Award No. 5497
Docket No. 5204
2-C&O-SM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Sheet Metal Workers)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Southern Region)

DISPUTE: CLAIM OF EMPLOYES:

A. That under the Current Agreement, Sheet Metal Worker, M. H. Adkins, was improperly denied pay in the amount of eight (8) hours at time and one half rate for February 22, 1965, which was his rest day and also a National Holiday.

B. That accordingly the Carrier be ordered to additionally compensate employe in the amount of eight (8) hours' pay at the time and one half rate for February 22, 1965.

EMPLOYES' STATEMENT OF FACTS: On January 8, 1965, the Knoxville, Tennessee wrecking crew regularly assigned to Derrick D-37 were called and departed from John Sevier Shop at 12:30 P. M. for a derailment at Royal Blue, Tennessee, which is near Caryville, Tennessee. The Derrick Crew was composed of Engineer and three (3) ground crew members.

The wrecking outfit, together with the regular assigned crew, upon arrival at Royal Blue, Tennessee, immediately began their assignment of rerailing Car SL&SF 163818. Upon completion of this assignment, the wrecking outfit departed, arriving at their home station 3:30 A. M. on January 9, 1965.

At the time of arrival at Royal Blue, Tennessee, the wrecking crew was immediately augmented with six (6) section laborers and General Foreman Jim Allen. General Foreman Allen and these section laborers performed wrecking service consisting of jacking, setting blocks and rerailing trucks, making hooks, blocking the derrick, and carrying cables throughout the entire operation, i.e., from the time the wrecking crew arrived at the derailment until the wreck was cleared and the wrecking crew departed. This is confirmed by affidavits from wrecking crew members submitted herewith and identified as being Exhibits A, B, C, and D.

attorney's fee to be awarded. Generally, awards seem to have been based on the amount of the recovery. Since the plaintiff here only seeks the recovery of $92.79, and since it is unable to cite any authority whatever to justify the Court in awarding more than nominal damages, it is found that attorney's fee in the amount of $25.00 is fair, just, and reasonable."

Section 8(b) of the National Labor Relations Act provides that:

"It shall be an unfair labor practice for a labor organization or its agents —

* * * * *

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other things or value in the nature of an exaction for services which are not performed or not to be performed."

The National Labor Relations Act does not apply in the Railroad industry, but is applicable to other industries engaged in Interstate Commerce. It is, therefore, significant that Congress has prohibited by law labor organizations from exacting sums of money from industries for services which are not performed and which cannot be performed.

The carmen's organization is here attempting to exact sums of money from Carrier for work which was not performed, and which could not have been performed by claimants.

The controlling agreement was **not** violated, and claimants were **not** adversely affected. They have no contract right to be paid the sum of money here demanded as an exaction or penalty on their behalf. Prior awards of the Board and prior decisions of the courts have denied such claims.

The controlling agreement not having been violated and the monetary claim on behalf of the two claimants being without any basis whatsoever the Board cannot do other than make a denial award.

All evidence here submitted in support of Carrier's position is known to employe representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right after doing so to present any other evidence necessary for the protection of its interests.

Oral hearing is requested.

(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.

The claimant worked 8 hours on February 22, 1965. This day was both the sixth day he worked that week and a day observed as a holiday under the Agreement. The carrier paid the claimant at the rate of time-and-one-half for this work. The employes claim he should have been paid at a treble time rate for this work.

At least two different provisions provide for payment at the rate of time-and-one-half for this work. Rule 6(b) provides that "work performed" on days observed as holidays "shall be paid for at the rate of time and one half." Rule 6(c) provides that "employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work weeks . . ."

Any accumulation of these premiums in those situations where they overlap would seem to be prohibited by the admonishment in Rule 6(d) that "there shall be no overtime on overtime." The term "overtime" is not limited to time in excess of 8 hours a day or 40 hours a week, but is broad enough to include all time for which an employe is paid a premium at the traditional rate of time and one half (or higher) to compensate him for working in excess of the agreed norm. Work on a day observed as a holiday is just as much in excess of the agreed norm as work on the sixth or seventh day of the week. It would appear that once such a premium has been applied to work and it becomes overtime that Rule (d) prohibits again making the same work overtime by the application of another such permium.

At least, this is how the railroad industry had interpreted these two premiums from their first appearance together in 1949 until the claim which culminated in 1962 in Award 3–10541 (Sheridan). As late as 1960, Mr. Leighty, the Chairman of the Employes' National Conference Committee, told Emergency Board No. 130:

> "We have another condition prevailing which our proposals before this Board would correct. That is that a holiday falls on a rest day of the regularly assigned employe and he is required to work on that day. Now, if it were just an ordinary rest day, he would get time and a half for it under the agreement. The fact that it is a holiday makes absolutely no difference whatsoever. He still gets only time and a half for working that holiday even though it is in excess of his work day and in excess of the forty hours." [Transcript of proceeding before Emergency Board No. 130, pages 1242–43.]

The remedy sought by the employes before Emergency Board No. 130 was not the accumulation of the overtime provisions claimed here, but the elimination of the provisions which restricted the basic straight-time payments for holidays to those holidays falling on work days.

In Award 3–10541 (Sheridan), the Third Division, without considering this understanding of the parties, concluded that such premiums were cu-

mulative. This award was followed as a matter of precedent in several Third Division awards, but even in the Third Division it has on occasion been repudiated or distinguished on insubstantial grounds, e.g., Awards 3–14240 (Perelson), 3–15749 (Kenan). This division, when sitting with Referee Weston, has followed Award 3–10541, e.g., Awards 2–5332, 2–5217, but when sitting with Referee Johnson, has refused to follow that award and, instead, has concluded that such premiums are not cumulative, e.g., Awards 2–5317. Special Board of Adjustment No. 564 (Dolnick), Award No. 23, has refused to follow Award 3–10541.

Award 3–10541 is erroneous. In that award the Third Division reached an erroneous conclusion because it failed to examine or consider the previous understanding of the parties. Nevertheless, were the precedent of Award 3–10541 unbroken, we would hesitate to break it at this time. The uncertainty created by failing to follow precedent frustrates bargaining, and encourages repeated appeals to this Board. But this uncertainty has already been created. It has been shown that Award 3–10541 is so palpably erroneous that it cannot command adherence even within the broad tolerance given previous awards under our principles of **stare decisis**. Under these circumstances we believe that abandonment of Award 3–10541 is the only way to re-establish predictability in this area.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1968.

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