid delays to train movements."

The testimony of the Employe Representatives before the various Emergency Boards, as indicated above, and the subsequent agreements between the carriers and organizations clearly indicate that there was no intention to pyramid one penalty upon another simply because an employe may perform service on a rest day which incidentally happened to be a holiday.

There has been no difference of opinion between the parties on this property as to the application of these rules for a period of twelve years. Only one penalty payment has been made over the years for any service performed on a rest day which also a holiday, and no claims have been made for anything more until now.

While the Employes have not so stated, we believe that they have been promoted to enter such claims 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 System Federation No. 17 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 claims be denied.

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

Oral hearing is not requested.

(Exhibits are 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.

Claimants performed duties of their regular assignment on Friday, January 1, 1965 (New Year's Day), a recognized holiday, which was also their rest day. Claim was made for 8 hours for each claimant at the time and one-half rate for working on their rest day as provided under Rule 4 of the Agreement. Claim was also made for 8 hours for each claimant at the time and one-half rate for working on their holiday as provided under Rule 3 of the Agreement. Carrier paid the claim for work performed on their holiday.

In its submission, Carrier has cited certain proceedings, recommendations and resulting Agreements of Emergency Boards number 66, 106 and 130. The Organization objected for the reason that the same were not considered or handled on the property. This objection is without merit for the reason that these proceedings constitute public records and as such, may be injected for consideration during any phase of the proceedings. (Awards 4263 — Anrod) However, this Board finds that the recommendations of Emergency Boards 66, 106 and 130 and the resulting agreement are not germane to the issue involved in this dispute.

This dispute turns on the interpretation of Rule 3 and Rule 4 of the Agreement. The pertinent part of Rule 3 is as follows:

> "Work performed on the following legal holidays, viz: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or proclamation shall be considered the holiday), shall be paid for at the rate of time and one-half.
>
> Service rendered by regular employes on their assigned rest days shall be paid for at time and one-half under Rule 4, paragraph (4)."

Rule 4, paragraph (4) is as follows:

> "(4) Employes called or required to report for service and reporting will be allowed a minimum of four (4) hours for two (2) hours and forty (40) minutes or less, and will be required to render only such service as called for or other emergency service which may have developed after they were called and cannot be performed by the regular force in time to avoid delays to train movements."

Carrier contends that claimants are stopped from asserting theinr claim for the reason that no similar claims have been made for a period of time in excess of twelve (12) years while these same rules were in operation. This contention is without merit for the reason that this Board has held many times that acquiescence by one or both parties over a period of years does not estop either party from seeking proper application of the Agreement at any time. The function of this Board is to determine whether or not an Agreement has been violated; not to condone present violations because of omission of claim prosecution for past violations.

On June 14, 1966, Carrier served Employes with a counter-proposal in response to Employe's Sec. 6 Notice served upon Carrier May 17, 1966 pro-

posing to amend the present Agreement. This counter-proposal, which was never adopted, is as follows:

> "PROHIBITION AGAINST MULTIPLE TIME AND ONE HALF PAYMENTS ON HOLDAYS
>
> Under no circumstances will an employe be allowed more than one time and one-half payment for service performed by him on any day which is a holiday.
>
> All agreements, rules, regulations, interpretations and practices, however established, which conflict with the above shall be eliminated, except that any existing rules, regulations, interpretations, or practices considered by the Carrier to be more favorable may be retained."

This counter-proposal serves as an admission by Carrier that it recognized time and one-half compensation for service performed on a legal holiday plus time and one-half compensation for service performed on his assigned rest day.

Carrier cites Third Division (Supp.) Award 14240 and Second Division Awards 5317, 5318 and 5319 in support of its contention. Award 14240 (Third Div. Supp.) is not in point with the instant dispute for the reason that it interpreted an Agreement wherein the rate of pay for service performed on rest days and holidays was contained in one rule. In the instant case, we are called on to interpret two separate and distinct rules governing this subject.

This Board is not passing on the question of whether or not a rule or rules are equitable; it is merely interpreting an Agreement which must be presumed to have been entered into freely and in good faith. This Board cannot enlarge or restrict such an Agreement. If inequities do exist, negotiation tables provide the proper forum for correction, not this Board.

In view of the fact that Rules 3 and 4 are separate independent rules in the Agreement; that Carrier has, by its counter-proposal of June 14, 1966, recognized the double pay at time and one-half rate brought about by the coincidental service on a rest day and holiday; and in keeping with the overwhelming number of sustaining Awards on this same question (Award 10541, 3rd Division, et seq.), 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 4th day of April 1968.

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