Award No. 10682
Docket No. MW-9884

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective agreement when it counted Labor Day, September, 1956, as one of the work days of September, 1956, and thereby erroneously computed and paid Assistant B&B Foreman J. J. Miller for services rendered in September, 1956.

(2) Assistant B&B Foreman J. J. Miller now be allowed the difference between what he was paid for the month of September, 1956, on the basis of 18/20 of the monthly rate of pay and what he should have been paid at the rate of 18/19 of the monthly rate of pay.

EMPLOYES' STATEMENT OF FACTS: Mr. J. J. Miller is regularly employed as an Assistant B&B Foreman, a position which is monthly rated. During the month of September, 1956, Mr. Miller worked 18 of the 19 assigned work days and was absent on one of such assigned work days, namely on September 4, 1956.

In computing and proportioning the Claimant's monthly rated pay, the Carrier included the Labor Day holiday as a work day, although such day is not an assigned work day as such. The Employes contended that the Labor Day holiday is not to be counted as a work day in computing the pay of monthly rated employes, and the instant claim was filed.

The Carrier has declined the claim.

The Agreement in effect between the two parties to this dispute dated June 1, 1956, together with supplements, amendments, and interpretations thereto, is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Under date of January 21, 1957 the Carrier's General Manager advised the undersigned General Chairman in part that:

This is proper because the 174 divisor is the average hours per month based upon 365 days in the calendar year, less two rest days per week, and which, of course, includes the seven specified holidays which are paid for but not worked.

$$(365—104=261\times 8=2088\div 12=174)$$

There can be no question but that under the August 21, 1954 National Agreement a monthly-rated employe is paid for each of the seven holidays, because his annual compensation was adjusted to include payment of 56 additional hours. Obviously the negotiators of that agreement used the formula they did, rather than add eight hours to the compensation of the particular month in which each holiday occurs, in order to maintain a uniform monthly rate the year around.

Actually, claimant here has been paid for the month of September, 1956, an amount in excess of that required by a literal interpretation of schedule rules. In September of 1956, claimant's monthly rate was $364.45. He was paid 18/20ths of 364.45 or $328.00. Had he been paid 18 days at the daily rate, he would have received $300.96 ($364.45\div 174=\$2.09\times 8=\$16.72\times 18=\$300.96$).

Either method of calculation contemplates that the paid for holidays will be included in the divisor used to determine the daily rate. Either method of calculation will, therefore, average out the same in a one-year period. However, to maintain a uniform monthly pay basis, the Respondent has calculated the compensation due a monthly rated employe who works only a portion of the month by using a fraction of the monthly rate, the actual days worked being the multiplicand and the days of the month, less rest days, being the divisor.

In its calculation of the compensation due claimant Miller for the month of September, 1956, Respondent has done nothing more than follow the pattern of the negotiators of the August 21, 1954 National Agreement so as to maintain a uniform monthly basis of payment throughout the year.

Apparently what Petitioner is now attempting to contend is that none of the seven paid-for holidays should be included in the divisor when determining the compensation to be paid a monthly-rated employe who performs service during only a portion of the month. Obviously such contention is directly contrary to the rules of the controlling agreement cited above.

Respondent, therefore, respectfully submits that Claimant Miller has already been properly paid for the service he performed during the month of September, 1956, and requests your Honorable Board to deny Petitioner's claim that he receive additional compensation for that month.

All data in support of the Carrier's position has been submitted to the Organization and made a part of the particular question here in dispute. The right to answer any data not previously submitted to the Carrier by the Organization is reserved by the Carrier.

OPINION OF BOARD: Claimant Miller missed two days in September one day was an assigned work day and the other was Labor Day. He was not required to work on Labor Day. There was 19 work days. The issue before us is just how Claimant's pay should be determined. Also Carrier contends that the claim now before us is not the same and therefore the Board lacks jurisdiction.

In the opinion of the Board the claim is substantially the same. The claim originally was against the Carrier for improperly withholding a day's pay and is still substantially the same.

The Carrier paid the Claimant 18/20ths of his monthly rate of $364.15. This is a deduction for the work day he missed and Labor Day. Claimant contends that he is entitled to 18/19ths of his monthly rate.

The terms of the Agreement do not state expressly the method to be used in determining the wages deducted. We can take into consideration how the parties have interpreted the Agreement. Apparently both parties have interpreted it to mean that the Employe is entitled to a fraction of days worked. The only difference being that Carrier contends that the Holiday should be included in the divisor.

Rule 60 specifically precludes a Holiday being a work day or included in the divisor as Carrier contends:

Rule 60 is as follows:

> "All monthly rates shown in this Article XV are for eight (8) hours per day, five (5) days per week, exclusive of holidays, 169⅓ hours a month. Overtime as per overtime rules."

We have previously held that Holidays are not working days. Thus there are 19 working days in September. Since Claimant missed one working day, 1/19 of his monthly rate, should be deducted. He should be paid 18/19 of his monthly rate.

Quite frankly, it would be very difficult to determine from the Agreement, the method to use in computing what Claimant should be paid. But in view of the fact that both parties interpreted the Agreement so that a fractional method should be used. We shall do likewise.

For the foregoing reasons we believe there has been a violation of the Agreement.

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 Employes involved in this dispute are respectively Carrier and Employes 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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of July 1962.

CARRIER MEMBERS' DISSENT TO AWARD NO. 10682, DOCKET MW-9884

The only contractual basis cited by the majority in justification of the sustaining Award is Rule 60. They say:

> "Rule 60 specifically precludes a Holiday being a work day or included in the divisor as Carrier contends:"

Whether a Holiday is a workday is, of course, irrelevant to this case; and, as is frankly admitted in the next to last paragraph of the opinion, neither Rule 60 nor any other rule of the Agreement, provides for apportioning the monthly salary in the manner contemplated by this claim. Hence this finding could not support the claim even if it were correct in saying that a Holiday cannot be included in a divisor used to apportion the monthly salary. But the record contains no evidence to support this finding; to the contrary, the record establishes that no issue with respect to including the Holiday in the divisor was ever raised on the property and the finding here made by the majority on that issue is contrary to the position taken by all parties on the property.

As Carrier points out in the record, the only claim handled on the property was for "eight pro-rata hours pay that was deducted for Labor Day". Thus, in the only claim handled on the property, the Claimant and the Organization consistently took the position that the Labor Day Holiday must be included in the divisor used to apportion the monthly salary, and the Claimant must be credited with that day in the same way that he was credited with days he worked, thus giving him a 19/20 fraction of the monthly rate. The Organization did not switch to its new and inconsistent position which excludes the holiday from the divisor until after the claim had left the property.

If we could consider that the new issue as to whether or not the Holiday should be included in the divisor presented only a question of interpretation of rules of the Agreement which are always before the Board (**Awards 8798** — Daugherty; **10494** — Dugan), then we should give due consideration to the fact that on the property the parties agreed the Holiday was to be included in the divisor, and their only point of disagreement was as to whether Claimant was entitled to an additional 1/20 of the monthly rate. The majority give lip service to the well-established rule that:

> ". . . We can take into consideration how the parties have interpreted the Agreement. . . ."

If the majority had applied this rule, they would have held that the Holiday must be included in the divisor, for that is the position taken by the parties at all times from the adoption of the Holiday Pay Agreement in 1954 until after this claim left the property.

The majority are here attempting to impose upon Carrier a requirement that it apportion a monthly salary in a manner which is admittedly not provided for in the Agreement, a manner to which Carrier has consistently refused to agree. Carrier has indicated its willingness to adopt a method of apportioning the monthly salary which this Board recognized as reasonable and proper in **Award 10081** (Begley) under somewhat similar rules on another Carrier. As Carrier correctly indicates, if the employes are permitted to repudiate this latter method of apportionment, then they have no agreement on apportionment and they must be compensated on the daily basis established in Rule 61 for employes who do not work a full month and hence do not qualify for the full monthly salary.

Claimant received more compensation than Rule 61 of the Agreement required Carrier to pay him for the days he worked, and no other rule of the Agreement provides for the additional compensation claimed. The Award would impose a new rule upon Carrier, and thus it exceeds the powers of this Board. **Awards 7166** (Carter), **8838** (McMahon), **9253** (Weston).

We dissent.

/s/ G. L. Naylor
G. L. Naylor

/s/ O. B. Sayers
O. B. Sayers

/s/ R. E. Black
R. E. Black

/s/ R. A. DeRossett
R. A. DeRossett

/s/ W. F. Euker
W. F. Euker