Award No. 8287

Docket No. CL-7900

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

W. O. Smith, Yard Clerk, Dallas, Texas, be allowed the difference between pro rata and overtime rate for the day's wage loss sustained on Decoration Day, holiday observed on Monday, May 31, 1954.

EMPLOYES' STATEMENT OF FACTS: Mr. W. O. Smith is regularly assigned to Yard Clerk position No. 12 Dallas Yard, working 3:00 P. M. to 12:00 midnight, Monday through Friday, with Saturday and Sunday as rest days. On Monday, May 31, 1954 (which day was observed for Decoration Day), Carrier required Mr. Smith to suspend work on his position and assigned and required Yardmaster Stovall to perform the duties which Mr. Smith performs during his regular assigned hours and days of service, and which he would have performed had he been permitted to work on May 31, 1954.

Investigation developed the fact that Yardmaster Stovall did actually perform the duties on Mr. Smith's yard clerk position. Mr. Smith filed claim with Carrier's Superintendent W. T. Alexander, Fort Worth, for one day's pay at time and one-half rate for May 31, 1954 (Exhibit A). Superintendent Alexander replied to Mr. Smith by letter dated July 16, 1954 and agreed to allow the claim at pro rata rate (Exhibit B).

On August 3, 1954 Mr. Smith replied to Superintendent Alexander's letter, advising that claim was payable at punitive rate because of a holiday involved, but that he was accepting the allowance of pro rata rate under protest. (Exhibit C).

On November 9, 1954 by letter Division Chairman Ingle appealed the claim to Superintendent Alexander (Exhibit D) reciting to the Superintendent what Mr. Smith had said in his letter of August 3, 1954. Superintendent Alexander replied to Division Chairman Ingle that his appeal was denied (Exhibit E). On December 14, 1954 General Chairman Wood appealed to Director of Personnel G. R. French from decision of Superintendent Alexander (Exhibit F). The instant claim was discussed in conference with Mr. French, Director of Personnel, on January 31, 1955 and by letter dated February

Exhibit No. 2. It is sufficient to cite here recent Third Division Award 6730 (Jay S. Parker), and the awards cited in it.

Therefore, the Carrier respectfully requests that the claim be dismissed or denied.

All known relevant facts and documentary evidence are included herein. All data submitted in support of Carrier's position has been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts here are not in dispute. As recited by the Carrier they are that: "Claimant did not work on the holiday, May 31, 1954. The yardmaster performed work on that day which claimant was entitled to perform. Claimant as a result thereof claimed a day's pay at time and one-half rate. Carrier paid the claim but at pro rata rate instead of time and one-half. Claimant accepted the payment under protest and it was appealed, culminating in this proceeding before the Third Division."

The rule relied upon by claimant is 32(b) Holiday Work, which says that "work performed" on the named holidays "shall be paid for at the rate of time and one-half."

One of Carrier's contentions is that claim was not appealed within the 60-day limit prescribed by Sec. 1, Art. V (b) of the Agreement of August 21, 1954, which by its own terms did not become effective until January 1, 1955. Carrier paid claimant the pro rata rate for the holiday involved "under the National Agreement of August 21, 1954," Article II of which became effective May 1, 1954.

Claimant, however, is not bound by that payment, because he accepted it under protest, and is not thereby foreclosed by the time limit relied upon by Carrier because the provision containing the time limit did not become effective until January 1, 1955, and the Carrier's superintendent says in his letter to Organization's Division Chairman on November 11, 1954 ". . . it is assumed that your letter of November 9th was intended as an appeal to claim, in which case please be advised that I do not agree with your position and your appeal is denied."

Aside from that the parties are agreed that "the issue has been reduced to the question of whether or not the Carrier is required to pay punitive rates for work **not** performed on a holiday" (emphasis ours), i.e., not performed by claimant.

Employes rely particularly on Award 7188 involving this same Carrier which award recites in part: "The claims will be sustained at the pro rata rates, except **as to holidays which shall be at the time and one-half rate.**"

We do not know what the Carrier means in saying "by agreement between the parties, punitive rates were not paid in applying that award", i.e., 7188. Presumably, because holiday services was not involved.

Carrier relies particularly on Award 6871 as sustaining its position, but it is to be noted that award involved a different carrier and different rule. Penalty pay was not an issue in that case.

Your referee has recently approved penalty payments in two holiday-work cases—Awards 8271 and 8272—and has not been persuaded that penalty payment under the circumstances herein is not justified.

As we noted at the outset, Carrier admitted that the work involved was work "which claimant was entitled to perform." That is a contract right and the contract requires time and a half pay. See Award 7134.

Our conclusion is that the Carrier violated the Agreement and claim should be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By ORDER of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of March, 1958.