Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6793
SECOND DIVISION Docket No. 6637
2-PB&NE-CM-'74

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

Parties to Dispute: (System Federation No. 96, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Philadelphia, Bethlehem & 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 A. K. Thatcher was unjustly dealt with when he was denied the holiday pay for May 28, 1973.

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.

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.

Claimant held a regularly assigned position. On May 24, 1973 Carrier posted a notice annulling Claimant's regular assignment on May 28, 1973, the Memorial Day holiday. Claimant was listed on the notice as first out to cover any vacancies occurring on the holiday.

At the bottom of the notice the following language appears:

> "An employee who is called to work on a Holiday, but fails to work, shall become ineligible to be paid for the unworked Holiday, unless his failure to work was because of sickness, or death in the immediate family or similar good cause."

A Carman Hughes, whose job was not annulled May 28, 1973, was scheduled to work his 8:00 A.M. to 4:00 P.M. shift on the holiday. On May 27, 1973 Carman Hughes reported off. Carrier alleges that after unsuccessfully attempting to reach Claimant by telephone, the work was assigned to another employe. As a consequence, Claimant was denied under the provisions of Rule 9(b) which reads as follows:

> "(b) An eligible Employee who does not work on a holiday shall be paid 8 times the straight time hourly rate of the job to which he is regularly assigned, exclusive of shift and Sunday premiums; provided, however, that if an eligible Employee 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 asserts that under theprovisions ofthe February 17, 1969 Memorandum of Understanding re Holiday Work, it had the right to work employes on holidays, in seniority order, whose jobs were annulled.

That Memorandum of Understanding reads in pertinent part as follows:

> "*** required holiday work will be performed by the regularly assigned incumbent of the position to be worked. Any vacancies due to report off of these regularly 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."

Carrier further asserts that Claimant was put on direct and actual notice that failure to work if called would result in forfeiture of the holiday pay by virtue of the language appearing at the bottom of the May 24, 1973 Notice */ (quoted above).

The Organization contends that since claimant's job was annulled he didn't come under the provisions of Rule 9(b) except to the extent that he qualifies under the first portion of the first sentence, viz. "An eligible employee who does not work on a holiday shall be paid 8 times the straight time hourly rate of the job to which he is regularly assigned ***."

There are two Second Division awards on this property involving the same parties, the same facts and the same issues. One sustains and the other denies.

Award No. 6100 rejected the contentions of the Organization, stating:

> "The February 17, 1969 Memorandum of Understanding contains clear, unequivocal language. There can be no mistaken intent that 'required holiday work will be performed by the regularly assigned incumbent of the position to be worked.' 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 refuses to work such a required assignment.
>
> 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 failure to accept and work on the holiday as set out in Rule 9(b) he became 'ineligible to holiday pay for the unworked holiday.'

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*/ The Organization argues that this wording has no effect because it was not part of any rule or agreement, and it was merely a unilateral effort on the part of Carrier in violation of Rule 35(a) that requires mutual consent to amend existing rules.

"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."

Subsequently, Award No. 6255 was rendered. The Board in that award, while taking note of Award 6100 did not consider it controlling and considered its dispute as "one of initial impact".

In sustaining the claim, the Board in Award No. 6255, it stated:

"In view of the foregoing, it is impossible to hold that the paragraph of the February 17 memorandum marked '1' standing by itself, put the employees 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." (Underscoring added).

Thus it is seen that Award No. 6255 departed from Award No. 6100 for the reason that it would be improper to penalize the Claimant therein because notice of Carrier's application of the February 17 memorandum was not given.

This Board is of the opinion that Award No. 6100 is the better reasoned award and shall subscribe to its result. In addition, the Board further finds that the notice requirements that the Board found lacking in Award No. 6255 were adequately taken care of by the language that was appended to the bulletin of May 24, 1974. This is not to say that the Board has determined that such language unilaterally amended the February 17 memorandum; the Board finding only that the notice problem that concerned the Board in Award No. 6255 was cured.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 25th day of November, 1974.