Award No. 14149
Docket No. TE-11850

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

THE MONONGAHELA RAILWAY COMPANY

STATEMENT OF CLAIM: Time claim of Block Operator Louise C. O'Neil dated January 1, 1958, requesting holiday penalty time, second trick HU Tower, account of work being performed by others not covered by Scope Rule of the ORT Agreement. (M-590)

JOINT STATEMENT OF FACTS: On January 1, 1958 (New Year's Day) HU Tower was blanked from 7:45 A. M. to 11:45 P. M. A southbound coal train crew went on duty at South Brownsville, Pennsylvania at 10:00 P. M. The normal procedure is for the conductor of a south-bound coal train crew when going on duty to report to the operator at HU Tower his engine number, time on duty of the engineer and conductor, number cars in train and location of work to be performed. The operator then relays this information to the Train Dispatcher, who then authorizes the train, through the operator at HU, to occupy the main track under the rules.

In this instance, arrangements were made whereby the following message over the Superintendent's signature was placed at the Yard Office for delivery to the conductor and engineer of the 10:00 P. M. coal train south:

> "This is your authority to occupy the main track under Rule 84, Book of Rules."

Rule No. 84 of the Book of Rules of the Operating Department, effective March 1, 1947, reads, in part, as follows:

> "Trains originating at any point must report to the Train Dispatcher before occupying the main track."

The information with respect to the engine number, time on duty, number of cars in train and location of work was given to the Train Dispatcher by the General Yardmaster.

Claimant, who held a regular assignment as Operator at HU Tower from 3:45 P. M. to 11:45 P. M. would have worked this trick on January 1, 1958 had the office not been blanked on that date, and filed claim for eight

AWARD 311

"In other words, all agreements of necessity leave management a considerable zone of operation within which management has the right and the duty to exercise judgment as to the best and most efficient way to run the business."

AWARD 2491

"We can only interpret the contract as it is and treat that as reserved to the carrier which is not granted to the employes by the agreement."

AWARD 2622

"Far better for all concerned is a course of procedure which adheres to the elemental rule, leaving it up to the parties by negotiation or other proper procedure to make certain that which has been uncertain."

AWARD 5079

"This Board has consistently held by a long line of awards that the function of this Board is limited to the interpretation and application of agreements as agreed to between the parties. Award 1589. We are without authority to add to, take from, or write rules for the parties. Awards 871, 1230, 2612, 3407, 4763."

Carrier has shown there is nothing in the Telegraphers' Agreement that restricts their right to have employes other than those covered by that agreement handle messages and reports over the telephone, nor any rule prohibiting telephone conversations by and between officers and dispatchers and that this position is supported by Awards of the Third Division, National Railroad Adjustment Board.

Carrier holds the claim to be without merit and requests it be denied.

OPINION OF BOARD: An agreed-upon Joint Statement of Facts is in evidence here. It reads as follows:

"On January 1, 1958 (New Year's Day) HU Tower was blanked from 7:45 A. M. to 11:45 P. M. A southbound coal train crew went on duty at South Brownsville, Pennsylvania at 10:00 P. M. The normal procedure is for the conductor of a southbound coal train crew when going on duty to report to the operator at HU Tower his engine number, time on duty of the engineer and conductor, number cars in train and location of work to be performed. The operator then relays this information to the Train Dispatcher, who then authorizes the train, through the operator at HU, to occupy the main track under the rules.

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Claimant, who held a regular assignment as Operator at HU Tower from 3:45 P. M. to 11:45 P. M. would have worked this trick on January 1, 1958 had the office not been blanked on that date, and filed claim for eight (8) hours' penalty time account of work being performed by others not covered by Scope Rule of The Order of Rail road Telegraphers' Agreement.

The claim was denied by the Superintendent Freight Transportation with the advise that the issuance of instructions to conductors at South Brownsville in the manner in which it was done and carried out did not in any way circumvent the rules of the applicable Agreement. The claim was then progressed in accordance with the Agreement up to the Director of Personnel, the highest officer designated by the Carrier to whom appeals can be made, and was denied by him."

Under these undisputed facts, the issue is whether the Telegraphers' Agreement and, more particularly, its Scope Rule was violated when in the absence of an Operator, the General Yardmaster reported the aforesaid train information to the Train Dispatcher.

In the circumstances present here the Board finds the Scope Rule of the Agreement was violated. Both the Joint Statement of Facts and the Carrier's General Order No. 2946 requiring that all train orders ". . . and other matters pertaining to train movements . . ." be handled through Block Operators, sustain the Employes' contention that the receipt and transmittal of information relating to train movements was work reserved by custom and practice to those Operators covered by the Agreement.

This case is distinguishable on its facts from that presented to and decided by the Board in recent Award 14018 (same parties and this Referee participating). There a yardmaster received tie-up time reports directly from train crews but those reports were later obtained from him by an Operator who then transmitted the information to the Dispatcher. Here the Yardmaster acted not as a mere "depository" but performed the work of receiving and transmitting train information directly to the Dispatcher. In so doing, his actions "infringed upon that totality of work which clearly is reserved for exclusive performance by members of the Telegrapher craft—the **receipt and transmittal** of messages of record." Award 14018.

Accordingly, the claim will be sustained on the grounds that the Agreement was violated when work reserved to members of theTelegrapher craft was performed by an employe of another craft or class.

Damages for such breach will be limited, however, to payment of eight hours' time at the pro rata rate. Payment of the time and one-half rate under Article V (i) of the Agreement is in order only where it is shown that a

Claimant performed work on one of the specified holidays. The rule clearly states "**Work performed** on the following legal holidays . . . will be paid for at the overtime rate . . ." (emphasis ours). Claimant here performed no work on the holiday of January 1, 1958, and is not, therefore, entitled to payment at the time and one-half rate as claimed. The proper measure of damages for the agreement violation here found is payment of the Claim at the pro rata rate.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 to extent set out in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of February 1966.

DISSENT TO AWARD NO. 14149, DOCKET NO. TE-11850

The majority quite correctly decided the basic issue of this case, viz: that "the Agreement was violated when work reserved to members of the Telegrapher Craft was performed by an employe of another craft or class."

However, in the final paragraph of the Opinion of Board, where the majority limits the damages for the breach of agreement to the "pro rata" rather than the "overtime" rate, it clearly fell into palpable error.

The error is so obvious that it is difficult to understand how it could have happened. This makes it necessary for me to discuss the question at some length.

The violation occurred on January 1, 1958, one of the holidays specified in Article V(i) of the Agreement. As noted in the Opinion this rule provides that for work performed on such days the payment will be at the overtime rate. The work was performed, but by the General Yardmaster instead of the Claimant Telegrapher. This violation of the Agreement deprived the Claimant of an opportunity to perform the required work and to be paid for it at the contract rate of time and one-half.

Under such a simple state of facts it seems incredible that there should have been any difficulty in determining that the damages for the breach of agreement should be the simple loss of wages incurred by the Claimant. The majority, however, said that, "Payment of the time and one-half rate under Article V(i) of the Agreement is in order only where it is shown that a Claimant performed work on one of the specified holidays. . . ." Therein lies the basic error. No supporting authority for such a statement is cited, and it runs counter to several well established principles that have been adhered to by this Board for decades.

In an overwhelming majority of our decisions where it has been found that a violation of an agreement took place we have awarded reparations to the Claimants. The basis for awarding reparations is generally considered to be either a remedial penalty tending to maintain a proper attitude of responsibility toward the commitments made by a carrier to its employes, or an outright award of damages measured by the actual wage loss suffered by a Claimant employe.

Award 14149 does not clearly state whether the majority intended the reparation awarded Claimant to be a penalty against the Carrier or reimbursement for her wage loss. The tenor of the paragraph under discussion, however, seems to point clearly to the "penalty" theory because it is only in such cases that awards of this Board have deviated from the payment a particular Claimant would have received if he had performed the work.

Thus we come to the first instance of departure from principles established by precedent awards. We have said time and time again that where agreement violations are shown to have occurred penalties are necessary to maintain the integrity of agreements and to discourage further violations. Awards 685 and 2282 contain classic examples of the statement of this principle, and in Award 3963 the Board said:

> "This is a pure penalty case. The claimant does not claim that he was deprived of work. The complaint is that the Carrier violated the Agreement and should be penalized therefore. We discussed this question at some length in Award No. 2282, written for the Board by this Referee, and it does not seem necessary to repeat or elaborate what was then said. Of the utmost importance is strict adherence to Agreements made in the processes of collective bargaining; and if inflicting an occasional penalty is necessary to impress this fact on parties to Agreements, the interests of all concerned are well served."

And in Award 5893, Referee Daugherty succinctly put it this way:

> ". . . If violations go unpunished, there may be insufficient incentive to avoid repetitions thereof."

In the present case the Carrier not only was not penalized but was given an incentive to repeat the violation. If the Claimant had been used to perform the work, as the majority properly found she had a right to be, she would have been paid the contract rate of time and one-half. But by violating the agreement as it did, and being required to make restitution of only two-thirds of the amount that Claimant would have earned if no violation had occurred, the Carrier is simply being invited to ignore the agreement. In short this award makes it less costly to the Carrier to violate the agreement than to observe it.

Such a result not only is contrary to the principle involved, but makes the award itself contradictory. In one breath the majority is implying a penalty but applying a premium for agreement violation.

Clearly, this is palpable error. But how could it have occurred? It seems to me that confusion of terms led the author astray.

This Board has for many years held fast to the proposition that where a penalty is to be imposed for violation of an agreement growing out of improper assignment of work it is to be measured by the rate which the regular employe would have received if he had performed the work.

This principle was first expounded at length in Award 3193, Referee Carter, as follows:

> "The question then arises as to the penalty to which the Carrier subjected itself by giving the work to one outside the Agreement. The Organization claims the time and one-half rate of the position. The Carrier claims, in case a violation is found, that the pro rata rate controls. The Organization bases its claim on the fact that if Claimants had performed the work, it would have been paid for at the overtime rate of time and one-half. It seems to us that the Agreement contemplates a different penalty rate for work lost and work performed falling within a penalty provision of the Agreement. It seems clear that the penalty rate for work lost because it was improperly given to one not entitled to it under this Agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work. That is the rate the regularly assigned employe would receive if he were deprived of it. We fail to find any contract provision, or any reason in addition thereto, that would give any other employe a greater penalty rate than the employe to whom the work was assigned in the event he was deprived of it. In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned. The overtime rule itself is consonant with this theory when it provides 'time in excess of eight (8) hours exclusive of the meal period on any day will be considered overtime.' The overtime rule clearly means that work performed in excess of eight hours will be considered overtime. Consequently, time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides. This conclusion is supported by this Division Awards 2346, 2695, 2823 and 3049."

For those who may wish to go further into the perpetuation of this principle I here set out a partial list of our Awards which give it effect: 3271, 3277, 3371, 3375, 3381, 3744, 3814, 3855, 3876, 4022, 4037, 4103, 4467, 4552, 4571, 4599, 4962, 5117, 5240, 5269 5398, 5444, 5548, 5579, 5607, 5721, 5784, 5926, 5929, 6004, 6473, 8188, 9309. And let us note particularly more recent Awards 11333 and 11604, both by Referee Coburn, who was also the Referee here in Award 14149.

In the present case the Claimant was the "regular employe" envisioned by the principle. If she had performed the work she would have been paid at the time and one-half rate, the only rate provided by the agreement for work performed on a holiday. The "penalty," likewise, and in conformity with the cited awards, should have been at the rate of time and one-half.

The language of some of the awards which apply the principle leaves much to be desired. Some of them actually say that the penalty rate for work denied is pro rata. Careful analysis of such awards, however, will show that such an incomplete statement may be true for the particular case where it is used, but is not true for all cases.

I believe the error of Award 14149 arose from assuming that such a generalization is applicable to the facts here, when in fact it is not applicable. This may appear to be a rather unlikely belief in view of what Referee Coburn said in Award 11333:

> "The secondary issue is whether Claimant is entitled to compensation at the overtime rate. We concur in those holdings of many years standing which state that the proper penalty rate for work lost because it was given to one not entitled to it under the Agreement, is the rate which the one rightfully entitled thereto would have been paid had he performed the work, (Awards 3193, 3271, 3277); or, put another way, the proper rate to be paid is the contract rate, (Awards 3381, 4022, 5784, 9309). Claimant here is entitled to the overtime rate under Rule 18 of the Agreement because that is what he would have been paid, if used, on his rest day, December 28, 1957, and on December 19, 1957, when the service would have been performed outside Claimant's regularly assigned hours."

But how else can that language be reconciled with Award 14149, by the same author, but which reaches an opposing conclusion?

In Award 11604, the Referee's understanding of the principle is clearly set out:

> "Carrier contends that in the event of a sustaining Award, this Claimant is entitled to no more than payment at the pro rata rate, and cites a number of Awards which so held. We think the proper measure of a Claimant's loss when work held to belong to him under the Agreement is improperly given to someone else is what he would have received had he performed the service. (See Award 11333 and Awards cited and relied on there.)"

Award 14149 leaves no doubt that the ground for limiting reparation was a theory that since the rule involved provides payment, at the specified rate, for "work performed" and because the Claimant herself performed no work, the payment should be at the "pro rata" rather than the "contract" rate. This is an unsupportable theory at best, and in view of the two awards by this same Referee, from which excerpts are quoted above, it becomes incredible.

In Award 11333, the rule cited as providing the overtime rate awarded the Claimant because he was not permitted to perform the work read in pertinent part:

> "Employes released from duty and notified or called **to perform work** . . . will be paid a minimum of two (2) hours and forty (40) minutes at rate of time and one-half . . ." (Emphasis supplied for emphasis and for comparison with similar emphasis by the Referee in Award 14149.)

In Award 11604, the applicable portion of the rule from which the reparation, at time and one-half, was derived read as follows:

"II. Employes required to perform service on their assigned rest days within the hours of their regular week day assignment shall be paid on the following basis:

A. I(I) Employes occupying positions requiring a Sunday assignment of the regular week day hours shall be paid at the rate of time and one-half with a minimum of eight hours, whether the required service is on their regular positions or on other work." (Emphasis ours as above.)

Certainly the rules in all three of these cases provided the time and one-half rate for "work performed." None of them provided a lesser rate for work wrongfully performed by someone who had an inferior right — if any — to perform it, to the detriment of the Claimants.

All rules, so far as I know, that provide rates of pay contemplate the performance of work to earn the compensation provided. It seems that the Referee's distinguishing the present case on the grounds indicated merely begs the question.

This Board has decided numerous disputes where work on holidays was improperly given to someone not entitled to perform it — as against the right of the Claimant to do so, the same issue we had here. So far as I can determine never before has the reparation awarded been reduced below the contract rate of time and one-half. Many of the awards have specifically noted that the only rate for holidays is time and one-half.

The question is important enough to warrant discussion and quotation from some of these awards. In Award 3376 the reparation was limited to "pro rata" rate except for Sunday rest days and holidays included in the period of violation. The Referee there, Tipton, said:

". . . Had he worked on any Sunday, he would have received the rate of time and one-half. **The same is true as to holidays specified in Rule 41.** The Claimant therefore is entitled to the overtime rate for Sundays and holidays, the straight time rate . . . for week days . . ." (Emphasis ours.)

Rule 41 there read in pertinent part:

"**Work performed** on Sundays and the following legal holidays . . . shall be paid at the rate of time and one-half. . . ." (Emphasis ours.)

In Award 4599 Referee Whiting held:

". . . The claim for time and one-half is proper since only Sunday and Holiday work is involved and whoever performed it would receive such premium rate for such days. The penalty rate for work improperly assigned is the rate which the occupant of the regular position to which it belonged would have received if he had performed it."

The rule there involved provided that:

". . . Employes called regularly to perform work on Sundays and specified holidays shall be allowed a minimum of eight (8) hours at time and one-half. . . ." (Emphasis ours.)

In Award 5837, which covers a case basically very similar to that in Award 14149, the only question presented to the Board was whether payment should be at the holiday rate of time and one-half as reparation to the Claimants who were deprived of work on a holiday. The carrier offered to pay the "pro rata" rate. Referee Yeager sustained the claim, using language that is fully applicable here:

> "The carrier in defense of the claim for pay at the time and one-half rate relies upon the decisions of this Division wherein it was held that where no work was performed by the claimant the pay should be only at the pro rata rate. The precedent of those decisions can have no application here. The rate under the agreement on a holiday was time and one-half of the pro rata rate. There was under the agreement no other rate. It could not be reduced no matter who performed the work. The pro rata rate could under no circumstances apply to it. To apply the rule contended for in the present instance would be to reduce the penalty below the agreed rates to be paid for the work of the position when performed on holidays. To do so would amount to an invasion and modification of the terms of the agreement between the parties."

In Award 6004 Referee Daugherty awarded, as a penalty against carrier for violation of the agreement, reparation to Claimants at the "pro rata" rate, except that he plainly said:

> ". . . The situation is different in respect to holiday work; here either group of workers — those improperly used or those entitled to the work — would be paid at the premium rates named in the agreement."

Referee Wenke, in Award 6306, made these remarks, the most pertinent of which I have emphasized for emphasis:

> "We come then to the question as to the rate at which it should be allowed. The claim is made for overtime. The work was performed **on Washington's Birthday** and Saturday and Sunday. The latter are rest days for track forces on regular section gangs. Rule 15 (a) requires **overtime pay for work performed on these days.** We have often announced the following rule:
>
> > 'The penalty rate for work lost because it was given to one not entitled to it under the Agreement, is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193 and 3271.' (Award 3277 of this Division.)
> >
> > See Award 3375.
>
> "Considering when Carrier had this work performed, and provisions of Rule 15 (a) of the parties' Agreement, the occupant of the regular position to whom it belonged would have received overtime had he performed the work. Consequently the claim is properly made for time and one-half."

Referee Carter, often referred to as having crystalized the theory which limits a penalty award to the rate the regular employe would have received if he had performed the work, had the following to say, in Award 7134, about the theory where the violation occurred on a holiday:

"The Carrier asserts that the pro rata rate only constitutes the measure of claimant's loss. We point out that the rate of pay for work performed on specified holidays is time and one-half, Rule 4-A-2, current Agreement. The contract value of holiday work lost is time and one-half. In effect, the regular rate for holiday work is time and one-half. It does not involve the claim for an unearned penalty as in the case of a claim for time and one-half for overtime lost. We conclude that the claim should be sustained at the time and one-half rate." (Emphasis mine.)

Award 7188, also by Referee Carter, held that:

"The claims will be sustained at the pro rata rates, except as to holidays which shall be at the time and one-half rate."

That decision was affirmed by Award 8287, Referee Bakke, where the parties were 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 theirs), i.e., not performed by Claimant."

The Referee went on to say:

"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 service 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."

In Award 12221 claims for payment at the holiday rate of time and one-half were sustained. Of a contention by the carrier that only pro rata rate should apply Referee Dolnick said:

"Carrier contends that in event of a sustaining Award, Claimant is entitled to payment at the pro rata rate and not at time and one-half. We do not agree. Claimant is entitled to the amount he would

have received had he worked the two holidays. See Awards 11604, 11333 and others."

The rule there involved provided the time and one-half rate for "Time worked" on holidays.

Many other awards, such as 8271, 8272, 10139, 11835, 13636, sustain claims for time and one-half for work improperly assigned on holidays without discussion of why that is the proper measure of reparation.

And in Award 12702, Referee Yagoda said that a rule providing a minimum of eight hours at time and one-half for "Time worked" on the specified holidays gives us no choice but to apply the contract rate where work was performed on a holiday by one not entitled to perform it.

In its variance from established principles concerning the measure of damages for violation of an agreement by assigning work to be performed on a holiday to someone not entitled to it, Award 14149 violates another firmly established principle which not only is universally observed but is required by the Railway Labor Act itself: This Board has no authority to change rates of pay agreed to by the parties in a collectively bargained agreement. Awards 4439, 5517, 5864, 5971, 5977, 6341, 6365, to name only a few.

The parties to the agreement here before us agreed to one rate of pay for work performed on a holiday. As indisputably shown by the Awards referred to above, such a rate is applicable whether work on a holiday is performed by an employe who is entitled to it, or by someone else. By the same authority the agreed, or "contract," rate is also the measure of reparation for violation whether the "penalty" theory or the "loss of wages" theory of damages is intended to be applied.

When the majority here "limited" the reparation to "pro rata" — obviously using that term to mean "straight time" rate, it attempted to create a rate of pay not provided for in the contract and not agreed to by the parties. I repeat here for emphasis a part of the above quotation from Award 5837:

> ". . . To apply the rule contended for in the present instance would be to reduce the penalty below the agreed rates to be paid for the work of the position when performed on holidays. To do so would amount to an invasion and modification of the terms of the agreement between the parties."

No words of mine could better state the reasons why, in its limitation of reparation, Award 14149 is palpably erroneous.

To the extent indicated, I dissent.

/s/ J. W. Whitehouse
Labor Member