Award No. 6255
Docket No. 6091
2-PB&NE-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That within the meaning of the controlling agreement and the Memorandum of Understanding dated February 17, 1969, Carman Charles Orem was unjustly dealt with when he was denied the holiday pay for January 1, 1970;

2. That the Carrier accordingly be ordered to compensate the above named eight (8) hours at the straight time rate of pay on account of this violation.

EMPLOYES' STATEMENT OF FACTS: Carman Charles Orem, hereinafter referred to as the claimant, was not scheduled to work the holiday, January 1, 1970. The schedule posted showing the names of these scheduled to work the holiday, January 1, 1970, does not include the name of the claimant as one of the employes scheduled to work.

On the morning of the Holiday, January 1, 1970, Mr. James Rodgers, Foreman on duty, called the claimant and requested him to cover a vacancy on the 8 A. M. to 4 P. M. shift due to report-off by Carman Alfred Hughes. Since the claimant had made plans for the day in view of the fact that he had not been scheduled to work the holiday, he informed the Foreman that he did not wish to work.

The Carrier thereupon denied the claimant the holiday pay for January 1, 1970.

This dispute has been handled with all officers designated to handle disputes, including the highest officer, all of whom have declined to adjust same.

The Agreement effective May 1, 1964 is controlling, as it has been subsequently amended.

"1. **By calling in seniority roster order the men holding a regular assignment who were annulled on the holiday;**" (Emphasis ours.)

The specific language of the agreement clearly requires the senior most unassigned carman to fill an emergency vacancy. Under this specific mandate, there is no valid basis to argue that Orem was not scheduled to work.

In conclusion, the Carrier emphasizes the reasons given in the denial of the Bogart claim (Docket No. 6018) as set forth in J. G. Long's letter dated October 14, 1969 to the Brotherhood's General Chairman A. H. Koch:

> The Company's denial of Bogart's claim for unworked holiday pay is bottomed on the following point: the February 17, 1969 Agreement regarding the method of filling emergency vacancies on holidays requires that the senior unassigned carman (in this case Bogart) be called and scheduled to perform the work. Since the Company was obligated to call Bogart, Bogart's responsibility to work the vacancy was equally great. Obviously, if the Company had failed to call Bogart, a valid runaround claim would have resulted. Since Bogart rejected the right to work the holiday assignment, he also rejected the right to receive unworked holiday pay which is paid to employes who are available but not needed to work on a holiday. Absent any such responsibility on the part of an employe, the February 17, 1969 Agreement regarding the filling of emergency holiday work becomes a meaningless scrap of paper because any carman could reject the work without penalty, thus reducing that agreement to a nullity. For these reasons, I affirm the original denial of the claim.

Turning briefly to the brotherhood's contention set forth in their April 20 and April 23, 1970 letters to the carrier alleging a procedural defect in the denial of this claim in that the Carrier's highest officer designated to handle claims failed to deny the claim **in writing** within 60 days of the conference on March 3, 1970, at which the claim was denied: In the absence of a requirement in Rule 30 — Grievances that such a denial be made in writing by the highest officer of the Carrier, the Carrier submits the Brotherhood's procedural objection is simply a red herring launched in a desperate maneuver to cloud the fact that Orem was scheduled to work in accordance with the February 17, 1969 Memorandum of Understanding and refused to work, thus forfeiting his right to receive unworked holiday pay for the January 1, 1970 holiday.

For the reasons hereinbefore set forth, the Carrier submits the instant claim is clearly barred under the express terms of the agreement and the claim should therefore 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 waived right of appearance at hearing thereon.

Thursday, January 1, 1970, was New Year's Day and a contractually provided for holiday. In accordance with a regular and established practice, management determined in advance which jobs would be needed to protect the work on that day and which would not be necessary in view of the cut-down in operations of plants it services. Claimant's 7:00 A. M. to 3:00 P. M. Carman assignment was one of the jobs which the Carrier annulled for the holiday. Five days prior to January 1, 1970, supervision posted a work schedule, listing jobs to be worked on the holiday and the employes assigned thereto. Set forth thereon was a list of five names under the title "Carmen Not Scheduled". Claimant's name is the last one found on this list. Also on the posted schedule is a list of employes under the title "Carmen on Rest Days". Thus, Claimant was originally afforded the holiday off, with pay, pursuant to General Rule 9(b) of the Agreement between the parties.

Early in the morning of January 1, 1970, Claimant was called by a foreman, advised that a carman scheduled to work that day had reported-off and requested that claimant replace said employe for the 8:00 A. M. to 4:00 P. M. shift. Claimant refused to accept the assignment, stating that he would "take a drop". The supervisor warned Claimant that he would forfeit his holiday pay, but Claimant nevertheless persisted in his position of refusing to comply with the call-out. Claimant, according to the Carrier, was the senior carman of those assigned to jobs that were temporarily annulled for the holiday. The foreman called another employe, junior to the Claimant, whose assignment had also been annulled and he appeared for work and covered the vacant job. The Carrier refused to pay Claimant holiday pay for January 1, 1970, relying on the forfeiture clause of Rule 9(b) for its action.

Petitioner charges that the denial of holiday pay to the Claimant was a violation of Rule 9(b), which reads:

> "An eligible Employe who does not work on holiday shall be paid 8 times the straight time hourly rate of the job which he is regularly assigned, exclusive of shift and Sunday premiums; provided, however, that if an eligible Employe is scheduled to work on any such holiday but fails to report and perform his scheduled or assigned work, he shall become ineligible to be paid for the unworked holiday, unless his failure was because of sickness or because of death in the immediate family (mother, father (including in-laws,), children, brother, sister, husband, wife and grandparents) or because of similar good cause."

Carrier avers that the claimant was "scheduled" to work on January 1, 1970. It submits that a letter agreement between the parties dated February 17, 1969, established a procedure for protecting the work when temporary vacancies due to report-offs occur on a holiday and that pursuant thereto Claimant, the Senior Carman whose assignment had been annulled, was obligated to comply with the call-out or suffer the forfeiture provided in Rule 9(b).

The letter agreement reads:

> February 17, 1969 — **Memorandum of Understanding Re: Holiday Work**
>
> Subject to the provisions of the Letter of Agreement dated February 17, 1969, required holiday work will be performed by the regular assigned incumbent of the position to be worked. Any vacanices due to report off these regular assigned men due to sickness, death, or similar good cause, will be filled.

1. By calling in seniority roster order the men holding a regular assignment who were annulled on the holiday.

2. By calling in reverse seniority order the men off on the holiday because of an assigned rest day."

The Carrier alleges that it was clearly understood that all employes whose jobs were temporarily annulled for the holiday were "scheduled" to be called in to cover vacancies due to report-offs by men regularly scheduled to work on the holiday. The Carrier, by the agreement is required to call in the most senior man for the first such vacancy and it is incumbent upon him to cover the vacancy or be construed to have absented himself without valid reason from "his scheduled or assigned work" and bringing the forfeiture provision of Rule 9(b) into play. To hold otherwise, would result in the Carrier being unable to fill vacancies and protect the work on holidays, a condition which would be most detrimental, chaotic and would disrupt operations on such days.

The Petitioner vigorously denies that the Memorandum of Understanding of February 17, 1969 was in any way intended to nullify the long established application of Rule 9(b). Claimant's regular assignment was annulled for January 1, 1970. He was not scheduled to work, and he therefore cannot be penalized for his refusal to accept the call-in. The intent of the parties in February, 1969, was to clarify and set a procedure for better implementation of the following General Rule:

"Rule 8(h)

Record shall be kept of overtime worked; and when possible Employes, in so far as their qualifications permit, shall be called with a view of distributing overtime equally. Employes shall not be laid off during regular working hours in order to equalize overtime."

We are treating this case as one of initial impact. The claim herein was filed and processed during the time a prior claim, by another carman employed by the Carrier herein and a member of the same Organization, involving a very similar set of facts, the same Rules and Memorandum of Understanding was in process of being appealed to the Second Division. Award 6100 thereon by this Division was issued in April, 1971, but, because these two claims are the first ones to arise involving interpretation and application of the February 17, 1969 Memorandum of Understanding, we do not consider that Award controlling.

Two facets of the record herein create uncertainty concerning the scheduling for New Year's Day, 1970. In its submission, Carrier states that Claimant, when his name was added to the list of Carmen not scheduled to work on the holiday, was alerted that he was nonetheless "scheduled" to be on call and first man to be called-in should a vacancy occur. Carrier's Exhibit 3, typewritten, has noted next to Claimant's name: "1st out." However, a careful review of all of the correspondence concerning the handling of the claim on the property, fails to disclose that this was at any time raised by the Carrier during the processing below. It is further noted that Employes' Exhibit A, which purports to be a photostatic copy of the January 1, 1970 schedule prepared and posted by supervision, is hand printed, and contains no notation next to the names of the Carmen not scheduled to work for purposes of indicating an order of call-out. Based on this, it is impossible to affirm or deny that Claimant was on due notice that he was required to be available and to report for work if called.

The Carrier's review of the background for the February 17, 1969 letter agreement, raises some question as to whether the Memorandum of Understanding was clearly understood by all parties to have the effect averred by the Carrier. Both parties were perturbed by the method of filling holiday work positions which was in effect prior to February 17, 1969. To overcome the discontent caused by Carmen taking over assignments of Helpers working as Carmen which were being worked on holidays, the Memorandum provided that "the regular assigned incumbent of the position" will work on the holiday if his job is being worked, regardless of whether he is a carman or a helper. Prior to the February 17, 1969 memorandum, there was maintained a "rotating overtime call list" and Carmen "were given first right to work Carman vacancies that arose over the holiday shut down period." There is nothing in the record that indicates that the parties, in negotiating the Memorandum of February 17, 1969 agreed that the pre-existing approach to overtime work on holidays was materially changed. The fact that Claimant, when called on the morning of January 1, 1970, stated that he would take a "drop," indicated that the employes believed that a formula for overtime call-ins existed whereby senior employes who rejected overtime call-ins would drop to th bottom of the overtime call list, but they were not construed as having refused "scheduled work."

In view of the foregoing, it is impossible to hold that the language of the paragraph of the February 17 memorandum marked "1," standing by itself, put the employes in the unit involved on due notice that a radical departure from the previous procedures and practices relative to holiday call-ins had been instituted thereby. The Carrier in good faith and for good reason may have believed that the memorandum afforded it the right to apply the formula as it construed it. The record, failing to indicate that Petitioner and the employes had reason to understand this impact, it would be improper to penalize the claimant. The parties are urged to jointly review the program and evolve an appropriate system to secure adequate protection of the work during holiday shut down periods.

The Petitioner's charge that Carrier had failed to comply with Rule 30(c) and therefore the claim should be allowed because of this procedural deficiency is rejected. The language of the Rule does not precisely require that the Superintendent or his designee render his decision in writing, although it would make good sense that such procedure be followed to obviate questions of fact as to whether the decision had been communicated to the appropriate employe representative. This is not a factor in the instant case. The Petitioner admits that it was orally advised in due time, a a joint meeting of labor and management, of the Carrier's position. As we have stated in many of our Awards, this Board is not empowered to amend, modify, add to or change the agreement entered into between the parties and to sustain the Petitioner on this factor would be violative of such holdings.

We are sustaining this claim on the merits and dismissing the request that the claim be granted on procedural grounds.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois this 13th day of March 1972.

DISSENT OF CARRIER MEMBER TO AWARD NO. 6255

The majority erred in this Award. It is stated in the Award:

> "We are treating this case as one of initial impact. The claim herein was filed and processed during the time a prior claim, by another carman employed by the Carrier herein and a member of the same Organization, involving a very smiliar set of facts, the same Rules and Memorandum of Understanding was in process of being appealed to the Second Division. Award 6100 thereon by this Division was issued in April, 1971, but because these two claims are the first ones to arise involving interpretation and application of the February 17, 1969 Memorandum of Understanding, we do not consider that Award controlling.
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> * * * * *
>
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This case does not involve a very similar set of facts, it is precisely the same (except for the name of claimant and date of claim), as the dispute which was denied in Award No. 6100 on April 21, 1971. In Award No. 6100 the neutral stated:

> "Rule 9(b) cannot stand alone. It must be read and applied with the February 17, 1969 Memorandum of Understanding. Scheduled work in Rule 9(b) includes 'required holiday work' resulting from reporting off vacancies. An employe may not arbitrarily refuse to work such holiday vacancies without accepting the loss of holiday pay. Since the claimant has shown no good cause for his falure to accept and work on the holiday as set out in Rule 9(b) he became 'ineligible to holiday pay for the unworked holiday.'
>
> Rule 9(h) has no relevancy to the holiday pay issue. It refers only to equalization of overtime work which is neither raised here nor is it applicable to this claim.
>
> Claim denied."

Despite the fact that the February 17, 1969 Memorandum of Understanding contains clear, unequivocal language, the neutral in this case states:

> "The record, failing to indicate that Petitioner and the employes had reason to understand this impact, it would be improper to penalize the claimant. The parties are urged to jointly review the program and

evolve an appropriate system to secure adequate protection of the work during holiday shut down periods."

In Award No. 6100 it is stated:

> "Work was required on the holiday; he was obliged to accept and work the position. Further there was an emergency. Carrier was obliged to call claimant. If carrier had called another employe without first calling claimant there would be a violation of the Memorandum of Understanding and claimant would have had a valid claim for compensation. Conversely, carrier is entitled to whatever remedy may be provided for under the rules when an employe refused to work such a required assignment."

It is evident from the record that the parties understood the intent of the language contained in the 1969 Memorandum of Understanding and that there is no necessity to "evolve an appropriate system" — the system is already there.

For the reason stated above, I dissent.

H. F. M. Braidwood
H. F. M. Braidwood, Carrier Member

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