

Award No. 10966

Docket No. MW-8935

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it failed and refused to allow Section Laborer Orville W. Kemper eight hours' pay at the pro-rata rate for July 4, 1955;

(2) Orville W. Kemper now be allowed eight hours' pay at the section laborer's pro-rata rate account of the violation referred to in part one (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, Mr. Orville Kemper, who was regularly assigned to the hourly rated position of section laborer at Texas Creek, Colorado, received compensation paid by the Carrier credited to the work day (Friday, July 1, 1955) immediately preceding Monday, July 4, 1955 (Holiday).

On Tuesday, July 5, 1955, the claimant, in keeping with Roadmaster J. B. Ball's following instructions, reported at Swallows, Colorado, and performed service as a Relief Section Foreman while the regular assigned foreman was absent on vacation.

"SB BF PUEBLO 340PM MAY 31 1955

JACK SELBY
O KEMPER TEXAS CREEK

JACK CARRY KEMPER ON YOUR PAYROLL AS LABORER
THE 4 OF JULY AND KEMPER WILL CARRY HIMSELF ON
SWALLOWS AS FOREMAN THE 5TH.

J B BALL 355 PM"

Accordingly, Foreman Selby carried the claimant on his payroll as a section laborer on July 4, 1955.

The beginning of the work week for the regularly assigned Section Foreman at Swallows was—as is the case with all of Carrier's Section Foremen—Monday. Therefore, the beginning of the work week of claimant as Section Foreman was Monday. The Carrier holds, in view of the mandatory provisions of ARTICLE II—HOLIDAYS of the August 21, 1954 Agreement, particularly Section 2 (a) thereof, the monthly rate of Section Foremen includes pay for holidays and Claimant, as a relief monthly rated Section Foreman, was properly compensated for July 4, 1955 and the claim must be denied.

All data in support of Carrier's position have been submitted to the Employees and made a part of the particular question in dispute. The Carrier reserves the right to answer any data not heretofore presented to it.

OPINION OF BOARD: The ultimate issue to be decided in this case is whether Claimant is entitled to holiday pay for July 4, 1955.

Claimant was a regularly assigned hourly rated section laborer, employed by Carrier at Texas Creek, Colorado. His regular assignment was Monday through Friday, inclusive. On May 31, 1955, Carrier's Roadmaster, Claimant's supervisor, sent a telegram to Foreman Jack Selby, Swallows, Colorado, and to Claimant as follows:

“SB BF PUEBLO 340PM MAY 31 1955

“JACK SELBY
O KEMPER TEXAS CREEK

“JACK CARRY KEMPER ON YOUR PAYROLL AS LABORER
THE 4 OF JULY AND KEMPER WILL CARRY HIMSELF ON
SWALLOWS AS FOREMAN THE 5TH.

“J B BALL 355 PM”

Pursuant to the instructions in the telegram, Claimant, starting July 5, assumed the duties of the Swallows Foreman during the latter's vacation.

The relevant provisions of the National Agreement of August 21, 1954, are:

“ARTICLE II—HOLIDAYS

“Section 1. Effective May 1, 1954, each regularly assigned hourly and daily rated employee shall receive eight hours' pay at the pro rata hourly rate of the position to which assigned for each of the following enumerated holidays when such holiday falls on a workday of the workweek of the individual employee:

New Year's Day	Labor Day
Washington's Birthday	Thanksgiving Day
Decoration Day	Christmas
Fourth of July	

“Section 3. An employee shall qualify for the holiday pay provided in Section 1 hereof if compensation paid by the Carrier is credited to the workdays immediately preceding and follow-

ing such holiday. If the holiday falls on the 1st day of an employee's workweek, the first workday following his rest days shall be considered the workday immediately following. If the holiday falls on the first workday of his workweek, the last workday of the preceding workweek shall be considered the workday immediately preceding the holiday."

As the telegram, set forth above, makes clear, Claimant was carried on the payroll as a laborer on Friday, July 1 and Monday, July 4. He worked his regularly scheduled work days immediately preceding and following the holiday. He did not assume the duties or status of Acting Foreman, pursuant to orders, until July 5. Consequently, we find that Claimant, under the terms of the Agreement, qualified for holiday pay, as a section laborer, on July 4.

Carrier, in its Submission, argues that Claimant was paid for July 4 in the manner in which it apportioned the monthly salary of the Foreman's job at Swallow between Claimant and the regular Foreman during the month of July. Petitioner denies that Claimant received any holiday pay; and, further, asserts that there is nothing in the record which shows that Carrier proffered such a defense to the Claim on the property. In addition, Petitioner points to the wording of the Claim itself in support of its position that Carrier did not pay Claimant holiday pay for July 4. We find nothing in the record that proves the aforementioned defense advanced by Carrier. We, therefore, credit the evidence, in the record, which supports Petitioner's contentions. Accordingly, we find that Claimant is entitled to holiday pay for July 4, 1955; and, will sustain the Claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the National Agreement dated August 21, 1954.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1962.

**CARRIER MEMBERS' DISSENT TO AWARD 10966,
DOCKET MW-8935**

In **Award 10966** the majority have failed to properly evaluate the evidence and as a result thereof have erroneously concluded that the Claimant has not been fully compensated.

The claim is for an allowance of eight hours at the pro rata rate of Section Laborer for July 4, 1955, and is based on Article II, Sections 1 and 3 of the 1954 National Agreement.

The controlling question which this Board had to resolve in order to properly dispose of this case concerned Claimant's status on Monday, July 4, 1955. Was he a monthly-rated foreman? Or was he merely an hourly-rated laborer? Or was he both and entitled to dual compensation for the holiday?

The majority have correctly indicated, both in panel and in the last paragraph of **Award 10966**, that for the purpose of applying holiday pay rules Claimant could not have occupied the dual status of both monthly-rated foreman and hourly-rated laborer on this holiday, and he is not entitled to the claimed eight hours at pro rata rate of a Laborer if on that day he was temporarily holding a position as foreman (**Second Division Awards 2485** — Schedler and **3806** — Johnson).

The only evidence submitted by Claimant with reference to his status and pay on July 4 is the telegram which the majority have quoted in their opinion. What the majority have failed to mention is the fact that both during handling on the property and before this Board Carrier explained that this telegram was prepared and sent by a roadmaster-clerk who did not understand the procedure followed by Carrier in handling such matters. This explanation of the telegram is not refuted in the record. With this unrefuted explanation, we seriously question the evidentiary value of the telegram in establishing Claimant's actual status.

We thus believe that on the record before us the majority err in concluding that Claimant "did not assume . . . status of acting foreman, until July 5". They also err in their conclusion that the record does not indicate Claimant was credited with July 4 as a foreman, and in their further conclusion that the record does not indicate Carrier proffered such a defense during handling on the property.

We dissent.

**G. L. Naylor
O. B. Sayers
R. E. Black
R. A. DeRossett
W. F. Euker**